

SUPREME COURT OF INDIA

Royal Education Society

Vs.

LIS (India) Construction Co. Pvt. Ltd.

C.A. No.7012 OF 2008 arising out of S.L.P. (C) No.12194 of 2006

(Lokeshwar Singh Panta and Aftab Alam)

02/12/2008

JUDGMENT

LOKESHWAR SINGH PANTA, J.

1. Leave granted.

2. This appeal is directed against the judgment and order dated 19.04.2006 passed by the Division Bench of the High Court of Judicature at Bombay in Appeal No. 198 of 2006. The appellant-Society has filed the above-said appeal challenging the order dated 14.11.2005 of the learned Single Judge whereby the appellant's Arbitration Petition No.423 of 2004 filed under Section 34 of the Arbitration and Conciliation Act, 1996 against the award of the Arbitral Tribunal was dismissed.

3. Briefly stated, the relevant facts are as follows:

The appellant is an educational society duly registered with the Charity Commissioner, Bombay under Bombay Public Trust Act, 1956. The appellant-Society is running an educational institution at Borli Panchatan, Taluk Shriwardhan, District Raigad, Maharashtra. The President of the appellant-Society is stated to be a renowned Surgeon and a gold medalist of University of Bombay, in Surgery and is affiliated to various well-known Hospitals in Bombay. The President of the appellant-Society hails from village Barli/Konkan and out of his emotional love to his native village and in order to educate his own village children; he took upon the responsibility to establish the school and institution at his ancestral land at Barli in Konkan area of Maharashtra. The appellant-Society is running English Medium School for the last about 20 years.

4. The appellant-Society desired to establish a women's college at Borli and, therefore, it invited tenders for construction of a building at Borli, Panchatan. The Society was depending upon unanimous donors, who have agreed to donate the entire amounts for the Project.

5. The respondent-company is incorporated under the Companies Act the Director of the respondent-company visited the site and in the presence of the donor, they agreed to construct the building at the proposed site. The respondent-company offered tender for constructing the building at a total cost of s.1, 55, 37,981.20 [Rupees one crore fifty five lacs thirty seven thousand nine hundred eighty one and twenty paise]. The college was named after the donor as 'Kalsekar Institute of Science'. It is the case of the appellant- Society that the tender of the respondent-company was accepted with the condition that the time was essence of the Contract and the respondent-company by its letter dated 29.04.2000 assured to the appellant-Society that the company will complete the Project within the stipulated time. The standard agreement drafted by the Council of Architect was executed on 20.04.2000 and the entire Project was to be completed within 18 months on or before 01.11.2001. It was also agreed that the final measurement and valuation shall be done in the 17th month. The date of the commencement was agreed upon 01.05.2000. The procedure for payment was that the respondent-company would submit the bills to the appellant's Architect and the same would be forwarded to the donor (President of the appellant-Society) and thereafter the cheque issued by the donor in the name of the appellant- Society and, in turn, the appellant-Society would pay the amount to the respondent-company.

6. The respondent-company allegedly failed to complete the Project as on 01.11.2001 and the appellant-Society did not give any extension of time to the respondent-company. The respondent-company paid a total sum of Rs.1, 41, 59,956/- as on 19.10.2001 for the cost of work done. The respondent-company abandoned the work in the midstream. The donor refused to give any amount beyond the agreed amount of Rs.1, 55, 37,981.20 when he found that the building was still incomplete and the contractors were demanding astronomical amount for completion of the entire building. The respondent- company removed their entire labour and machinery from the site and it left the building incomplete as an orphan without any care or maintenance to face the wrath of seasons. The building has no windows and doors on the upper floors. Subsequently, correspondence was exchanged between the appellant-Society and the respondent-company. The respondent-

company also failed to pay the electricity bill of Rs.1, 29,000/-.

