

The Executive Engineer(c) Dr-Vi vs.m/s Bhasin Associates

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Court : Delhi

Decided On : Mar-29-2019

Appellant : The Executive Engineer(c) Dr-Vi

Respondent : M/S Bhasin Associates

Advocate for Def. : Mr. Amit Gautam

Advocate for Pet/Ap. : Mr. S. K. Singh, Mr. Rameezuddin Raja, Ms. Khushboo Khan

Judgement :

\$~21 * IN THE HIGH COURT OF DELHI AT NEW DELHI Date of decision:

29. h March, 2019 + O.M.P. 463/2011 THE EXECUTIVE ENGINEER(C) DR-VI

... Petitioner

Through: Mr. S. K. Singh, Mr. Rameezuddin Raja & Ms. Khushboo Khan, Advocates. (M-9899347995) versus M/S BHASIN ASSOCIATES Respondent

Through: Mr. Amit Gautam, Advocate (M- CORAM: JUSTICE PRATHIBA M. SINGH858788623) Prathiba M. Singh, J.

(Oral) 1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 has been filed challenging award dated 22nd December, 2010 passed by a Ld. Sole Arbitrator - Sh. S. Prakash, who is stated to be a technical Arbitrator of the Department.

2. The background of the case is that the work construction of 21.3 MGD Switch Pumping Station at Tughalkabad was awarded to M/s Bhasin Associates vide work Order No.WSU/EE(C)DR-VI/96/-7023 dated 25th September, 1996. The total value of the work order was Rs.1,82,33,044/-. The work was to commence on 5th October, 1996 and the stipulated date of completion was 4th June, 1998.

3. As per the contractor, the work was finally concluded on 31st December, 2003, but the Department disputes this position. The contractor raised various claims against the department. The same were referred to a Sole Arbitrator, who awarded certain sums in favour of the contractor. The O.M.P. 463/2011 Page 1 of 11 present petition has been filed challenging the said award. The finding of the Ld. Arbitrator is that the contractor is entitled to outstanding payments and interest thereon. The Ld. Arbitrator also awarded escalation, refund of security deposits and interest thereon. Apart from this, the Ld. Arbitrator also awarded overhead costs due to prolongation of contract and for loss of turnover. Loss of profits under Claim 9 was rejected. The counter claims filed by the Department were also rejected.

4. The submission of Ld. counsel for the Department is that the Ld. Arbitrator failed to give any finding on the question of delay and has also wrongly awarded interest on interest. Ld. counsel has taken the Court through various letters exchanged between the parties, which according to him showed that the work was not concluded by 31st December, 2003, but continued until 2005. The finding of the Ld. Arbitrator that the date of completion is 31st December, 2003 is therefore challenged. Reliance is placed by Ld. Counsel, on letters dated 7th December, 1998, 9th February, 1999, 9th April, 1999, 18th June, 2004 and 13th July, 2004. Ld. counsel further submits that the Ld. Arbitrator, having not examined the question of delay, wrongly rejected the counter claims of the Department. Further, it is submitted that the award of Claim 8 for overhead costs and loss of turnover merely basing the same on the Hudson formula without any evidence being on record is also not tenable. Reliance is placed on a judgment of this Court in All India Radio v. M/s Unibros & Anr. OMP No.331/2002, Decided on 25th February, 2010.

5. On the other hand, Ld. Counsel appearing for the Respondent submits that the Ld. Arbitrator, being a technical Arbitrator of the same Department, the award ought to be given credence. He submits that when a technical O.M.P. 463/2011 Page 2 of 11 Arbitrator is appointed, since the Arbitrator has complete knowledge of the manner in which construction contracts are executed and implemented, the scope for challenge is also quite limited. He relies upon the judgment of the Supreme Court in *Associate Builders v. Delhi Development Authority* (2015) 3 SCC49 to submit that unless there is a grave perversity or illegality, the award ought not to be interfered with.

