

Union of India Vs. M/S. Quick Communication Systems Pvt Ltd.

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Court : Mumbai

Decided On : Jul-02-2012

Judge : Anoop V. Mohta

Appeal No. : ARBITRATION PETITION NO.305 OF 2009

Appellant : Union of India

Respondent : M/S. Quick Communication Systems Pvt Ltd.

Judgement :

The petitioner (The Chief Project Manager, Central Railway, Mumbai through the Union of India), has challenged Award dated 26.12.2008 passed by the learned Arbitrate Tribunal, by filing the present petition under section 34 of the Arbitration and Conciliation Act, 1996 (for short “the Arbitration Act).

2} The summary of Award is as under:

“CLAIMANT'S CLAIMS:

Claim No.	Brief Description	Claims as per Terms of Reference	Claims as Modified CD III
1	Work done not paid	10,16,800/-	10,16,800/-
2	Payment of 6th Bill	6,61,180/-	6,61,180/-
3	Refund of Security Deposit	10,88,100/	10,88,100/

4	Loss of Profit	18,43,285/-	18,43,285/-
5	Loss of Advance	38,60,700/-	38,30,172/-
6	Loss due to Infrastructure	4,50,000/-	4,50,000/-
7	Under utilization of labour	51,35,775/-	42,11,397/-
8	Under utilization of overheads	25,67,888/-	21,30,480/-
9	Loss of business opportunities	25,67,888/-	Withdrawn
10	Interest	24%P.A.	24%P.A
11	Cost of Litigation	5,00,000/-	5,00,000/-
	TOTAL	2,74,50,374	

RESPONDENT'S COUNTER CLAIMS:

Claim Nos.	Brief Description	Amount claimed(in Rs.)	Amount Awarded(in Rs.)
1	Delay in completion of contract	22,16,000/-	Nil
2	Risk and Cost	30,64,120/-	Nil
3	Labour under utilization	10,60,356/-	Nil
4	Incidental losses	3,17,77,440/-	Nil
	TOTAL	3,81,17,916/-	Nil

We, the Arbitral Panel, hereby order that an amount of Rs.30,29,111/- (Rupees Thirty Lakh Twenty Nine Thousand One Hundred and Eleven only) may be paid by the respondent to the claimant towards total of the awards within 45 days. The Arbitral Panel also directs the respondent that the amount recovered against Risk and Cost to be returned to the claimant after due verification. If the payment is not made within 45 days, the award shall carry a simple interest of 12% w.e.f date of receipt of award to the actual date of payment."

3} The factual background as per the petitioner is as under:

(a) On 8.10.2003, the respondent was awarded with a contract for the work of conversion of 1500 V DC OHE to 25 K V AC OHE in KhardiKasara Section at a total cost of Rs.2,17,61,740/- with a rider of completion period of twelve months ie upto 07.10.2004. As per the contract, the respondents were required to submit all details designs and drawings within the prescribed time.

(b) As alleged, during the period January 2004 to March 2004, the respondents failed to make any plan nor submitted the required designs and drawings and also the respondents could not show the progress of the work though the petitioners conducted weekly progress meetings with the respondent to speed up the progress. Respondents had not taken care while submitting the plans and drawings initially as the same were not as per the requirements and standards and therefore, the same were required to be corrected and resubmitted on several time until its final approval causing inordinate delay in making progress in the work.

(c) On 27.05.2004, seven days notice was issued to the respondent to show the progress of work as the progress of the work was extremely poor. Thereafter, contract period was extended upto 30.11.2004.

(d) As alleged, until 07.01.2005, the drawings resubmitted with correction and the approval, was intimated. There was no progress in the work and only 30% progress was shown by the respondent. On 10.01.2005, again seven days notice was given to the respondent to show progress in the work. Thereafter, again on 02.02.2005, 48 hours notice was given to the respondents as they failed to show any progress.

(e) On 07.02.2005, the contract was terminated at the risk and cost of the respondent in respect of the balance work.