7. On these premises, the respondent-company filed Arbitration Application bearing No. 61 of 203 before the High Court of Judicature at Bombay. The President of the appellant-Society appeared in-person. The said Arbitration Application came up before the learned Single Judge on 02.05.2003, on which date following order was passed:-

"... The Petitioners have already appointed Mr. Devbhakta as their arbitrator. Mr. Roshan Nanavati is appointed as second arbitrator. These two arbitrators will appoint third arbitrator who will act as Presiding Arbitrator. The arbitral tribunal so constituted will decide all issues between the parties including claims and counter claims, if any, and also existence of arbitral clause and/or that the claims as raised by the Petitioners are arbitrable or not. Application stands disposed of accordingly."

8. The respondent-company filed its alleged claim on 31.07.2003, whereas the appellant-Society filed reply thereto and counter claim also on 21.1.2003 accompanied by report dated 21.01.2002 of the Architect Khalil R. Shaikh and Associates. The arbitration proceedings were heard on various dates and finally the Arbitral Tribunal passed an Award on 23.02.2004, but since the respondent-company did not pay the fees of the Arbitral Tribunal, therefore the Award was not declared. Subsequently, it appears that the respondent-company paid the fees of the Arbitral Tribunal and thereafter on 20.04.2004 the said Award was communicated and declared to the appellant-Society by the Arbitral Tribunal by its letter dated 20.04.2004. The following Award was passed by the Arbitral Tribunal:-

1. We do hereby award that the Respondents namely M/s. Royal Education Society do pay to the Claimants namely M/s LIS (India) Construction Co. (P) Ltd., the sum of Rs.35,50,762.03 [Rupees thirty five lakhs fifty thousand seven hundred sixty two point zero three only] in full and final payment of the claim No.1 upheld by us in this arbitration proceedings.

2. We do hereby award that the Respondent do bear and pay interest at 7% per annum on the amount of Rs.35,50,762.03 [Rupees thirty five lakhs fifty thousand seven hundred sixty two point zero three only] from 13.06.2003 till the date of award as also interest at 7% p.a. from the date of award till the date of payment excluding two months needed to make arrangement for payment.

3. We do hereby award that the Respondents namely M/s. Royal Education Society do pay to the Claimants namely M/s LIS (India) Construction Co. (P) Ltd., the sum of Rs.5,00,000/- [Rupees five lakhs only] towards claim No.2.

4. We do hereby award that the Respondent do bear and pay interest at 7% p.a. on the above amount of Rs.5,00,000/- from the date of award to the date of payment excluding one month needed to make arrangement for payment.

5. We do hereby award that each party do bear and pay its own legal cost as well as cost of this arbitration proceedings.

6. We do hereby award that each party do bear and pay three Arbitrators' fees in equal parts."

9. Being aggrieved by the Award of the Arbitral Tribunal, the appellant-Society filed Arbitration Petition 423 of 2004 before the High Court of Judicature at Bombay. The learned Single Judge dismissed the said arbitration petition on 14.11.2005.

10. Feeling aggrieved thereby, the appellant-Society filed appeal challenging the correctness and validity of the order dated 14.11.2005 of the learned Single Judge and the Award passed by the Arbitral Tribunal. The Division Bench of the High Court, as noticed above, dismissed the appeal on 19.04.2006. Now, the appellant-Society has filed this appeal by special leave.

11. We have heard the learned counsel for the parties and meticulously examined the judgment and order of the Division Bench confirming the order of the learned Single Judge dismissing the Arbitration Petition of the appellant-Society.

