IN THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM:NAGALAND:MEGHALAYA:MANIPUR:
TRIPURA:MIZORAM & ARUNACHAL PREDESH)
SHILLONG BENCH

CR(P) No. 31(SH) of 2006

M/s BK Engineering
Enterprises.

: Petitioner

Versus

1. Union of India
Represented by
Commander Work Engineers,
Spread Eagle Falls, Shillong.

2. Col. JS Brar,
Sole Arbitrator,
Director Esp – 1
E-in-C's Branch,
Army Headquarters,
Kashmir House,
New Delhi.

: Respondents

B E F O R E
THE HON'BLE MR JUSTICE T VAIPHEI

For the petitioner	: Mrs PDB Baruah, Advocate
For the respondents	: Mr SC Shyam, CGC
Date of hearing	: 12.3.2012
Date of Judgment and order	: 27-04-2012

JUDGMENT AND ORDER

This revision is directed against the judgment dated 19-9-2006 passed by the learned additional Deputy Commissioner, Shillong in F.A.O. No. 16(T) of 2004 setting aside the judgment and decree dated 7-9-2004 passed by the learned Assistant to the Deputy Commissioner, Shillong in

Arbitration Misc. Case No. 23(T) of 1999 making the Award dated 28-2-1999 of the arbitrator a rule of the Court.

2. The facts giving rise to this revision are that a contract agreement bearing CA. No. CWE/UMR/10 of 91-92 – Provision of EOT Crane 2 Nos. for EME workshop at Umroi was entered into between the petitioner and the respondent No. 1 on 31-10-1991. The contract agreement was signed pursuant to the work order issued by the Garrison Engineer (P) Ltd., Umroi vide his letter dated 12-11-1991, which stipulated the date of commencement of the work to be 19th November, 1991 and the date of completion as 18-5-1992. The period of completion of the work was six months. When a dispute arose between the parties over the execution of the contract, the same was referred to an arbitrator unilaterally appointed by the respondent authorities. The arbitrator so appointed was a serving engineer at the headquarters of Chief Engineer, Shillong. The arbitrator duly entered into reference and proceeded with the arbitration proceedings wherein both the petitioner and the respondents filed their claims and counter-claims. Both the parties also adduced their respective evidence. At the conclusion of the proceedings, the impugned speaking award was passed on 28-2-2009 in favour of the petitioner**.** The petitioner thereafter filed Arbitration Misc. Case No. 23(T) of 1999 under Section 17 of the Arbitration Act, 1940 ("the Act" for short) before the learned Assistant to Deputy Commissioner, Shillong, who, as noted earlier, made the award a rule of the Court. This prompted the respondent No. 2 to file an application under Sections 30 and 33 of the Act for setting aside the award. The learned Assistant to DC, after hearing both the parties passed the judgment dated 7-9-1994 thereby making the award dated 28-2-1994 a rule of the Court and dismissed the petition filed by the respondents under Section 30 and 33 of the Act. The

respondent No. 2, aggrieved by the judgment dated 7-9-2004, preferred an appeal, registered as FAO No. 16(T) of 2004, before the learned Additional Deputy Commissioner, Shillong, who, after hearing the parties, passed the impugned judgment. It is now the turn of the petitioner to file this revision petition.

3. The reference arose out of five claims made by the petitioner, namely, (i) payment for damages on account of delay in handing over of site quantified at `6,37917.50 (modified claim); (ii) payment on account of increase in the supply and fixing of 30 lbs rail and down shop lead incorporated in the works amounting to `60,000/-; (iii) payment of `1,00,000/- on account of escalation of labour and material cost and should be paid at the rate specified in the CA; (iv) payment of interest @ 24% on account of delayed payment for a period of delays and (v) cost of reference to arbitrator quantified at `21,000/-. In terms of the work order, the date of commencement of the contract works was 19-11-1991 and the date of completion of the work was 18-5-1992, which was extended of 14-11-1992, on which date the work was also actually completed while final bill was paid on 19-12-1992. In so far as claim No. 1 is concerned, the arbitrator found that the respondent had failed to hand over the site to the petitioner on 19-11-1991 as corroborated by the letter dated 31-8-1992 of the Garrison Engineer, Umroi addressed to M/s Singh Associates indicating therein that the site was not ready for execution as on 31-8-1992, which was also corroborated by the correspondence made by the petitioner with the GE, Umroi dated 15-9-1992 and 30-9-1992, which further confirmed that the site was not made available on 30-9-1992; that the petitioner placed orders for procurement of components well in time

i.e. on 9-11-1991 and 12-11-1991; that non-availability of the site was the main ground or one of the grounds of the delay in completion of the work, which prompted the petitioner to seek extension of time for completion of the work and that there was thus fundamental breach of the contract agreement. The arbitrator accordingly awarded a sum of `1,74,806.80 by way of damages due to delay in handing over the site under various heads such as idleness of staff and highly skilled labour, engineers, tools and plants and loss of overheads and profit.