6. Ld. Counsel further relies upon the Departments files wherein the Engineer has recorded that the delay is not attributable to the contractor. This fact has been noticed by the Ld. Arbitrator in the award, at the first stage itself where the Arbitrator has mentioned the hindrance register. He submits that the finding of the Ld. Arbitrator that delay is not attributable to the contractor is thus not liable to be interfered with. It is further submitted by Ld. Counsel that since delay is not attributable to the contractor, the contractor is entitled to escalation as also compensation for the overheads incurred.

7. It is further submitted by Ld. Counsel by relying upon the judgment of the Supreme Court in *Hyder Consulting (UK) Limited v. Governor, State of Orissa* (2015) 2 SCC189 that the arbitrator has the discretion to award pre-award interest under Section 31 of the Act.

8. The Court has heard the Ld. Counsels for the parties and perused the award, as also the arbitral record. There is no doubt that the Ld. Arbitrator being a technical Arbitrator has considered the requisite evidence on record, including the hindrance register. A perusal of the hindrance register and the note sheet pointed out by Ld. Counsel for the Respondent clearly shows that the delay is due to reasons not attributable to the contractor. The relevant portion of the notings of the department dated 28th February, 2003 are set O.M.P. 463/2011 Page 3 of 11 out herein below: work for which to is not attributable As per photocopy of hindrance register, placed opposite in the file at page/88-89/C, inordinate delay has been shown/recorded which the Contractor that is why first and 2nd escalation bill

amounting to Rs.3,19,019/- has already been paid and third escalation bill amounting to Rs.9,83,642/- is under process of approval and concurrence. It is worthwhile to record here that few additional works are required to be still executed at SPS by the same Agency alongwith remaining/balance revised estimate/proposal amounting to Rs.7,08,328/- is under process of approval by the Competent Authority as an amount of Rs.1,82,17,165/- stated to be paid to the contractor is against awarded cost of Rs.1,82,33,045/-. Previously the work of construction of SPS was delayed due to the reasons explained in hindrance register and other reasons mentioned by the EE(C)Dr. VI in his earlier notes. Now to Gravity duct near Pant Polytechnic by the Agency M/s Tirupati Cement Products is likely to be stated very soon and its likely date of completion is Nov 2003 as approved in their case for extension of time. As such the Agency, of the instant work M/s Bhasin Associates will be in position to complete the work by 31.12.2003. In view of the above, extension of time upto 31.12.03 is recommend the Competent Authority without benefit of escalation and with the levy of compensation @ 2% (two percent) . The is being processed separately. The various reason for excess expenditure has been explained in the deviation statement enclosed in that file Revised estimate for the work of construction of 21.3 MGD SPS at Tuglakabad. The works are within the scope of work to be taken up at the time of commissioning of S.P.S. The balance amount has also been mentioned in the said statement in Column No.10 for approval and concurrence by file for revised estimate O.M.P. 463/2011 Page 4 of 11 9. mark with green ink. It is therefore, you are requested to recommend the extension of time upto 31.12.03 with escalation and without levy of compensation. In fact, noting dated 30th October, 2000 records clearly that the contractor has completed 97% of the work as of the said date. Thus, it is clear that the contractor had only a very minute portion of the work left after the said period. The said noting reads as under: The contractor has requested for extension of time upto 30.11.2000 vide his letter NO:

737. Dt. June 14, 2000. The contractor has completed 97 % of the work so far. The statement showing delay/hindrences due to non-finalising of sizes etc., has been prepared and placed in the file at page-79-80/C. The hindrences as mentioned is for 536 days. EE(E&M) vide his letter NO:

543. Dt.8.9.2000 has directed E&M Contractor to complete the work after procuring the same without further delay. The contractor has been directed to complete the work of installation of E &M portion by Oct.

2000. The finishing work after E&M work will take further period of one month as such the extension of time recommended up to 30.11.2000. 10. A perusal of the above two extracts clearly shows that the Department is unanimous as to the fact that the contractor was not responsible for the delay. It is due to other reasons that the contractor was given repeated extensions, even up to 30th June, 2004. Thus, the finding as to delay is not liable to be interfered with as it is based on the evidence on record.

