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

+ **Date of Decision: 09.07.2010**

% **O.M.P. 345/2010**

M/S BHAGWANA RAM CHOUDHARY & CO Petitioner
Through: Mr. Pankaj Chaudhry, Advocate

versus

THE EXECUTIVE ENGINEER BFD-V, CPWD
BARMER (RAJASTHAN) Respondent
Through:

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

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| 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)

IA 7981/2010 (Exemption)

Allowed, subject to all just exceptions.

O.M.P. 345/2010

1. The petitioner has filed the present petition under Section 34 of the Arbitration and Conciliation Act ("the Act") to seek for setting aside of the award dated 03.02.2010 made by Sh. Divakar Garg, the sole arbitrator in Case No.ARB/DG/389.

2. The learned Arbitrator has rejected all the claims made by the petitioner/contractor and has upheld the action of the respondent in

rescinding the contract and in forfeiting the Earnest Money Deposit (EMD) and in encashing the performance bank guarantee furnished by the petitioner, by holding that the petitioner had failed to perform the works under the contract.

3. The petitioner/contractor was awarded the contract involving the work of maintenance of roads, embankment and culverts on Indo-Pak Border from BP 921 to BP 951 in Gujarat Sector (Sub Head: Repair to damaged road) vide agreement No.01/EE/BFD-V/BMR/2007-08. The tendered amount was Rs.94,91,242/- as against the estimated cost of Rs.54,13,319/-. The date of start of work was 13.04.2007 and the stipulated date of completion was Rs.12.08.2007. However, the work was prematurely rescinded by the respondent on 25.06.2007. This led to disputes arising between the parties, which were referred to arbitration of the learned Arbitrator.

4. The petitioner/claimant's claim No.1 was for Rs.18 lakhs towards work already done but which remained unpaid. The petitioner also claimed refund of the forfeited EMD of Rs.1,10,000/- (Claim No.2); the refund of forfeited security deposit of Rs.4,75,000/- (Claim No.3); and, the refund of forfeited performance guarantee of Rs.4,75,000/- (Claim No.4). Loss of profit of Rs.7,50,000/- was claimed under Claim No.5. Interest was claimed under Claim No.6 and arbitration/litigation charges of Rs.50,000/- was claimed under Claim No.7. The petitioner/claimant, however, gave up claim no.3 as, in fact, neither any security deposit had been deposited by the petitioner nor the same was forfeited by the respondent.

5. It appears that after the date of start of the work, i.e. 13.04.2007, on account of failure of the petitioner to start the work, the respondent initially sent a communication dated 28.04.2007 complaining about the delay in start of work. The petitioner did not submit the progress chart for each milestone and did not get it approved from the department as envisaged in clauses (5.1) and 10 of the agreement. The petitioner also did not obtain a valid labour license under clause 19 of the contract, nor submitted any labour report as envisaged under clause 19-D of the contract. All this showed that the petitioner was not ready for the performance of the contract.

6. A further notice was issued to the petitioner by the respondent on 22.05.2007 under clauses 3(a), 3(b) and 3(c) and he was called upon to show cause as to why action be not taken against him for breach of contract. There was no response to this notice by the petitioner.

7. Another show cause notice dated 08.06.2007 was issued to the petitioner. He responded to this show cause notice vide letter dated 13.06.2007, wherein he cited hindrances like rains on few days. The petitioner informed that they had started collection of GSB material and stone aggregate and had also asked for stoppage of traffic on the road to start the laying and compacting of stone aggregate for road work. The claimant vide communication dated 16.06.2007 stated that it was aware that the road in question is an important border road and that it could not be closed for any time. The petitioner also assured

that they would complete the work by 12.08.2007, i.e. the stipulated date of completion.

8. The respondent, after considering the ground reality that even after lapse of 50% of the time (two months) upto 13.06.2007, the work had not even started, rescinded the contract vide communication dated 25.06.2007. Thereafter, joint measurements of the material brought by the claimant was fixed for 18.07.2007 and the material brought by the petitioner at site was recorded. Respondent found out that the materials brought by the claimant were not as per CPWD specifications. This was communicated to the claimant vide letters dated 20.08.2007 & 31.08.2007 and he was also requested to remove the rejected material from the site immediately.