4. As for claim No. 2, the arbitrator recorded the findings that the 306 running meter of 30 lbs FB Rail and 205 running meter down shop lead to be provided were provisional and measurable as mentioned in the work order issued by the respondent; that the increase in quantity on the ground was intimated by the petitioner, for which additional amount was demanded by it through necessary deviation, which was acknowledged by the GE, Umroi, who sought advise from the CWE, Shillong as to whether the increased quantity of FB rail and DSL was to be entertained or not since deviation order (DO) could not be entertained due to financial concurrence limitation; that in view of the above, extra quantity of 8 running metre of 30 lbs FB rail and 24 running metre of DSL was provided by the petitioner, and payment on this count was, therefore, admissible and justified. He accordingly awarded a sum of `20,880/- in favour of the petitioner. Coming now to claim No. 3, the findings of the arbitrator in this behalf are that that the petitioner had placed orders for purchase of the main components as on 9-11-1991 and 12-11-1991 and had assured that the work worth `5 lakhs would be completed by the end of Mar, 1992 vide its letter dated 10-2-1992 and that stores worth a sum of `8,06,664/- had

been ordered for procurement before the original date of completion, for which no cost escalation was called for, but left over job worth an amount of `2,83,380/- (`10,90,044-`8,06,664) was admissible for cost escalation as the delay was attributable to the department. The arbitrator, therefore, awarded cost escalation @ 11.49% on the amount of `2,83,380/- i.e. `32,560/-. As for claim No. 4, the arbitrator awarded interest at the rate of 18% per annum with effect from 12-12-1992, which came to `3,34,392.88 for the delayed payment. The total amount so awarded thus comes to `5,71,790.18.

5. The correctness of these findings was challenged by the respondents in their application for setting aside the award of the arbitrator. The learned Assistant to Deputy Commissioner, Shillong dismissed the application and made the award a rule of the court. However, the appeal preferred by the respondents before the learned Additional Deputy Commissioner, Shillong from the aforesaid judgment succeeded, which prompted the petitioner to prefer this revision. Assailing the impugned judgment, Mrs. P.D.B. Baruah, the learned counsel for the petitioner, submits that the appellate court has failed to notice the letter dated 9-12-1991 of the petitioner addressed to the Garrison Engineer, Umroi disagreeing the date of commencement of the work prior to 8-12-1991 and of the letter dated 15-9-1992 addressed to the Garrison Engineer, Umroi revealing that the work of installation of the Track Girders for the cranes had not been completed by the B/R contractor till as late as 15-9-1992, and has, in the process, erroneously come to the conclusion about the actual date of handing over the site; such findings are

perverse and cannot be sustained in law. It is further submitted by her that the appellate court did not properly appreciate the fact for the type of highly specialized technical work such as installation of EOT cranes in a workshop, the site contemplated therein was not a piece of land but are Track Girders (Gantry Girders), which was to be provided by the Department under the contract agreement and over the Track Dirder, the EOT cranes were to be installed by the petitioner and that the Track Girders were not completed till as late as 15-9-1992; the finding of the appellate court on this aspect of the matter is perverse. The learned counsel also contends that the appellate court wrongly held that the respondent authorities never asked the petitioner to provide the extra quantity of 30 lbs of FB Rail by ignoring the evidence on record. The learned counsel further maintains that the contract in question was an item-wise rate contract, which was duly accepted by the respondents and formed a part of the letter of acceptance of tender vide the letter dated 31-10-1991 and not a lump sum contract. According to the learned counsel, the impugned judgment, therefore, suffers from non-application of mind and is otherwise bad in law and is thus liable to be set aside. On the other hand, Mr. S.C. Shyam, the learned CGC, supports the impugned judgment, which is based on evidence and does not warrant the interference of this Court.