11. There is no doubt that the contractor has repeatedly sought extensions to complete the remaining portion of the work, which finally must have been completed by 31st December, 2003. The letters relied upon by Ld. Counsel O.M.P. 463/2011 Page 5 of 11 for the

... Petitioner

to argue that even as of 2004, the work was not completed may not be fully correct because a perusal of letter dated 18th June, 2004 and 13th July, 2004 shows that the 19th RA bill and thereafter the final bill, was itself submitted as of July, 2004. Only some checking/testing and engagement of staff for watch and ward services was remaining at that stage as well. The Ld. Arbitrators finding that the date of completion ought to be construed as 31st December, 2003 is a reasonable view considering the abovementioned letters, which showed that even as of 2004, very small portions of the work were remaining. The said finding is also not liable to be interfered with.

12. Coming to the claims, Claim -1 is in respect of pending payments and recoveries. The award records as under: to a The claimants have agreed sum of Rs.4,55,283.22 as the amount finally due to them and as worked out by the respondents but they have protested and not agreed to recoveries on account of a) levy of compensation b) non testing of joints and c) non finishing of joints. During the course of arguments and counter arguments and various submissions, it has become clear that the pipe line was not tested by the claimants and also that

the finishing of pump house was not carried out to the full satisfaction of the respondents. I am of the view that the above recoveries of Rs.12,850/- and Rs.10,000/-, though arbitrary, are in order. The levy of recovery of Rs.15,61,048/- compensation. The work was on 31.12.2003. completed is towards 13. From the above, it is clear that the department and the contractor had agreed that a sum of Rs.4,55,283/- was due to be paid to the contractor. It is O.M.P. 463/2011 Page 6 of 11 this amount which has been awarded to the contractor by the Ld. Arbitrator. This cannot be faulted with.

14. Insofar as Claim-2 is concerned, the Ld. Arbitrator has awarded interest of Rs.55,726/- as the pre-award interest i.e. from the date of reference till the date of award. This, being within the discretionary power of the Ld. Arbitrator, and it being the admitted position that several amounts were due to the contractor, this is also not liable to be interfered with. The amount of Rs.55,726/- shall be considered as part of the awarded sum.

15. Insofar as Claim-3 is concerned, the same relates to escalation. Considering the fact that 97% of the work was itself completed by the year 2000 and amounts were due to be paid to the contractor for almost 4 to 5 years thereafter, the contractor having executed the work to the satisfaction of the Department, the claim of escalation is liable to be allowed. Moreover, on the amount of escalation, the Ld. Arbitrator observed as under: The amount, as worked out jointly by both the parties; as per accepted principals of CPWD; works out to Rs.13,18,772/-. Taking all facts of the case into consideration and also that the claimants cannot be held responsible for delay, I feel the escalation is payable and being statutory in nature I award a sum of Rs.13,18,772/- (Thirteen lacs eighteen thousand seven hundred seventy two only) against this claim. 16. The amount of escalation was thus jointly worked out between the parties and hence no interference is called for.

17. Claim-4 relates to interest on the escalation. The amount of escalation was not a pre-determined sum and was determined for the first time in the arbitral proceedings by the Ld. Arbitrator. On the said sum, the pre-award interest would not be reasonable in the facts and circumstances of this case, O.M.P. 463/2011 Page 7 of 11 as extensions were repeatedly granted at the request of the

contractor by the department specifically subject to the condition that there would be no benefit of escalation. Despite this, due to the delay by the department, the Ld. Arbitrator has awarded escalation, which is not interfered with, however, interest on the escalation amount would be liable to be paid only from the date of the award and not for the pre-award period. The award qua Claim 4 is set aside.

18. Claim 5 is a nil award.

19. Claim 6 is related to refund of security deposit and interest on refund of security deposit. The work having been executed completely and delay being not attributable to the contractor, there is no justification to hold back the security deposit. Refund of security deposit of Rs. 5,00,000/- is upheld.