(f) After termination of the contract, disputes arose between the petitioner and the respondent thereby the respondent raised 11 claims which were referred to Learned Arbitrators vide letter dated 3.3.2006 by the General Manager, Central Railway and the petitioner also filed the counter claims in respect of the balance work at the risk and cost of the respondent and as the work was carried out through the other contractor.

(g) On 26.12.2008, the learned Arbitrators have held that most of the delay was on the part of the petitioner; and further that the termination of the contract was not proper as the contract already expired and accordingly, allowed the claims of the respondent and rejected the counter claims of the petitioners. Thus, on 20.03.2009, the present petition is filed.

4} The relevant conditions of contract permits the petitioner in case of a breach of contract, to get the work completed and/or carried out by any other agency at the cost and risk of the contractor. The contractor would be liable for reimbursement in the event of any loss on this account. As per the Scheme of Work from the date of Letter of Acceptance of Tender, the contractor should submit to the Chief Project Manager within a period of 90 days, various documents. The petitioner in turn is entitled to take decision within 30 days from verifying the designs and drawings. It is also necessary that work be done as approved. The usual Monthly Progress Report, Quality Assurance Programme in Supply and Erection also part of the conditions. There is a clause of Recovery for Delay in Completion. There is a clause of extension of time. The contract would entitle to apply for extension of atleast two months before the period of completion. It also means that the petitioner needs to take decision within reasonable time, either to accept and/or reject the extension sought.

5} There is also a provision whereby in case of delay in completion of work within the time limit, the petitioner-purchaser to give seven days previous notice to take necessary steps to complete the work. This requirement is also means an intimation/notice to the contractor that the petitioner-purchaser would get the work done or complete the work through third agency. Therefore, the communication to reject the extension of time in either way, is a necessary action, which petitioner-purchaser needs to take, within reasonable time. The petitioner can terminate the contract by giving notice as contemplated under the condition, if there was no extension granted. Therefore, even if the contract lapses and/or expires for want of extension, the notice of termination with intimation to get the work done through the third agency is mandatory/relevant.

6} The payment clause also permit the petitioner to withhold money due to the contractor arising out of his contract for any default of the contractor from other contracts which the contractor might have with the Government of India. There is a provision under the contract to deal with the determination of the contract owing to the default of the contractor. There is a Arbitration Clause to settle the dispute and defences of any kind whatsoever arising out of or in connection with the contract during the progress of the work and/or after its completion and before or after determination of the contract.

7} As dispute arose and as the petitioner failed to appoint Arbitrator as per the clause, the application was moved for appointment of Arbitrator and ultimately this Court has appointed the Arbitral Tribunal on 18.5.2005 and 3.3.2006. The respondents, pursuant to the reference, raised various claims. The petitioner also filed counter claims.

8} Both the parties appeared before the Tribunal through their respective representatives and advocates. They filed their claims as well as counter claims and rejoinder alongwith the documents. Both the parties, as agreed, not led any evidence. The Arbitral Tribunal, as agreed, proceeded to decide the matter on the basis of documents/ material placed on record by the parties.

9} Admittedly, the petitioner awarded the contract to the respondent by Work Order dated 8.10.2003 having total cost of Rs.2,17,61,740/-. The completion period was 12 months ie up to 7.10.2004. The nature of work was to carry out the work of conversion of 1500 VDC to 25 KV AC OHE in KhardiKasara section.

10} The work was not completed within the stipulated period of 12 months. The respondent, therefore, had applied for extension and sought extension of completion period up to 31.01.2005 without Liquidated Damages (LD). The petitioner granted extension from 7.10.2004 up to 30.11.2004 vide its letter dated 17.11.2004 with a penalty of Rs.2,000/- per week leaving effectively only 13 days to complete balance portion of the work. As the work was not completed by 30.11.2004, the respondent-claimant, therefore, applied for an extension from 17.12.2004 up to 31.03.2005 without LD. The respondent did not receive any communication. The petitioner issued seven days notice for termination on

10.01.2005 which was followed by a 48 hours notice on 02.02.2005. In the result, by the letter dated 07.02.2005, the petitioner terminated the contract after expiry of 48 hours notice to 02.02.2005. Thereafter, arose the dispute between the parties.

