2023:MLHC:495

Serial No.01
Supplementary List

HIGH COURT OF MEGHALAYA
AT SHILLONG

Arb.A.No.6/2023

Date of Order: 19.06.2023

Public Works Department (National Highway) Vs. M/s BSC-CC & JV, 6-2-913/914

Coram:

Hon'ble Mr. Justice Sanjib Banerjee, Chief Justice
Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

For the Appellant : Mr. A. Kumar, Advocate-General with
Mr. S. Sengupta, Addl.Sr.GA
Mr. S. Sahay, GA
Mr. A.S. Pandey, GA
Ms. S. Laloo, GA

For the Respondent : Mr. R. Prakash, Adv with
Mr. K. Ch. Gautam, Adv
Mr. K. Tiwari, Adv
Mr. S. Gangar, Adv
Mr. A. Pandey, Adv

i) Whether approved for reporting in Law journals etc.: Yes/No

ii) Whether approved for publication in press: Yes/No

JUDGMENT: (per the Hon'ble, the Chief Justice) (Oral)

This is a complete waste of time and a reckless exercise undertaken by an irresponsible appellant. The challenge here is under Section 37 of the Arbitration and Conciliation Act, 1996 to an order dated May 17, 2023 passed by the Commercial Court, Shillong on a plea under

Section 34 of the Act challenging an arbitral award rendered on July 27, 2021.

2. The arbitral award was made on an application under Section 31(6) of the Act. Such provision empowers an arbitral tribunal to pass an interim arbitral award in respect of any matter that may be covered by a final arbitral award.

3. The appellant herein engaged the respondent for the two-laning of the highway from Shillong to Nongstoin and beyond, possibly, up to Tura. The claims in the reference pertained to the delay, disruption and prolongation of the contract together with interest on account of delayed payments and the like. There is no dispute that there was delay in the execution of the contract and the appellant herein submits that it was for such reason that the value of the contract had been revised and claims on account of interest and the like for previous delayed payments had been subsumed in the enhanced value of the contract.

4. The contract itself provided for a two-tier mechanism for the resolution of disputes. In such context, clause 25 of the contract is of some relevance:

> "25. **Procedure for Disputes**
>
> 25.1. The Dispute Review Expert (Board) shall give a decision in writing within 28 days of receipt of a notification of a dispute.
>
> 25.2. The Dispute Review Expert (Board) shall be paid daily at the rate specified in the Contract Data together with reimbursable expenses of the types specified in the Contract

> Data and the cost shall be divided equally between the Employer and the Contractor, whatever decision is reached by the Dispute Review Expert. Either party may give notice to the other to refer a decision of the Dispute Review Expert to an Arbitrator within 28 days of the Dispute Review Expert's written decision. If neither party refers the dispute to arbitration within the next 28 days, the Dispute Review Expert's decision will be final and binding.
>
> 25.3. The arbitration shall be conducted in accordance with the arbitration procedure stated in the Special Conditions of Contract."

5. Despite the value of the contract being enhanced, the contractor sought to assert a claim on account of delayed payments of its regular bills. In accordance with clause 25 of the contract, the Dispute Review Expert Board considered such claim and, by a reasoned decision passed on September 25, 2016, found that the contractor was entitled to a substantial sum. Upon the contractor requiring the Dispute Review Expert Board (DREB) to re-examine its claim since several aspects of the delay had not been accounted for, a revised decision was passed by the DREB on February 19, 2017 finding that the contractor was entitled to a sum in excess of Rs.117 crore on account of interest for delayed payments and on account of unpaid bills or delayed payments for bitumen.

6. In accordance with clause 25.2 of the contract, such decision of the DREB ought to have been challenged by the appellant employer within 28 days. However, even if it be accepted for argument's sake that the abridgement of the time would fall foul of Section 28 of the Contract Act, 1872, what is evident is that there never was any challenge at all to

such decision of the DREB of February 19, 2017 which incorporated the earlier decision of September 25, 2016 within its fold.

7. On the remainder of the disputes between the parties pertaining to delay, disruption and prolongation of the contract, a separate decision was rendered by the DREB on September 25, 2018.

8. Prior to the second decision of the DREB being pronounced on the delay, disruption and prolongation aspect, since the amount awarded by the DREB on February 19, 2017 remained outstanding for a long time, the contractor wrote to the appellant herein on June 11, 2018 seeking arbitration. The relevant letter, at paragraph 11.0 thereof, specifically invoked clause 25.3 of the agreement read with the relevant clause of the special conditions of the contract and the disputes described in such paragraph pertained to three specific heads: additional usage of bitumen; reimbursement of labour cess; and, interest on delayed payments.

