* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ Date of Decision : 30.04.2009

% O.M.P. No.158/2000

H.L. GUPTA CONSTRUCTION LTD. ..... Petitioner
Through: Mr. O.P. Khadaria, Advocate with
Mr. Deepak Khadaria, Advocate.

versus

INDIAN RAILWAY WELFARE ORGN. ..... Respondent
Through: Mr. A.K. Tewari, Advocate.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

1. Whether the Reporters of local papers may be allowed to see the judgment? No
2. To be referred to Reporter or not? No
3. Whether the judgment should be reported in the Digest? No

VIPIN SANGHI, J. (Oral)

1. The respondent Indian Railway Welfare Organization has challenged the award made by the Arbitral Tribunal dated 24.03.2000 arising out of the contract no. IRWO/GGN/Cont.1/15/III dated 06.05.1992 entered into between the parties, by invoking the provisions of Section 34 of the Arbitration and Conciliation Act 1996 (The Act). The petitioner had been awarded the work of developing a housing project for serving and retired railway personnel and their widows by the aforesaid contract at Sector 15 –II, Gurgaon, Haryana.

Disputes arose between the parties which were initially referred to two Arbitrators namely Sh. J.L. Kaul and Sh. V.D. Chaddha. The two Arbitrators appointed the presiding Arbitrator Mr. Gauri Shankar and the three of them constituted the Arbitral Tribunal. By their impugned award, they have partly allowed the Claims made by the petitioner and rejected the counter Claims of the respondent altogether.

2. Mr. Tewari, learned counsel for the respondent/objector has sought to impugn the award made on the Claims raised by the petitioner. However, no objection has been raised at the time of arguments in relation to the rejection of the counter Claims.

3. The first objection raised by Mr. Tewari relates to the award on Claim No. 2 towards payment of escalation. The Claimant/petitioner had made a Claim for Rs.29,40,116.00/- towards escalation. The Arbitrators have allowed the same to the extent of Rs.27,19,876/-. I may, at this stage, notice a few relevant dates and facts. The date of commencement of the work under the contract was 14.01.1992. The stipulated date of completion under the contract was 13.07.1994. The actual date of completion was 30.11.1995. The respondent employer granted extension of time without levy of liquidated damages beyond the stipulated date of completion up to 31.03.1995. The extension beyond 31.03.1995 i.e. from 01.04.1995 to 30.11.1995, which translates to about 35 weeks, was granted subject to levy of liquidated damages under agreement at the rate of Rs. 10,000/- per week as provided for under Clause 5.2.25. Consequently, liquidated damages

to the tune of Rs. 3.50 lacs were imposed upon the petitioner.

4. The learned Arbitrators, while dealing with Claim for escalation held that as the extension of time beyond 31.03.1995 was granted upon payment of liquidated damages (levy of which was upheld while denying claim No.1 of the petitioner/claimant), the petitioner contractor was not entitled to any price escalation that had taken place after 31.03.1995. However, the Tribunal held that for works done after 31.03.1995 and up to 30.11.1995, the petitioner would be entitled to payment on the basis of labour/material indices prevalent in the quarter January-March 1995, since the petitioner contractor would have been entitled to get the rates prevalent in the quarter January-March 1995, had the work been completed on or before 31.03.1995.

5. Learned counsel for the respondent objector submits that the Tribunal could not have granted the rates based on the indices prevalent in the quarter January-March 1995. The case of the respondent is that for work done beyond 31.03.1995, the rates prevalent should have been based on the labour/material indices existing at the time of tender opening way back in December 1991. He refers to Clauses 6.4.0 and 6.4.1 of the contract between the parties. These clauses reads as follows:

> "6.4.0 Price Escalation:
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> If the prices of materials (not being materials supplied or services rendered at fixed prices by the Employer) and, or wages of

> labour required for execution of the work increase, the Contractor shall be compensated for such increase as per provisions detailed below and the amount of the Contractor shall accordingly be valid, subject to the conditions that the compensation for escalation in prices shall be available only for work done during the stipulated period of the contract including such period for which the validity of the contract is extended under the provisions of clause 5.2.24 of the contract without any action under clause 5.8.2 and also subject to the condition that no such compensation shall be payable for a work for which the stipulated period of completion is 6 months or less. Such compensation for escalation in the prices of materials and labour when due, shall be worked out based on the following provisions:
>
> 6.4.1 The base date for working out such escalation shall be the last date on which tenders were stipulated to be received."

