



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

+ **O.M.P. No. 331/2002**

25th February, 2010

ALL INDIA RADIO

...Petitioner

Through: Mr. Abhinav Jain, Advocate.

M/S. UNIBROS & ANR.

....Respondents.

Through: Mr. Jagdish Vats, Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

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JUDGMENT (ORAL)

VALMIKI J.MEHTA, J

1. This petition under Section 34 of the Arbitration Act, 1996 challenges the Award dated 15.7.2002 passed by the sole Arbitrator. The Award deals with only one claim i.e. Claim No.12. Claim No.12 was the claim of the respondent/contractor for loss of profits. The Arbitrator has awarded loss of profits to the contractor after holding that the petitioner was guilty of causing



prolongation of the contract from 11.4.1991 to 30.10.1994. The Award the disputes which arose out of the contract awarded to the respondent for additional construction of Doordarshan Branch at Mandi House substructure including the double basement.

2. The issue is that, if it is the petitioner who is guilty of delay in causing prolongation of the contract from 11.4.1991 to 30.10.1994, what is the consequence thereof. In consequence of prolongation of time in the performance of the contract, a loss of profit may be payable under Section 73, or it can only be that escalation is payable under Section 55 of the Contract Act. It depends on the facts of each case as to whether a contractor is entitled to loss of profits under Section 73 because of prolongation of the contract by the department. Prolongation of a contract no doubt causes the immediate consequences provided under Section 55 of the Contract Act, 1872, (provided the ingredients therein are complied with) however, loss of profit is not an automatic consequence of extension /prolongation in the performance of the contract, even assuming that the same is on account of fault of the petitioner/employer/Union of India.

3. When a contract is performed during a prolonged period, instead of the originally contracted period, in certain cases, loss of profit does take place to the contractor, however, to get such loss of profit, it is necessary for the contractor to prove before the Arbitrator that in the period of performance of the contract in the extended/prolonged period, the contractor has been forced to



utilize men, machinery, material, overheads etc. which could have been elsewhere in any other contract. Merely because there is a prolongation of the contract, as stated above, loss of profit is not a natural consequence. The ingredient of profit is very much inbuilt in the performance of a particular contract and the contractor does get that ingredient of profit while performing the contract in the extended period. If, however, the contractor claims extra profit, than as already inbuilt in performance of the contract, it is incumbent upon the contractor/respondents to establish and prove before the Arbitrator that at the site in question it had used more men, machinery, overheads and so on which could have been utilized in some other contract to earn profit and therefore, the contractor is caused loss of profit in not executing the other contract. I am supported in the view I am taking by a judgment of a learned Single Judge of this court (Pradeep Nandrajog, J) in the judgment reported as ***Bharat Engg. Enterprises Vs. DDA 2006 (Supp.) Arb. LR 129*** wherein it was held as under:

“28. If a contract gets prolonged, a party would be entitled to escalation on account of price rise, if established, for the materials consumed during extended period of work as also reimbursement for extra wages paid to the workmen if it is established that labour rates increased. Party may also be entitled to be compensated for idle machinery provided it is established that the same could be used for some other works. Further, if any plant or machinery is taken on hire, hire charges can be sought. But I fail to understand any claim towards loss of profit. I accordingly hold that sum of Rs.73,935.48 awarded under sub-head (c) is patent illegality committed by the learned arbitrator. I may additionally note that it was not the case of the contractor that it did not bid for other works because manpower was deployed at site of the other work in question and due to the said fact the contractor could not take up other works.”



4. I have gone through the entire Award. The Award as regards the claim is in three parts. The first part holds the petitioner guilty of delay in the performance of the contract. There is no dispute to this finding. The second part of the Award under Claim 12 refers to the evidence to show the rate of profit which would have been available to the contractor. There is no dispute on this aspect also. The third part of the Award gives a quantification of the rate of profit. The most important aspect and which is the fourth aspect i.e. loss of profit caused on account of unnecessary retention of men, machinery, material, overheads and so on at the site in question, is not found, even by a whisper in the impugned Award. Even before this court, it has not been pointed out as to how before the Arbitrator it was established that unnecessary men, material, machinery, overheads and so on were used in the performance of the contract which could have been used in the performance of some other contract to earn the profit claimed as a loss under this Claim 12.

5. In this view of the matter, the Award is clearly illegal and against the law of the land. The law of the land is the Contract Act, 1872 under which loss of profit can only be allowed in the circumstances, already narrated above, and to which there is absolutely no evidence before the Arbitrator and nor does the Award deal with any such evidence filed in the arbitration proceedings.

6. While hearing objections under Section 34, a Court is entitled to, and in fact duty bound to interfere with an Award if the Award is illegal or



against the contractual provisions or is so perverse that it shocks the conscience. In my opinion, the impugned Award, in the present case, not only is wholly illegal being violative of the settled legal position with regard to the Contract Act, but it is perverse which shocks the judicial conscience because the effect of the allowing of this claim has been that huge amount of Rs.1,44,83,830/- is awarded to the respondent. Not only that, interest at 18% thereafter has been awarded from 12.5.1997 till date of actual payment and which therefore would mean that the amount awarded presently would become over Rs.3 crores. This position, in my opinion, is totally unacceptable, being against the substantive law of land which is the Contract Act and also on account of the findings being totally perverse in that amounts have been awarded without even a modicum of reference to the evidence with regard to additional men, material, machinery, overheads and so on which are forced to be used by the respondent/contractor at the present site in this contract and which for the purpose of awarding of profit, it is necessary that these were extra and the same could have been used elsewhere to earn additional profit.

7. In view of the above, I accept the objections to the Award and the Award dated 15.7.2002 of the Arbitrator is set aside and the claim of the contractor under Claim 12 will accordingly stand dismissed. In the facts and circumstances of the case, I award costs of Rs.50,000/- in favour of the petitioner and against the respondents. Since the Union of India has been forced



into this litigation on account of a misconceived claim of the respondent, it fit that if costs are not paid within a period of four weeks from today, then, the same shall carry interest at 9% per annum till actual payment. I may note that Supreme Court recently in the case of *U.P. Cooperative Federation Vs. Three Circles (2009)10 SCC 374* after referring to the 55th report of the Law Commission of the year 1973, has held that interest can be imposed on the costs awarded. Accordingly, in the facts of the present case, I deem it fit to award interest on the costs.

8. With the aforesaid observations, the petition stands disposed of.

VALMIKI J.MEHTA, J

February 25, 2010

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