20. The interest in Claim 7 on the security deposit is modified and granted only from the date of award. Hence, the award of Rs. 2,64,000/- is set aside.

21. Claim 8 is in respect of overheads due to prolongation of work and loss of turnover. The Arbitrator records specifically that no evidence has been brought on record by the contractor except placing the Hudson formula. Going by the judgment of this Court in All India Radio (supra), by simple application of the Hudson formula without any other independent evidence, the said claim is not sustainable. The relevant portions of the said judgment are extracted herein below: 20. In the present case, the only evidence that was led was the evidence of Hudson's Formula which was applied to the delay caused in completion of the work and thereafter the arbitrator arrived at the assumption of loss of profit of Rs. 1,44,83,830/- as against the value of the contract of Rs.5,45,27,383/-. No independent evidence was led by the respondent to O.M.P. 463/2011 Page 8 of 11 prove that the respondent was capable of earning such price elsewhere or that such contract was available but the respondent could not take up such project due to prolongation of the contract. No credible evidence is on record on the basis of which such assessment could be made. The issue, therefore, is whether or not such award passed could be set aside exercising the power under Section 34 of the Act. xxxx 24. In the light of the aforesaid factual and legal proposition, I may now proceed to consider whether the award passed by the arbitrator as against Claim No.12 could be set aside under the provisions of Section 34 of the

Arbitration and Conciliation Act, 1996. The arbitrator disallowed the claim Nos. 10 and 11 of the respondent on the ground that there is no sufficient evidence placed by the respondent on record in support of the aforesaid claims. Even so far claim No.12 is concerned, the same is the case. Except for placing on record the Hudson's Formula and a passage law on Building and Engineering Contracts, no other evidence is placed on record by the respondent to show that the profit percentage as claimed towards loss of profit was a realistic one at that time and consequently there was no change in the market and also that the work of at least the same general level of profitability would have been available to the respondent at the end of the stipulated contract period. Therefore, evidence in respect of the said claim appears to be definitely not available on record. In absence of any credible evidence and when claims under Claim Nos. 10 and 11 were rejected on the ground that no sufficient evidence had been placed on record by the respondent indicating increase in the price/rates for the work executed after the stipulated contract period and also on machinery, centring/shuttering etc., Claim No.12 was allowed by establishment, account from the book of O.M.P. 463/2011 Page 9 of 11 the arbitrator without even considering whether the respondent has placed credible and reliable evidence as required to be proved. There is no discussion of any such evidence in the award except for reference to Hudson's Formula. Even in respect of acceptability of Hudson's Formula the very book on which reliance is placed by the respondent provides that such Formula could be applied only when there is sufficient evidence on record of the nature required to justify applicability of the Formula. The application of the Hudson formula in the absence of any other evidence, is thus not sustainable. Accordingly, Claim No.8 is set aside.

22. The total amounts thus awarded are - Claim 1- Pending Payments and Recoveries: Rs.4,55,283/-, Claim 2 - Interest on Account of Delay in Payment: Rs.55,726/-, Claim 3 - Escalation: Rs.13,18,772/-, Claim 4 - Interest on Escalation: Set aside Claim 5 - Interest on Delay in Payment of Extra Items: Nil award Claim 6- Refund of Security Deposit: Rs. 5,00,000/- Claim 7 - Interest on Delay in Refund of Security Deposit: Set aside Claim 8 - Overheads due to prolongation of work and for loss of turnover: Set aside Total: Rs. 23,29,781/- The above amount shall be treated as the awarded amount. Simple Interest @ 10% per annum on the said

amount shall be payable from the date of award till the date of payment. The department is directed to pay the awarded amount as modified by this order within a period of 8 weeks, failing which, interest @ 12% would be liable to be paid to the contractor upon the expiry of the period of 8 weeks. O.M.P. 463/2011 Page 10 of 11 23. With the above directions, O.M.P. is disposed of. PRATHIBA M. SINGH JUDGE MARCH29 2019/Rahul (corrected and released on 8th April, 2019) O.M.P. 463/2011 Page 11 of 11

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