6. To meet this submission of the respondent, learned counsel for the petitioner submits that for work done after 31.03.1995, not only the petitioner had been subjected to levy of liquidated damages at the rate of Rs.10,000/- per week aggregating to Rs. 3.50 lacs, the petitioner had also been denied escalation during the period 01.04.1995 up to 30.11.1995. All that the petitioner had been granted are the rates which were prevalent in the quarter January-March 1995 to which the petitioner would, in any event, have been entitled had the work been completed on or before 31.03.1995.

7. Having considered the rival submissions and the reasoning adopted by the learned Arbitrators who have attempted to fairly and judiciously interpret the contract between the parties, I find the approach of the Arbitrators to be unassailable. Since the petitioner

contractor would have been entitled to the rates prevalent in the quarter January-March 1995, if the work had been completed by 31.03.1995, it does not stand to reason that for the left over works, which got completed by 30.11.1995 the petitioner should be denied to those rates and should be relegated to the rates when the tenders were lastly received. Pertinently, the time for execution of the contract was extended by the respondent upto 31.03.1995 without levy of compensation. This means that the respondent was obliged to pay the escalated rates for works done after the initial/stipulated date of completion. These works obviously would include works done even after the extended date of completion.

8. A perusal of the award on Claim No. 2 shows that the escalation amount has been worked out by the Tribunal at Rs. 27,19,876/-. Though the basic reasoning of the Tribunal on which the awarded amount is founded has been stated, further details are not available in the award.

9. Mr. Khadaria submits that no objection has been raised by the respondent to say that the amount of escalation worked out by the learned Arbitrators at Rs. 27,19,876/- is erroneous or that there is an arithmetic error in the computation made by the Tribunal. He submits that if there was any error in the arithmetic computation of the said amount, it was open to the respondent to have moved the Tribunal under Section 31 of the Act within 30 days, which was never done.

10. I have been shown the figures of the amount Claimed by the

petitioner in its Statement of Claim aggregating to Rs. 29,40,116/-. It is clear that the Arbitrators have applied their mind to arrive at the figure of 27,19,876/- as the amount of escalation due upon application of the above set out principle in the award. I find no error in the award relating to Claim No. 2 and consequently uphold the same while rejecting the respondent's objection.

11. The next objection raised by Mr. Tewari is to the refund of ground rent awarded to the extent of Rs. 45,811/-. The respondent had sought to impose ground rent of Rs. 55,811/- on the ground that the petitioner had occupied the site leading to inconvenience to the respondent due to the stacking of materials from other contracts of the petitioner. The contract itself is silent on this aspect. The Arbitrators interpreted Clauses 5.3.9 and 5.3.10 to hold that these clauses do not authorize the respondent to levy damages. These clauses reads as follows:

> "5.3.9 Contractor to keep site clear:
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> During the execution of the work, the Contractor shall keep site reasonably free from obstructions and shall store or dispose off any constructional plant and surplus material and clear away and remove from site any rubbish or temporary work no longer required.
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> 5.3.10 Clearance of site on completion:
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> On the completion of the work, the Contractor shall clear away and remove from site all constructional plant surplus materials, rubbish and temporary work of every kind. Contractor shall leave whole of the site, work of every kind, and 10 meters distance from the site periphery clear in workman like conditions to

the satisfaction of the Engineer."

12. In my view, there is no error in the interpretation accorded by the learned Arbitrators to the aforesaid clauses, which may call for interference at this stage. The Arbitrators, in my view, had correctly held that if the contractor failed to clear the site, the option available to the client/respondent is to get the job done by another agency, i.e. to get the site cleaned, and recover the cost. However, ground rent could not be recovered. The Arbitrator, in any event, granted an amount of Rs. 10,000/- on account of the inconvenience stated to have been suffered by the respondent. Mr. Khadaria has pointed out that the respondent had led no evidence to defend the said Claim. No basis for the deduction of Rs.55,811/- towards ground rent had been established before the tribunal. Consequently, no error can be found in the award in respect of Claim No. 4. The objections in this respect are rejected.

13. The third objection raised by the respondent is in relation to Claim No. 6 which was towards payment of the cost of bore-well. The tribunal has awarded a sum of Rs. 40,100/- in respect of this Claim on the basis of consent of the parties. A perusal of the objections preferred in this court shows that it is not the case of the objector that the consent to pay Rs. 40,100/- for the bore-well as recorded in the award, has wrongly been recorded. The bore-well continued to remain in the use of the respondent. Consequently, I see no merit in this submission of the respondent and the same is rejected.

