(2011) 178 DLT 496 : (2010) 4 ILR Delhi 187

Delhi High Court

Case No: FAO (OS) No. 338 of 2010 and CM No. 8828 of 2010

National Highways Authority of India		APPELLANT
	Vs	
Unitech-NCC Joint Venture		RESPONDENT

Date of Decision: Aug. 30, 2010

Acts Referred:
Arbitration and Conciliation Act, 1996 â€" Section 28(3), 34

Citation: (2011) 178 DLT 496 : (2010) 4 ILR Delhi 187

Hon'ble Judges: Vikramajit Sen, J; Mukta Gupta, J

Bench: Division Bench

Advocate: Parag P. Tripathi, ASG, Aparajita Swarup and Anuj Bhandari, for the Appellant; Priya Kumar, for the Respondent

Final Decision: Dismissed

Judgement

Vikramajit Sen, J.
This Appeal impeaches the decision of the learned Single Judge by which the Objections of the Appellants u/s 34 of the

Arbitration and Conciliation Act, 1996 ("A and C Act" for short) came to be dismissed. We think it relevant to record, at the very threshold, that

the Appellants have concurrently and consecutively lost at all the four tiers that have preceded this Appeal.

2. The Appellants firstly lost before the "Engineers" who they have themselves selected pursuant to a Global Tender. The "Engineers" are an

independent entity, namely, Sheladia-rites [JV], Vishakhapatnam. Sheladia Associates is incorporated in United States, whereas the other Joint

Venturer is RITES Limited, a well-known and reputed Indian engineering corporation. It is these Consultant/Engineers who, by virtue of Clause

5.2.1 of the Contract, are empowered to resolve ambiguities, omissions, errors, faults and other defects in the Drawings or any other Contract

Document as perceived by the Contractor (Respondents before us). The Contractor had approached the said ''Engineers'' to decide the question

of whether the Contractors/Respondents were entitled to claim escalation on the Contract Work. The Appellants had adopted the view that they

were not liable to pay escalation and price variation on the original quantity of work contracted as per Bill of Quantity (BoQ) items but only on

deviation in work provided for in Clause 60.1(d). This stand is taken even though indubitably the period within which the Contract was to be

completed was spread over thirty-two months and was for a value of Rs. 1,46,00,000,00/-. The Engineers had, on an interpretation of the

Contract, decided that the Contractors/Respondents were entitled to escalation even on BoQ items. The Respondents had, in accordance with the

re-worked formula for calculating the escalation, claimed a sum of Rs. 1,55,87,88,905/-; but the Engineers had quantified and found due and

payable by the Appellants to the Respondents only on the sum of Rs. 17,27,18,420/-.

3. The second tier is the Dispute Resolution Board which, poignantly, had been approached not by the Appellants but by the Respondents. This

was for the reason that, predicated on the original formula contained in the Agreement, the Respondents had laid a claim for approximately Rs.

1,55,00,00,000/-. In other words, the Appellants were even till this stage satisfied with the correctness of the computation whereby the escalation

was restricted to Rs. 17,27,18,420/- by the ''Engineers''.

4. The third stage of adjudication was before the Arbitral Tribunal which was approached by the Respondents once again underscoring the

position that the Appellants had no grievance or opposition to the grant of Rs. 17,27,18,420/- + Rs. 57,04,914/-The Arbitral Tribunal, by means

of a detailed Award, upheld the decision of the previous two entities and allowed interest at the rate of 10 per cent per annum.

5. Undaunted by these findings, the Appellants have invoked Section 34 of the A and C Act by filing Objections before the learned Single Judge.

Once again, its contentions have been roundly and soundly rejected. The learned Single Judge found the attitude of the Appellants obdurate and

stubborn, contrary to the stand taken by the Appellants themselves for the major part of the Contract, and keeping the frivolity of the Objections in

perspective, ordered that the actual costs, as quantified on Affidavits be paid by the Appellants to the Respondents, together with interest at the

rate of nine per cent per annum in case the costs were not paid within 45 days.

6. We have already highlighted the fact that it was the Respondents who had approached the Dispute Resolution Board, assailing the quantification

of escalation of Rs. 17,00,00,000/- as calculated by the ''Engineers''. We have underscored the obvious inference that the Appellants were

satisfied with this calculation. What is of added relevance is that payments were made without demur by the Appellants until the 27th Running Bill.