6. Before I proceed further, it will be apposite to remind myself of the legal principles enunciated by the Apex Court from time to time for the interference of a court in the award of an arbitrator. The scope of interference of court with the award passed by an arbitrator is limited and the court would not be justified in re-appreciating the material on record

and substituting its own view in place of the arbitrator's view. Where there is an error apparent on the face of record or where the arbitrator has not followed the statutory legal position, the court would be justified in interfering with the award of the arbitrator. The error apparent on the face of the award contemplated by Section 16(1)(*c*) as well as Section 30(*c*) of the Arbitration Act is an error of law apparent on the face of the award and not an error of fact. An arbitrator cannot ignore the law or misapply it order to do what he thinks is just and reasonable. The arbitrator has got ample power in giving an award. The arbitrator is the sole judge of the quality as well as the quantity of evidence and it will not be for the court to take upon itself the task of being a judge of the evidence before the arbitrator. The court should approve the award with the desire to support it if that is reasonably possible rather than to destroy it by calling it illegal. Only when the award is based upon a proposition of law which is unjustified in law, the error of law must appear from the award itself or from any document or note incorporated in it or appended to it. It is not permissible to travel beyond and consider material not incorporated in or appended to the award. The legal position was succinctly explained by the Apex court in ***State of U.P. v. Allied Construction, (2003) 7 SCC 396*** in the following manner:

> *"4. Any award made by an arbitrator can be set aside only if one or the other term specified in Sections 30 and 33 of the Arbitration Act, 1840 is attracted. It is not a case where it can be said that the arbitrator has misconducted the proceedings. It was within his jurisdiction to interpret clause 47 of the agreement having regard to the fact-situation obtaining therein. It is submitted that an award made by an arbitrator may be wrong either on law or on fact or an error of law on the face of it could not nullify an award. The award is a speaking one. The arbitrator has assigned sufficient and cogent reasons in support thereof. Interpretation of a contract, it is trite, is a matter for the arbitrator to determine (see* ***Sudarshan Trading Co. v. Govt. of Kerala****). Section 40 of the Arbitration Act, 1940 providing for setting aside*

> *an award is restrictive in its operation. Unless one or the other condition contained in Section 30 is satisfied, an award cannot be set aside. The arbitrator is a judge chosen by the parties and his decision is final. The court is precluded from re-appraising the evidence. Even in a case where the award contains reasons, the interference therewith would still not be available within the jurisdiction of the court unless, of course, the reasons are totally perverse or the judgment is based on a wrong proposition of law. An error apparent on the face of the records would not imply closer scrutiny of the merits of documents and materials on record. Once it is found that the view of the arbitrator is a plausible one, the court will refrain itself from interfering. (see* ***U.P. SEB v. Searsole Chemicals Ltd.*** *and* ***Ispat Engg. Works v. Steel Authority of India Ltd.****).*
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> (Underlined for emphasis)

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7. Coming now to the findings of the arbitrator on the question of delay in handing over the site to the petitioner, the first point to note is that in reaching the conclusion that there was delay on the part of the respondents in handing over the site to the petitioner and, conversely, there was no delay on the part of the petitioner installing the cranes in question, he relied on the letter dated 31-8-1992 of the Garrison Engineer, Umroi ("GE" for short) to M/s Singh Associates, the correspondences made by the petitioner with the GE bearing dated 15-9-1992 and 30-9-1992 and the fact that the petitioner had placed the order for purchasing the components of the cranes on 9-11-1991 and 12-11-1991. In the letter dated 31-8-1992, the GE complained to M/s Singha Associates about the non-completion of straightening and leveling of gantry girders in the main workshop building despite the orders dated 29-2-1992 and 24-8-1992 and informed them that the petitioner-firm was unable to fix the EOT cranes over these gantry girders, which could be done only when the balance work in gantry girders were completed by them. By the letters dated 15-9-1992 and 30-9-1992, the petitioner reminded the respondents about the non-availability of site and non-supply of electricity therein, which hampered the progress of the work. The term non-availability of site was understood to mean the non-

completion of straightening and leveling gantry girders upon which the cranes were to be fixed. There is no dispute about this. The finding of the arbitrator that the orders for components of the cranes were placed by the petitioner in the month of November, 1991, is supported by the letter dated 24-4-1992 of Greaves Cotton & Co. Ltd. addressed to the petitioner (Ext. G-9) and the letter dated 2-5-1992 of Unicon Technology International Pvt. Ltd. addressed to the petitioner (Ext. G-10) and the letter dated 9-5-1992 of the petitioner addressed to the respondents (Ext. G-17). In my opinion, it cannot be said that those findings are not based on evidence or are perverse: this Court cannot re-appreciate the evidence on record nor can it consider the adequacy or inadequacy of such evidence. The arbitrator, chosen by the parties, is the master of fact and of law, and his findings cannot be disturbed by courts except for not fulfilling the terms and conditions contained in Section 30 of the Act. Therefore, I hold that there is no error apparent on the face of the impugned award. At any rate, the view taken by the arbitrator is a possible view, and this Court, who is not sitting in an appeal over his finding, cannot substitute its view with the view of the arbitrator.