12. It is not in dispute that Dr. Abdur Rahim Undre is the President of the appellant-Society. He registered the appellant-Society with the Charity Commissioner, Bombay. The appellant-Society is running schools and college for women at a small village Borli Panchatan in Taluka Shrivardhan, District Raigad. Dr. Abdur Rahim Undre, as a President of the appellant-Society, donated all his immovable property and established English medium school in his native place. The appellant-Society through its Architects, M/s Salim Dawawala, had invited tenders for construction of Girls College at Borli Panchatan. The respondent-company had submitted its tender for the said work. It is not in dispute that the tender of the respondent-company was accepted on behalf of the appellant-Society. The work was awarded to the respondent-company by the appellant-Society. Thereafter, a formal contract agreement dated 20.04.2000 was entered into by and between the parties. As per the terms of the contract, the work under the contract was stipulated to be completed by 01.11.2001, i.e. within 18 months period from 01.05.2000. The total estimated cost of Project was Rs.1, 55, 37,981.20 based on item-rate contract. Undisputedly, as the respondent-company could not complete the work within the stipulated period, therefore a dispute arose between the parties, which were

referred by the learned Single Judge to three members of Arbitral Tribunal, namely, Shri Russi R. Mistry, Shri Madhav Deobakhta and Dr. Roshan N. Nanavati. Both the parties filed their statements of claim and counter-claim before the Arbitral Tribunal. The respondent-company under Claim No.1 had claimed a sum of Rs.38, 06,576.75 for outstanding R.A. Bills. Against R.A. Bill No.17, an amount of Rs.21,33,423.18 was claimed, whereas against R.A. Bill No.18 a sum of Rs.15,35,356.97 was claimed out of which a sum of Rs.1,37,796.60 was claimed beyond prolonged period of work, i.e. 01.11.2001 to 21.01.2002. The Arbitral Tribunal had allowed the following claims:-

1. In regard to R.A Bill No.17, a sum of Rs.22, 45,708.61 was awarded.

2. For R.A. Bill No.18, a sum of Rs.13, 05,053.42 was awarded.

3. Bill beyond R.A. Bill No.18 was rejected. The total amount awarded under Claim No.1 was Rs.35, 50,762.03.

13. It was the claim of the respondent-company before the Arbitral Tribunal that gross value of the work executed by it within the stipulated period was to the tune of Rs.1,45,59,956/-, but the total work executed was to the extent of Rs.1,80,78,908/-. Thus, the difference between the gross value of the work and the amount of total work got executed in the prolonged period was Rs.35,18,952 and the said amount was claimed on escalation rate at 10%. The Arbitral Tribunal awarded a sum of Rs.35,50,762.03 under Claim No.1 and a sum of Rs.5,00,000/- under Claim No.2 to the respondent-company along with interest at the rate of 7% p.a. from the date of award till the date of payment, excluding two months needed to make arrangement for payment. Claim Nos.3, 4, 5, 6, 7 and 8 were rejected. The counter claim of the appellant-Society was rejected.

14. As stated above, the Award of the Arbitral Tribunal was upheld by the learned Single Judge as well as by the Division Bench of the High Court.

15. We have gone through the general conditions of contract executed between the appellant-Society and the respondent-company. The Type of Contract in terms of clause (3) of the Contract was item-rate contract and the Contractor was to be paid for the actual quantity of work done, as measured at site, at the rates quoted by him in the Contract Bills. In terms of clause 16 (1) the Architect shall be the Owner's representative during the construction period, who shall periodically visit the site to familiarise himself generally with the progress and the quality of the work and to determine in general if the work was proceeding in accordance with the contract document. As per clause 32, when any instruction or decision given at site involves an extra or whereby the Contractor may plan to claim an extra, it shall be the responsibility of the Contractor to inform the Architect of the extra amount and get written authorization from the Architect before proceeding with the work involved.