The Respondents had billed under Clause 60.1 which included escalation on the Running Contract Bills. These Bills did not pertain to any

''variation'' or ''extra work'' ordered by the Appellants. The conduct of parties is indicative of their understanding of the contract which governed

their dealings. According to Ms. Priya Kumar, learned Counsel for the Respondents, the sharp turnaround was the consequence of the advisory

dated 20.5.2004 issued by National Highways Authority of India that escalation/price variation ""is not available in those agreements where it is not

found in the express language"". What transpires is that after making the payments of escalation upto the 27th Running Bill, the somersault of the

Appellants led to their making recoveries of amounts already paid from the subsequent Bills presented by the Respondents.

7. It is obvious that the interpretation of the Contract forms the fulcrum of the dispute between the two adversaries before us. As already

mentioned, the power to interpret the Contract was reposed in the "Engineers" as per Clause 5.2.1. of the Contract. The Engineers, on a

thorougher and lucid examination of the contract, have concluded that escalation was contractually payable on the Contract itself as well as on any

variation thereto. Even under the regime of the repealed Arbitration Act, 1940, their Lordships have opined in the celebrated Judgment of

Sudarsan Trading Co. Vs. Government of Kerala and Another, that -""Once there is no dispute as to the contract, what is the interpretation of that

contract, is a matter for the arbitrator on which the court cannot substitute its decision"". The continuity of this opinion is manifest from a reading of

Himachal Pradesh State Electricity Board Vs. R.J. Shah and Company, inasmuch the Court reiterated the position that - ""when the arbitrator is

required to construe a contract then merely because another view may be possible the court would not have justified in construing the contract in a

different manner and then to set aside the award by observing that the arbitrator has acceded the jurisdiction in making the award"". Numaligarh

Refinery Ltd. Vs. Daelim Industrial Company Ltd., records that with regard to the interpretation of a contract, the decision of the Arbitrator should

not be interfered with by the Court. After adverting to Tarapore and Company Vs. Cochin Shipyard Ltd., Cochin and Another, , their Lordships

recorded that there can be no quarrel with the proposition that - ""if a question of law is specifically referred to by the parties to the arbitrator for

decision, award of the arbitrator would be binding on the parties and court will have no jurisdiction to interfere with the award even on ground of

error of law apparent on the face of award"". Very recently, in McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others, after perusal

of a plethora of precedents, their Lordships have enunciated this aspect of the law in the following manner:

112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of

construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature,

scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into

consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration

for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to

determination of a question of law. See Pure Helium India Pvt. Ltd. Vs. Oil and Natural Gas Commission, and D.D. Sharma v. Union of Indi

(2004) 5 SCC 325.

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction

unless it is found that there exists any bar on the face of the award.

114. The above principles have been reiterated in Chairman and M.D., N.T.P.C. Ltd. Vs. Reshmi Constructions, Builders and Contractors, ,

Union of India (UOI) and Others Vs. Banwari Lal and Sons (P) Ltd., , Continental Construction Ltd. Vs. State of U.P., and State of U.P. Vs.

Allied Constructions, .

8. In the case before us, the Arbitral Tribunal has unequivocally upheld the interpretation of the contract expressed by the "Engineers" who have

been contractually empowered by the parties to impart meaning to the sundry clauses of the subject Agreement.

9. It would be perilous and constitutionally unjustifiable to ignore and lose sight of Parliament"s endeavour to curtail curial interference in arbitration

awards. Section 34 of A and C Act does not contemplate the existence of errors on the face of the Award, which the Supreme Court has clarified

to be beyond judicial interference. The learned Single Judge has, in the impugned Order, rendered a threadbare consideration of the terms of the

Contract and his conscience has not been provoked in the least bit. The learned Single Judge has failed to find any infraction of the public policy of

India. However much we stretch our thinking, we cannot conceive of a construction of the contract contrary to that carried out by the Competent

Authority and more particularly by the learned Single Judge. Interference by us will be justified if the views of the learned Single Judge can be

perceived as a perversity.

10. The learned Additional Solicitor General has reiterated the argument made before the learned Single Judge, which, succinctly stated, is that

words cannot be added or taken away from a contract and the only permissible interpretation is a facial and literal interpretation of the terms

delineated in the Contract itself. Our attention has been drawn towards State Bank of India and Another Vs. Mula Sahakari Sakhar Karkhana

Ltd., where it has been observed that documents ""must primarily be construed on the basis of the terms and conditions contained therein. While

construing a document the court shall not supply any words which the author thereof did not use"". That very Judgment, however, notices that

surrounding or attending circumstances can be taken into consideration if ambiguity is encountered. In Provash Chandra Dalui v. Biswanath

Banerjee 1989 Supp. (1) SCC 487, their Lordships have clarified that if the contract is to be construed with reference to its objects and the whole

of its terms and that ""it is legitimate in order to ascertain the true meaning of the words used and if that be doubtful it is legitimate to have regard to

the circumstances surrounding their creation and the subject matter to which it was designed and intended they should apply"". For the sake of

brevity, we shall refrain from discussing each precedents cited by learned Counsel for the parties as it would only be avoidable prolixity. We must

constantly be mindful of the fact that these dialectics are relevant before the Arbitral Tribunal.