9. It would appear that the claim on account of delayed payments included the quantum awarded by the DREB as there is a reference, earlier in the said letter, to the DREB decisions of September 25, 2016 and February 19, 2017.

10. In response to the contractor's letter of June 11, 2018, the appellant claimed that the appellant was "to appeal against the order of the Dispute Review Board and the matter is being communicated to the DRB accordingly." This assertion made no sense at all and was

completely contrary to clause 25 of the contract between the parties that required the dispute to be carried to the appropriate forum within a specific period. Even if such specified period is ignored, a dispute had to be raised and the appellant had to pursue such dispute and bring it to a logical conclusion.

11. Since the agreement between the parties provided for arbitration as specifically recorded in clause 25.3 thereof read with the special conditions of the contract, the only meaningful way in which the appellant could have disputed the DREB decision of February 19, 2017 (which included the earlier decision of September 15, 2016) was by referring the matter to arbitration. Till date no step has been taken by the appellant in such regard.

12. On the contrary, on some frivolous grounds that the contractor need not have taken into account at all, the appellant wrote on July 18, 2018 for the notice of June 11, 2018 to be recalled. The appellant has not been able to demonstrate that the contractor withdrew such notice.

13. By the appellant's letter of January 16, 2019 a reference was made to arbitration. It may do well to notice the entirety of such letter from where it quotes the subject till where the substance of the letter ends:

> "Sub: 2-laning of Shillong – Nongstoin section of NH 44 and Nongstoin – Rongjeng – Tura State road in the State of Meghalaya under Phase 'A' of SARDP-NE – Nomination of Arbitrator – reg.

Ref: No.RW/NH/12018/142012MG/SARDP-NE (part-1)
Dt. 20.12.2018.

Sir,

With reference to the subject cited above, I am directed to forward herewith a copy of the letter under reference above received from Ministry of Road Transport and Highways regarding the nomination of Shri K.K. Jalan IAS (Retired) as Arbitrator to represent the Ministry and State PWD, Meghalaya.

This is for your information and necessary action.

Enclo: As stated above."

14. It is evident that the nomination of the arbitrator that was made was in respect of the matter covered by the subject referred to in the relevant letter. The subject was, quite clearly, "Nongstoin section of NH 44 and Nongstoin – Rongjeng – Tura State road..." There is no doubt that the relevant letter of January 16, 2019 referred to a letter dated December 20, 2018 that had been received by the appellant from the Union Ministry of Road Transport and Highways and it is equally possible that a copy of such letter was also forwarded by the appellant to the contractor. However, what cannot be missed is that the nomination of the arbitrator was in respect of the subject-matter which was clearly indicated in the letter though the letter also carried a reference to the previous letter received from the relevant Union Ministry.

15. The contractor responded to such nomination of arbitrator by the appellant by the contractor's letter of February 1, 2019. Much is

sought to be made out by the appellant of the first paragraph of such letter of the contractor which reads as follows:

> "We are in receipt of your letter dated 16.01.2019, cited above at sl.no 9, whereby we were informed the appointment of Mr. K.K. Jalan IAS (Retd.) as your nominee Arbitrator to adjudicate on "Decision of the DRB on Claim of the Contractor regarding, Delay, disruption and prolongation cost" only."

16. The contractor's reply, thereafter, proceeded to record the history of the relationship between the parties before culminating in a request made at paragraph 10.0 to the effect that all the decisions of the DREB ought to be referred to the arbitral tribunal. A table-form chart was included in such paragraph and the claims indicated therein included the one on delayed payments and another for interest on delayed payments for bitumen. These two matters were covered by the DREB decision of February 19, 2017 (including the previous decision of September 26, 2016).

17. Significantly, the appellant herein did not respond to the letter of February 1, 2019 and the contractor's request for all disputes to be referred to arbitration may be inferred to have been acceded to.

18. It was in such circumstances that the arbitral tribunal came to be constituted with two nominees of the two parties and a third arbitrator who was appointed in accordance with the agreement between the parties. At the first sitting of the reference held on April 10, 2019, copious minutes have been recorded. However, there is no submission or

clarification by the representatives of the appellant present at such meeting to confine the terms of reference of the arbitral tribunal to only the claims on account of delay, disruption and prolongation of the work or to exclude the claim on account of the decision of the DREB rendered on February 19, 2017 (including the earlier decision of September 25, 2016).

19. It was only after the contractor's statement of claim was placed before the arbitral reference in the end of May, 2019 that an application under Section 16 of the Act was filed by the appellant herein. Such application was filed on July 30, 2019. It is necessary to ascertain the scope and purport of the relevant application from the pleadings therein.