Clause 40 of the Arbitration Agreement stipulates that upon it becoming reasonably apparent that the progress of the works is delayed, the Contractor shall forthwith give written notice of the cause of the delay to the Architect and if in the opinion of the Architect, the completion of the work to be or has been delayed beyond that date for completion stated in the appendix to these conditions or beyond any extended time previously fixed under this clause. The record shows that the Architect of the appellant-Society issued letter dated 20.4.2000 to the Managing Director of the respondent-company whereby the tender quotations of the respondent-company was accepted by the appellant-Society on certain conditions contained in the said letter. One of the conditions was that total cost of the Project will be within Rs.1.55 crores. Further condition was that the Project of the construction of the Girls College at Borli, Panchatan for the appellant-Society shall be completed within stipulated time frame of 18 months from 01.05.2000 and if the Project was not completed within stipulated time, a penalty of Rs.1,000/- per day will be charged and if completed before time, same amount will be paid as bonus. It was also stipulated that the respondent-company could mobilize the work from 21.04.2000. The MOU will be read in conjunction with tender document and other prevailing laws of the State Government.

16. In response to the said work order, the Director of the respondent-company vide reference : LIS/RES/00/06 dated 29.04.2000 acknowledged and accepted the work order dated 20.04.2000 and stated that the respondent-company had started mobilization for the commencement of the said Project and assured the appellant-Society to complete the same within the stipulated time limit. In terms of the Agreement, the Director of the respondent-company informed the Architect of the appellant-Society vide letter dated 16.05.2000 that in terms of the Agreement the respondent-company had already mobilized the site and executed the work at the site. The parties thereafter have exchanged various communications with each other. The respondent-company could not complete the work within the stipulated period, the appellant-Society vide letter dated 04.09.2001 refused to give further extension of time beyond stipulated period as contemplated in the Terms of the Agreement. It is not disputed that the appellant-Society has paid a sum of Rs.1,41,000/- to the respondent-company before 01.11.2001, i.e. the stipulated period for execution of the work. The respondent-company submitted R.A.Bill Nos.17 for Rs.22,45,708.61 and R.A. Bill No. 18 for Rs.13,05,053.42 after the stipulated period of the execution of the work. The appellant-Society has not extended the stipulated time beyond 01.11.2001. The respondent-company claimed a sum of Rs.1,80,78,908/- for the work done by it till 21.01.2002.

17. Undisputedly, the appellant-Society is an educational society duly registered by the Charity Commissioner under Bombay Public Trust Act, 1956. Dr. Syed Akhtar, a renowned Surgeon, is the President of the appellant-Society. He has established a women's college at his native village Borli Panchatan with a sole purpose of giving education to the children of his native village. He has donated his entire land for the construction of the women's college and received substantial amounts by donations from magnanimous donors for the Project. The work of construction of the college was entrusted to the respondent-company for a total cost of Rs.1,55 crores. Looking to the charitable cause for which the President-Donor of the appellant-Society has donated his land and raised money from the donors, we do not wish to embark upon the merits of the claims and counter claims raised by the parties before the Arbitral Tribunal. In the interest of both the parties and in order to settle

their dispute finally, we think it proper and reasonable that in addition to Rs.1,41,51,956/- already paid by the appellant-Society to the respondent- company for the work executed by it, an extra sum of Rs.21 lakhs shall be paid by the appellant-Society to the respondent-company on account of the work claimed in R.A. Bill No.17 .The respondent-company is not entitled to the payment of the amount claimed for prolonged period of work done after 01.11.2001 to 21.01.2002. The claim beyond 01.11.2001 made by the respondent-company and awarded by the Arbitral Tribunal, therefore, is wholly untenable and unsustainable.

18. In the facts and circumstances of the case, the respondent-company cannot be held entitled to the retention money and interest as awarded by the Arbitral Tribunal in its Award, which has been affirmed by the High Court. The balance amount of Rs.21 lakhs, as ordered by us, shall be paid by the appellant-Society to the respondent-company within eight weeks from the date of this order.

19. In the result, for the above-said reasons, the appeal is partly allowed and the judgment and order dated 19.04.2006 of the Division Bench of the High Court affirming the order of the learned Single Judge in Arbitration Petition No. 423 of 2004 whereby the Award of the Arbitral Tribunal was upheld, shall stand modified in the aforesaid terms and to the extent indicated above. The parties are left to bear their own costs.