8. In claim No. 2, the petitioner was claiming payment to the order of `60,000/- on account of increase in the supply and fixing of 30 lbs rail and down shop lead incorporated in the works. The arbitrator recorded the finding that the increase in the quantity of FB rails and Down Shop Lead used was duly intimated by the petitioner and additional payment demanded through deviation and that the GE intimated about this to CWE, Shillong and sought his advise as to whether the claim was to be entertained or not. According to the arbitrator, the quantities of the items namely, 306 Running metre of 30 lbs Rail and 205 Running Meter Down

Shop lead were provisional and measurable as they were mentioned in the work order No. 1 issued by the respondents, and payment on these extra quantities was admissible and justified. He, however, awarded a sum of `20,880/- to the petitioner against the claim amount of `60,000/-. The contention of Mr. SC Shyam, the learned CGC, is that the respondents had never asked for provision of such extra quantity nor had there been any approval accorded thereto by the respondents: the arbitrator has erred in allowing the claim on this count. In a lump sum contract, which is the case here, further submits the learned CGC, the petitioner was to make the crane functional within the rates contracted for, and no extra payment is admissible to the petitioner for the extra work rendered by it without the approval of the CWE, Shillong. In clause 1 of Chapter VIII of *Law Relating to Building Engineering Contract in India* by G.T. Gajria, the term "Lum Sum Contract" is explained thus:

> **"1. Lump Sum Contracts: If the contract is to construct a specified work for a specified sum of money (commonly called lump sum contract), the contractor's claim for payment is a liquidated demand, and the contractor is entitled to receive the said price on completion in every detail as required by the terms of the contract. If the contractor carries out any extra work relating to the work under contract which is not included in the lump sum amount, he is entitled to further payment."**

9. The legal position on lump sum contract best understood by the decision of Channel J. in ***Patnam and Fotheringham Ltd. v. Pilditch (1904)*** reproduced in *Hudson's Buildings Contracts, 4th Edn. Vol. 2, p. 368*. A contractor undertook to complete to complete certain works for a sum of £17,000 "according to the plans, invitation to tender, specification and bills of quantities." Other clauses provided that the contractors should supply everything requisite for the execution of the works included in the contract according to the true intent of the drawings, specification and quantities,

whether or not particularly described in the specification and quantities and shown on the drawings, and for measurement of alterations and additions and valuation of them according to the prices on the bills. There was no express provision for measurement of the works as a whole. It was held that if the quantities in the bills were less than those required by the drawings, the contractor was entitled to be paid an appropriate addition to the contract sum, since the quantities were introduced with the contract as a part of the description of the contract work, and if the contractor was required to do more, it was an extra. The fact that the extra quantities of FB rails and down shop lead were required for completion of the work in accordance with the terms of the contract is not disputed by the respondents: all they said is that their prior approval was not obtained for the extra work. In my opinion, the arbitrator did not travel beyond the terms of the contract in upholding the claim of the petitioner in this behalf also. The terms of the contract does not expressly, or by necessary implication, prohibit the payment of the bills for such extra work The arbitrator has the power to interpret the terms of the contract, and in doing so, he did not commit any error apparent on the face of the award. In ***Mcdermott International Inc. v. Burn Standard Company, (2006) 11 SCC 181***, the appellant sub-contractor claimed substantial fabrication charges in refurbishment of certain buoyancy tanks and fabrication of tie downs and sea-fastening relating to construction of off-shore rigs. The respondent claimed that these heads of fabrication not being provided for in the contract, claims in respect thereof were not allowable. The arbitrator found that the fabrication work was actually done, and the refurbishment and fabrication done was necessary, and in fact a part of the fabrication work specified in the contract, and also noted admissions of the respondent in this regard. Holding that these

matters were in the realm of appreciation of evidence and fact, the Apex Court held that no interference was called for as findings arrived at by the arbitrator cannot be said to be perverse.