20. At paragraph 2 of such application, the appellant exhorted that the arbitral tribunal could acquire jurisdiction only in the manner laid down in the contract between the parties and further asserted that the claims which had been raised by the claimant but had not been referred to arbitration in terms of the contract could not be entertained by the tribunal. Despite the appellant having nominated its person on the arbitral tribunal, the two nominees of the parties having decided on the third arbitrator in accordance with law and no objection raised by the appellant, not only at the first hearing in the reference but for a period of more than three months thereafter, the appellant finally claimed in the relevant application that since there was no dispute between the parties in respect of the decisions rendered by the DREB on September 25, 2016 and

February 19, 2017, such claim carried by the contractor to the reference was not arbitrable.

21. Indeed, it is necessary to see the exact words of the appellant used in the relevant application, sans the sub-paragraphs that followed:

> "6. It is respectfully submitted that the Claimant is liable to be non-suited on each of the above preliminary grounds which are more particularly detailed hereinafter:
>
> 1. IN RE: CLAIM NO.1: Claims relating to the due payable interest on the delayed/late payments of IPC's and accrued payable due interest on principal amounts awarded and paid to the Claimant by the Respondent, as per the decision of the Dispute Review Board dated 25.09.2016 and 19.02.2017.:
>
> **a. No-existence of 'dispute' in terms of provisions of contract warranting invocation of dispute resolution process:**
>
> ..." *(Emphasis in original)*

22. Thus, what is evident from the relevant application is not any assertion that the dispute pertaining to the non-payment of the sum as decided by the DREB on February 19, 2017 (inclusive of the amount as decided on September 25, 2019) had not been referred to arbitration, but only that since no dispute in such regard had been raised by the appellant, there was nothing to adjudicate in such regard in the arbitration.

23. Classically, in the early days of arbitration law in this country, it was also the understanding of some courts that the mere non-payment without any attempt to justify such non-payment would not be a dispute which would be covered by an arbitration agreement to be referred to

arbitration. Indeed, the understanding in such regard has undergone a transformation over the last century or so and even the mere non-payment now amounts to a dispute, since without any adjudication thereof, despite there being no dispute, the party claiming the money has no recourse to the same.

24. What is even more significant is that the appellant herein admitted categorically and unequivocally that it had not raised any dispute in respect of the DREB decision of September 25, 2016 as modified and enhanced by the subsequent order of February 19, 2017. In clear words, the appellant herein admitted, accepted and acknowledged that it was liable to pay such amount; only that the arbitral tribunal could not go into it since there was no dispute in such regard and, as a consequence, the matter was not amenable to arbitration or any form of adjudication.

25. In the light of the nomination made by the appellant herein in its letter of January 16, 2019 and the subject-matter therein covering the entire gamut of the transactions between the appellant and the contractor, it was a possible view that the arbitrators could take. It is not necessary in this jurisdiction to hold that the view taken by the arbitrators was the correct view or the only possible view. It would pass muster if it is recognised that one of the possible views was taken by the arbitrators.

26. In addition, it must not be missed that the immediate response of the contractor, following the reference of the disputes to arbitrator by

the appellant, in the contractor's letter of February 1, 2019, was to call for all the outstanding matters to be taken to the reference. To this, there was no reply from the appellant. In the backdrop of the contractor's letter of February 1, 2019, the complete lack of response thereto by the appellant herein and the arbitral tribunal being constituted thereupon, it was possible for the arbitral tribunal to assume that the entirety of the disputes between the parties pertaining to the contract had been referred to such arbitral tribunal.

27. The award that was rendered and which is challenged in the present proceedings was made on July 27, 2021. Such award was made following an application by the contractor under Section 31(6) of the Act. In the award, the arbitral tribunal reckoned that since no dispute had been raised at all by the appellant in respect of the decisions rendered by DREB on September 25, 2016 and February 19, 2017, the appellant herein could no longer object to the total amount decided in favour of the contractor being made the subject-matter of an award.

28. Indeed, if one were to be hyper-critical, one would question why the arbitral tribunal went into the issue of interest on interest and duplication of interest since such matters had never been canvassed by the appellant herein upon the appellant failing to raise any form of dispute to the two decisions of the DREB made on September 25, 2016 and February 19, 2017.

29. The appellant seeks to distort the order passed on March 21, 2020 on its application under Section 16 of the Act. At paragraph 46 of the relevant order, the arbitral tribunal observed that till the date of the appellant herein filing its application under Section 16 of the Act on July 19, 2019 it remained silent "and thus it would amount to giving acquiescence to notice dated 01.02.2019 for consolidation of both the claims." It is evident that the arbitral award read the conduct of the appellant herein exactly as this Court has done in inferring that upon the appellant herein not responding the letter of February 1, 2019 and not indicating the bounds of the arbitral tribunal's authority in course of previous hearings in the reference, the authority of the arbitrators extended to the entirety of the contract between the parties.