14. Learned counsel for the objector has next argued that the award on Claim No. 5 directing refund of penal rate recovery of Rs. 95,277/- made by the respondent, has been made in violation of the contractual terms. There were three parts to this refund Claim. Claims in the first two parts were rejected by the Tribunal. The third part of Claim No.5, which has partially been allowed by the Tribunal reads as follows:

> "(c) Regarding penal rate of recovery for waste steel, contract provides for recovery for wastage of steel over 5% at twice the normal rate of Rs. 11,000/- per tonne. IRWO havae not established any loss in this matter and therefore, the rate for recovery should be reasonable, since steel was freely available in the market and its sale no longer controlled by the Government. Nevertheless, wastage beyond 5% is not justified & IRWO should not suffer any loss on this account. It is, therefore, considered that BLGC should pay for the extra wastage over 5% @ actual market rate plus 12-1/2% departmental charges. Taking the actual average purchase rate as Rs. 13,000/- per tonne, the amount of recovery works out to Rs. 95,277/- only. This part of the claim is therefore, allowed t the extent of Rs. 95,277/- only against Rs. 1,42,109/- demanded by BLGC."

15. Mr. Tewari has relied upon Clause 6.3.2 (vi) of the contract which reads as follows:

> "6.3.2 (vi) In case of steel reinforcement, the theoretical quantity of steel shall be on the basis of actual measurements plus 5% to cover for wastages, cut pieces and rolling margins. The contractor will not be required to return the cut pieces of steel, but the recovery for the 5% of the quantity over the measurements will

> be made from the Contractor at a fixed price of Rs. 11000/- (Rupees eleven thousand) for Tor Steel Bars and Rs. 10,500/- (Rupees ten thousand five hundred) for MS bar per tonne. The Contractor is permitted to return the unused reinforcement bars above 3 meters to the Employer at the end of the work. The Contractor is permitted to return the unused reinforcement bars above three meters to the Employer at the end of the work."

16. Mr. Tiwari has submitted that the recovery had been made in accordance with the contractual terms. The Tribunal could not have ignored the agreements terms and substituted their own notion of what they thought fair and reasonable in contradiction with the agreement of the parties.

17. In response to this submission of Mr. Tewari, learned counsel for the petitioner has argued that the respondent had not established the suffering of any damages. He also argues that apart from single rate recovery, the Arbitrators had allowed 12½% of the actual market rate towards departmental charges.

18. Having considered the rival submissions, I am of the view that the award of the learned Arbitrators on Claim No. 5 (c) is not sustainable, since it is squarely in contravention of Clause 6.3.2 (vi) as extracted above. Pertinently, the Arbitrators themselves take note of the contractual provision in the opening line of their award on Claim No. 5 (c) by observing "***Regarding penal rate of recovery for waste steel, contract provides for recovery for wastage of steel over 5% at twice the normal rate of Rs.11,000 per tonne***".

19. The Arbitral Tribunal is a creature of the agreement between the parties, and it could not have disregarded the contractual terms. Since the contract clearly provides for recovery for wastage of steel over 5 per cent at twice the normal rate of Rs. 11,000/- per ton, not only the parties but the Tribunal was bound by the said term and the Tribunal was bound to enforce the rights of the parties as contained in the said term. The Tribunal could not have, on its own, reduced the penal rate recovery to only 12 ½ per cent by permitting it as "departmental charges". Consequently, I set aside the award made on Claim No. 5 (c) for Rs. 95,277/-.

20. Lastly, Mr. Tewari has argued that the Arbitrators have unreasonably awarded 12 per cent interest in favour of the respondent. A perusal of the award shows that the Tribunal has not awarded any interest for the pre-litigation and pendente lite period. However, interest has been awarded from the date of the award till actual payment at the rate of 12 per cent per annum. Reliance placed by Mr. Tewari on Clause 5.2.0 to object even to this award of interest appears to be misplaced. Clause 5.2.0 merely provides that no interest shall be payable upon the earnest money or security deposit or any amount payable to the contractor under the contract except as provided for under the conditions of the contract. Once the matter has been referred to the Arbitrators and the Tribunal has crystallized the liability of the respondent, the said clause cannot be invoked to deny the Claim of interest for all times to come. The said clause would have

no application to the grant of interest by the Arbitral Tribunal from the date of the award. Otherwise, it can lead to highly inequitable result, namely, that the respondent can continue to withheld the amount due under the award for as long as it desires without even feeling the pinch of paying interest thereon. As has been held by the Supreme Court in ***G.C. Roy Vs. Secretary Irrigation*** 1992 (1) SCC 508 the award of interest is merely by way of compensation on account of the falling value of rupee due to inflation. I, therefore, reject this objection of Mr. Tewari.

21. For the aforesaid reasons, the petition is disposed off in the aforesaid terms leaving the parties to bear their respective costs.

VIPIN SANGHI, J.

APRIL 30, 2009
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