11. The following observations from the impugned Award rendered by the Arbitral Tribunal, which has been affirmed without reservation by the

learned Single Judge, are worthy of reproduction:

1.10 Taking into account all the above arguments of the parties, we are of the considered view that on a conjoint reading of Bidding Date Sub-

clause 14.4, ITB Sub-clauses 14.4 and 31.4, Sub-clauses 70.1, 70.2, 70.6 and 70.7 and 70.8, 60.1 and 60.2 of COPA, the conclusion is

inevitable that all these clauses are consistent and provide that price adjustment is payable on the entire work comprising all BOQ items including

variations and daywork except where such variations and daywork are otherwise subject to adjustment (that are valued at current prices). All

these sub-clauses corroborate one another and are in complete harmony except for Sub-clause 70.3 which has ambiguity and errors as explained

in para 1.5.4.

1.12.3.5 We have considered the contentions of both the parties. In our view, the National Highways Authority of India (NHAI), the author of the

Contract document, was conscious of the fact that tender documents are not perfect and mistakes may have occurred. Words used in Clause

5.2.1 are ""ambiguities"", ""omissions"", ""errors"" ""faults"" and ""other defects"" in the Drawings or other Contract Documents. Under this clause the

Engineer was given enabling power. The Engineer can resolve the ambiguity or correct the error or supply the omission to remove contradictions

and inconsistencies. By doing this, the Engineer was not rewriting the contract but only exercising a contractual power.

According to Sub-clause 67.3 of the Contract ""Any dispute in respect of which the Recommendation(s), if any, of the Board has not become final

and binding pursuant to Sub-clause 67.1 shall be finally settled by arbitration as set forth below. The arbitral tribunal shall have full power to open-

up, review and revise any decision, opinion, instruction, determination, certificate or valuation of the Engineer and any Recommendation (s) of the

Board related to the dispute.

The Arbitral Tribunal has the contractual power to resolve the ambiguity or correct the error or supply the omission in the contract document

emanating from Sub-clauses 67.3 and 5.2.1 of the Contract and Section 28(3) of the Arbitration and Conciliation Act, 1996. Drafting error can be

corrected and defect cured under this Clause to make the contract to conform to the true intention of the parties. Removing the drafting error is not

to re-write the contract. The Arbitral Tribunal is not re-writing but only interpreting the contract.

...

1.13.3 We find that the Engineer has throughout the execution of the Work firmly maintained that price escalation is payable on all BOO items.

12. We need to constantly remind ourselves that we are not experts in every field. In the present case, the Arbitral Tribunal comprised of a former

Director and Chief Engineer, appointed by the Respondents, a former Engineer-in-Chief, PWD appointed by the Claimant; both of them

appointed a Chief Engineer MORT and H as the Presiding Arbitrator. Before encapsulating the operative part of the Award, these expert

Engineers have unanimously observed as follows:

1.16.2 It is our experience that as per sound engineering practice based on FIDIC guidelines adopted in such civil construction contracts, price

adjustment clause is included in the contracts to take care of the increase/decrease in the price of materials, bitumen, cement, labour, machinery

and P.O.L.(Petrol/Diesel, Oil and Lubricants) during the period of execution. The Contractors are required to quote their rates prevailing at the

time of preparation of their Bid. The price adjustment clause is applicable to all items of the work. The reason is that in long term contracts the

increase in the price and cost of inputs into the BOQ items during the period of execution is so uncertain and the Contractors are not expected to

bear such uncertain extra burden.

This factor of usage of the trade has also to be taken into account by the Arbitral Tribunal in making their decision as per Section 28(3) of the

Arbitration and Conciliation Act.

13. Having articulated this appreciation of law, it would be illogical for us to enter into a detailed dialectic upholding the views of the Arbitral

Tribunal with regard to the interpretation of the contract vis-a-vis the claim for escalation on the BoQ contained in the contract. We uphold the

detailed reasoning of the learned Single Judge in the impugned Order which, in turn, had appreciated the conclusion of the Arbitral Tribunal. No

perversity has been detected by the learned Single Judge as also by us. We affirm that the contract envisages payment of escalation on BoQ spelt

out in the contract as well as on deviations and extra work subsequently placed by the Appellants on the Respondents. For these reasons, the

Appeal is devoid of merit and is dismissed along with pending application with additional costs of Rs. 30,000/-.