10. This then takes me to claim No. 3 i.e. payment on account of escalation of cost of labour and materials, for which the petitioner claimed a sum of `1,00,000. The arbitrator, however, awarded `32,560 on this count. The findings recorded by the arbitrator in this context are that the contractor had already had placed orders for purchase of the main components of the cranes as early as 9-11-1991 and 12-11-1991 vide Ext. G-9 and Ext. G-10 and had assured the respondents that the work worth about `5 lakhs would be completed by the end of March, 1992 and that stores worth a sum of `8,06,664 had been ordered even before the original date of completion and, as such, cost escalation for this was not justified, more so, when payment for this had already been claimed in the first running account receipt and that cost escalation was to be considered only for the left over work worth `2,83,380 (`10,90,044-`8,06,664) and, therefore, determined the cost escalation at `32,560.40. I do not find any legal infirmity in these findings, and no interference is, therefore, called for.

11. The last of the claims pertains to the award of interest at the rate of 18% per annum for pre-reference, pendent elite and future period as against the claim of 24% per annum. The case of the respondents is that there is no provision in the contract for payment of interest on the amounts payable to the contractor and therefore no interest ought to be awarded. In the instant case, there is no express bar in the contract with respect to

interest to be awarded. In my opinion, this contention is best answered by the following observations of the Apex Court in ***State of Rajasthan v. Ferro Concrete Construction (P) Ltd., (2009) 12 SCC 1***:

> *"60. The appellants contend that there was no provision in the contract for payment of interest on any of the amounts payable to the contractor and therefore no interest ought to be awarded. But this Court has held that in the absence of an express bar, the arbitrator has the jurisdiction and authority to award interest for all the three periods-pre-reference, pendent elite and future (vide decisions of the Constitution Bench in* ***Irrigation Deptt., Govt. of Orissa v. G.C. Roy, Dhenkanal Minor Irrigation Division v. N.C. Budharaj*** *and the subsequent decision in* ***Bhagawati Oxygen Ld. V. Hindustan Copper Ltd.****). In the present case as there was no express bar in the contract in regard to interest, the arbitrator could award interest."*

12. Having said that, the petitioner is still not yet out of the woods. The power of the arbitrator to award interest is one thing and the quantum of the interest to be awarded by him is an entirely another matter. No material is discernible as to under what circumstances an interest at the rate of 18% was awarded by him to the petitioner. The legal position with respect to the quantum of interest to be awarded was also propounded by the Apex court in ***Ferro Concrete Construction (Pvt.) Ltd. case (supra)*** at para 67 in the following manner:

> *"67. In regard to the rate of interest, we are of the view that the award of the interest at 18% per annum, in an award governed by the old Act (the Arbitration Act, 1940), was an error apparent on the face of the award. In regard to award of interest governed by the Interest Act, 1978, the rate of interest could not exceed the current rate of interest which means the highest of the maximum rates at which interest may be paid on different classes of deposits by different classes of scheduled banks in accordance with the directions given or issued to banking companies generally by Reserve Bank of India under the Banking Regulation Act, 1949. Therefore, we are of the view that pre-reference interest should be only at the rate of 9% per annum. It is appropriate to award the same rate of interest even by way of pendent elite interest and future interest up to the date of payment."*

13. In awarding hefty interest i.e. at the rate of 18% per annum for pre-reference, pendent elite and future interest, the arbitrator has violated the provisions of Interest Act, 1978: there is thus an error of law apparent on the face of the award. This is one of the limited grounds upon which the courts can interfere with the award passed by the arbitrator. Thus, consistent with the judgment of the Apex Court in Ferro Construction Pvt. (Ltd.) (supra), the interest awarded by the arbitrator to the petitioner for pre-reference, pendent elite and future interest shall stand modified and reduced to 9 (nine) per cent per annum.

14. The result of the foregoing discussion is that the appeal is partly allowed. The impugned judgment of the learned Additional Deputy Commissioner, Shillong is hereby set aside. The impugned award, which was made a rule of the court by the learned Assistant to Deputy Commissioner, Shillong, except for the interest awarded therein, stands restored. The respondent authorities shall now pay the awarded amount together with simple interest calculated at the rate of 9 (nine) per cent per annum as indicated in the award. The impugned judgment is, accordingly, modified to the extent indicated above. There shall be no order as to costs.

JUDGE

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