11} Admittedly, till the termination of the contract and/or till the last extension ie 30.11.2004, the respondents, pursuant to the directions and/or instructions received from time to time, had been doing work and accordingly submitted RA Bills from time to time. The petitioner paid the amount for work done up to 4th RA Bill. The bills which remained to be unpaid are of 5th and 6th bills. Therefore, the first question is who has committed default and whether the contract was illegally terminated and/or need no termination as it expired automatically for want of extension. It is not the case of No Work At All. It is a case where, as alleged, the respondent failed to complete the work within the stipulated time and, therefore, the petitioner got balance work done through some third agency, who took, as recorded, more than 18 months to complete the remained work.

12} Admittedly, the contractor just cannot proceed to start and/or should commence with the work unless permitted by the petitioner's officer. As per the contract, as well as, terms and conditions, it was always under the supervision, instructions and authorisation of the petitioner's officers.

13} Admittedly, the work was not completed within the stipulated period of 12 months i.e. upto 7 October 2004. The Application was moved for extension, as on instructions and permission, the construction was going on. The extension was sought up to 31 January 2005 without LD. The Petitioner granted extension from 7 October 2004 upto 30 November 2004 vide letter dated 17 November 2004 with a penalty of Rs.2000/- per week thereby, gave only 13 days to complete the balance portion of work. This was impossible task. The claimant, therefore, again applied for extension by letter dated 17 December 2004 upto 31 March 2005 without LD. There was no response. On the contrary, 7 days notice of termination was issued on 10 January 2005, followed by the 48 hours notice, on 2 February 2005. The termination letter dated 7 February 2005 stated that the contract had been terminated after expiry of 48 hours notice dated 2 February 2005, as the learned Arbitral Tribunal recorded and same remained controverted, that important crucial

decision for progress of the work including the approval of drawings was given on 26 October 2004 in the back ground that the contract was expiring on 30 November 2004. The aspect of the said drawing of 10.5 meters high mast were never discussed, in the Progress Review Meetings, in a way it was almost impossible for the Respondent to get the masts fabricated and erected in the short time of about one month.

14} Admittedly, the Respondent completed 30 foundations out of 69. As the balance foundations were in a rocky area, their request dated 13 October 2004 and 3 November 2004 to blast the rocks for casting the foundations was not acceded to. The alternative use of drilling for casting foundations was never discussed and/or accepted. The proper and fast decision at the relevant time, as was not done, that resulted into delay in proceeding with the further progress of the contract. Though certain drawings were approved at the relevant time and accordingly the Respondent proceeded as recorded above, that itself was not sufficient to complete the work in time. The land and background area always play important role in such construction. The construction, so made was under their instructions and supervision. The issue was, further extension, as well as, the approval of the drawings for further progress on rocky land. There is no denial that the approval was granted, but it was subject to production of the documents by that time very marginal period was left. Without giving further opportunity to submit the drawings and/or give explanation and/or justification, the contract was abruptly terminated. Even the last extension so sought was not given, knowing fully that the Respondent needs to submit some documents for the blasting procedure. The grant of extension by giving only 15 days time was of no use in such type of construction activities.

15} The learned Arbitral Tribunal further recorded that the balance work was given on 8 June 2005 to complete the work of 12 months. The completion certificate was issued on 12 December 2006. The new contractor, therefore, had taken about 18 months to complete the balance portion of the work. The time was granted to the new contractor upto 31 March 2008 for attending the defects and deficiencies. The Petitioner's action, therefore, shows non-application to the facts, as well as, the work in progress and/or nature of the work and ultimately wrongly exercised the

power by terminating the contract abruptly and by granting as much as 18 months time to complete the third contractor. This also means, it was known to the Petitioner that the work could not have been completed unless it followed by all the formalities within stipulated time.