30. Again, paragraph 49 of the order dated March 21, 2020 is sought to be twisted out of context by the appellant as the appellant suggests that such paragraph held out a promise by the arbitral tribunal to adjudicate on the disputes pertaining to the claim on interest at a later stage; but while passing the impugned award on July 27, 2021 the arbitral tribunal quite facetiously indicated that the matter had already been decided in its previous order of March 21, 2020. It is necessary that the relevant paragraph be seen in its entirety:

> "49. It is well settled that the question of limitation is a mixed question of fact and law. Moreover, there are triable issues in the present case, since Respondent has not made payments to

> the Claimant in terms of the order of DRB-I and DRB-II. Thus, there has been no final settlement between the parties. Therefore, such disputes are to be considered by the Arbitrator and not by the Civil Court. On this point we are supported by the following decision: ...”

31. It is clear that what the arbitral tribunal sought to indicate in the relevant paragraph was that there was no final settlement between the parties by payment and accord. The arbitral tribunal also noticed that no dispute had ever been raised by the appellant pertaining to the claim on account of interest for delayed payments which called for adjudication. The arbitrators finally held that in view of the arbitration agreement contained in the matrix contract between the parties, there was no mandate for either party to approach any civil court as all disputes had to be finally decided in accordance with the arbitration agreement and not otherwise. There is no element of promise held out in the relevant paragraph that the matter pertaining to interest for delayed payments or any purported dispute in such regard would be considered at a later stage.

32. The argument appears to be a figment of the appellant’s imagination.

33. Here is a case of a contract being stretched beyond its original period and payments not being tendered within reasonable time. There was a mechanism which was established in the agreement and the contractor succeeded by obtaining favourable decisions from the authority that was tasked with such duty to adjudicate such disputes within the

framework of the contract. Indeed, there are letters on record which reveal that the contractor offered to give up a substantial part of the amount that had been adjudicated in its favour by the DREB and even enhanced the quantum of rebate, if only to prompt the appellant to making immediate payment. However, the appellant did not relent.

34. There are other specious excuses which are proffered and irrelevant references made in this matter which has been a complete waste of judicial time. Notwithstanding the contract being between the appellant and the contractor, a fact which is undeniable and is clearly admitted, the appellant refers to the correspondence it exchanged with the relevant Union Ministry and the advice that it is received from such Ministry. In a contract between two parties, neither is governed by the conduct of a third party, whatever may be such third party's control over the other party. Indeed, an issue has been sought to be raised quite seriously that the Union Ministry of Road Transport and Highways was a necessary and a proper party to the present proceedings. Surprises never cease. Such ludicrous assertion may probably be because the officials who are behind the appellant; who do not need to pay from their own pockets for their recalcitrance and it is the tax-payers' money that being squandered.

35. The court of the first instance was perfectly justified in not touching the award. The award rendered on July 27, 2021 is unimpeachable, it is based on the clear and tacit admission on the part of

the appellant herein and the appellant could never have turned around to question its own admission or seek to deny the payment of what was found by the DREB on February 19, 2017 (including the decision of September 25, 2016) to be due and owing to the contractor. In making the interim award, which is as efficaciously executable as a final award, the arbitral tribunal has only given the contractor a part of its dues that had remained outstanding for a long time. The court of the first instance, quite appropriately, quoted the relevant paragraphs from the impugned award with approval and observed that the same did not call for any interference.

36. It has become fashionable, particularly for public sector undertakings and government litigants, to throw sheafs of paper at the court and believe that such voluminous tomes would dissuade judges from looking deep into the matter and be frightened enough to grant an adjournment and delay the inevitable. It is time that unworthy litigants with frivolous causes give up the habit of preying on the court's delays and the only way this can be ensured is by imposing actual and primitive costs for such misadventure.

37. The greater malaise is how the system works, particularly, the manner in which works contracts are issued by government agencies. Oftentimes, ridiculous and incredibly low rates are quoted by the regular contractors to beg the contract and, thereafter, rely on their allies in the government agencies to create grounds that allow claims for enhancement

to be made. The ultimate enhanced value, possibly, makes for the profit of the contractor and the service charges that it needs to defray to its allies in the system. Rather than waging only a verbal war against corruption from every possible pulpit, persons in authority may serve the system better by setting the government house in order in such regard.

38. The real tragedy is not in the appellant as a litigant shying away from payment or its officials being too clever and a half; the tragedy is in the erroneous expert advice that is rendered to the litigants as the appellant.

39. Arb.A.No.6 of 2023 is dismissed with costs assessed at Rs.10 lakh which will be paid over and in addition to the amount awarded.

(W. Diengdoh)
Judge

(Sanjib Banerjee)
Chief Justice

Meghalaya
19.06.2023
"Lam DR-PS