16} Strikingly, the contract was terminated on 7 February 2005 when admittedly, extension was only upto 30 November 2004. Therefore, once the contract was terminated automatically by lapse of time, the issuance of termination notice dated 7 February 2005 was not bonafide. Once the extension period was not granted, there was no occasion for the Respondent to complete and/or to show the substantial progress. 7 days notice and all further actions as rightly observed by the learned Arbitral Tribunal was illegal. The action of termination so taken, therefore, was rightly held to be illegal though there may be some delay on the part of Respondent.

17} Therefore, taking into consideration overall view of the findings and the material placed on record read with the clauses so referred and the reasonings so given, I see there is no reason to interfere with the findings arrived at by the learned Arbitral Tribunal that the termination of the contract was illegal.

18} Claim Nos. 1 and 2 are pertaining to the work done, but not paid. In view of the findings so recorded above and admittedly the work was done under the supervision and control of the Petitioners and the contract was terminated abruptly so referred above, the risk and cost recoveries so claimed and thereby not made the payment, has rightly observed to be untenable. The award so granted by giving reasons needs no interference on the same ground. There is nothing wrong, if the Arbitral Tribunal has directed to refund the security deposit.

19} The aspects of loss of profit, loss of advance and loss due to infrastructure and as awarded the reasonable compensation though claim was huge, and in view of the above reasonings itself against the respective claims, the notional lump sum amount of loss of profit of Rs. 2,00,000/- i.e. @ 10% of unexecuted value of the work when the claim was of Rs.18,43,284/- is well within the framework of law and the record. The loss of advance, though claimed Rs.38,30,170/-, for the same reasons, lump sum amount of Rs.1,00,000/- specifically when the illegal termination

is proved, cannot be stated to be exorbitant and unreasonable. As the work could not be completed in full, the infrastructure cost incurred by the Respondents just cannot be overlooked though claimed Rs.4,50,000/- a lump sum amount of Rs.75,000/-, as awarded is just and adequate. Therefore, taking overall view of the matter, the amount so awarded based upon the facts and circumstances, need no interference.

20} The Arbitral Tribunal has rightly considered the facts and circumstances and not awarded the amount towards the claim of under utilization of labour, loss of business opportunities, cost of litigation. The Respondents admittedly, not challenged the award with regard to the loss of profit, loss of advance and loss of infrastructure and even for the rate of interest so granted, though the interest is claimed @ 24% p.a..

21} The counterclaim of the Petitioners in view of the above discussion and the reasonings so given by the Arbitral Tribunal, as the action of Respondents of termination of the contract and withholding the amount, though the work was done was held to be unlawful and illegal, is not tenable.

22} Once it is held that the action of the Petitioners was wrong and therefore, the consequences of detaining the amount and/or claim under the clauses of risk and cost is untenable. The under utilization of supervising staff, the Petitioners are also not entitled for, as the contract was terminated abruptly and illegally. The claim based upon the delay by the Respondents in the facts and circumstances as recorded above is also unacceptable. The hypothetical claim on the foundation of anticipated savings is quite feeble, specifically when not supported by the evidence and/or documents. The fact of getting the work done through their agency after more than 18 months itself destroy and demolish their own counter-claim on all counts. Therefore, taking overall view of the matter, I see there is no case made out by the Petitioners for reconsidering the counterclaim which was duly and properly rejected by the Arbitral Tribunal. The award so granted, is well within the framework of law and the record. There is nothing perverse and/or illegal. The view of the interpretation so given is well within the framework of the terms and conditions of the contract, need no interference.

23} The grant of simple interest @ 12% w.e.f. the date of award. Admittedly, the Respondents unable to use and utilize the amount from the date of award. However, considering the fact that it is a road construction matter and in view of the judgment **Krishna Bhagya Jala Nigam Ltd. Vs. G. Harischandra Reddy and Anr., 2007 AIR SCW 527**, I am inclined to reduce the simple interest throughout to 9% p.a. till realization.

24} In the result, the award is modified to the above extent only. The rest of the award is maintained. The petition is disposed off. So far as the interest is concerned, the grant be at 9% simple interest throughout till realisation. No costs.

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