9. Before the learned Arbitrator, the petitioner/claimant pleaded that he had mobilized the required labour and material at site, but the progress of work was slow on account of obstruction by BSF authorities at site, non availability of space for stacking the material, heavy and frequent traffic on the narrow road at the site, continuous rain in the area, non availability of approval from BSF for stoppage of traffic on the road, non payment of work already done and non availability of AE due to frequent transfer.

10. On the other hand, the respondent relied on the contractual terms. The petitioner was required to acquaint himself with the site conditions before tendering. The petitioner was also advised that some

restriction may be imposed by the BSF, and under special condition no.3 the claimant was advised that vehicular traffic cannot be stopped and if required, such traffic may be diverted on the diversion road to be provided by the petitioner at his own costs.

11. The learned Arbitrator relied on the communication of the petitioner dated 13.06.2007 and two communications dated 15.06.2007 and 16.06.2007 (C-3 & C-4), which showed that the petitioner started collecting materials as late as around 13.06.2007. He also gave importance to the fact that the hindrances were pointed out by the petitioner only after the receipt of the show cause notice dated 08.06.2007. The stand taken by the petitioner in its communication dated 13.06.2007 and 15.06.2007 (C-3) that the work could not be done without stopping the vehicular traffic was held to be contrary to the contractual terms, as the petitioner was informed that the traffic could not be stopped on the said road, and it was the obligation of the petitioner to provide for a diversion road to carry out the contractual work.

12. The non submission of the time and progress chart and also the failure of the petitioner to examine the tender conditions was also considered by the learned Arbitrator to be a reason enough to reject his claims. As per Schedule F of the tender document, the petitioner was supposed to complete upto 1/8th work within 1/8th of the total time and upto 3/8th of work within 1/2 of the total time allowed. However, since no work had begun despite half of the period having expired, the

learned Arbitrator held that the rescission of the contract could not be said to be arbitrary or illegal. Consequently, he held that the respondent was entitled to forfeit the EMD and the performance guarantee under the contract. He, therefore, rejected the claim nos.2 and 4. As aforesaid, claim no.3 had already been withdrawn by the petitioner.

13. So far as claim no.1 was concerned, the learned Arbitrator referred to the joint measurements taken on 18.07.2007, which showed that only some substandard materials like stone aggregate and GSB (which was not even contracted for) were collected by the petitioner at the site. The respondent had directed the petitioner to remove such materials from the work site vide letter dated 31.08.2007. Since the petitioner failed to establish that it had executed any part of the contracted work, the learned Arbitrator rejected claim no.1. Claim no.5 towards loss of profit was rejected, as the learned Arbitrator held that the determination of the contract was legal and contractually valid. Consequently, claim no.6 towards interest and claim no.7 towards litigation/arbitration expenses were also rejected.

14. The submission of the learned counsel for the petitioner is that the contract could not have been rescinded merely on account of the late start of the work. In support of his submission, he relies on ***M/s Hind Construction Contractors by its sole proprietor Bhikamchand Mulchand Jain (Dead) by LR's v. State of***

Maharashtra, AIR 1979 SC 720 to submit that the contract could not have been rescinded as time was not of the essence of the contract. In my view, this decision is not applicable in the facts of the present case. It appears that the petitioner did not even raise the issue as to whether the time was of the essence of the contract or not before the learned Arbitrator. This issue cannot be raised at this stage of the proceedings. The petitioner has not even referred to the terms of the contract to substantiate his contention that time was not of the essence of the contract.

15. The facts of this case do suggest that, in fact, time was of the essence of the contract. A perusal of the award shows that the period during which the work was to be completed was only four months. Moreover, the petitioner was required to give the timetable of milestones as per Schedule F of the tender document, which provided, inter alia, that upto 1/8th work had to be completed within 1/8th of the total time and upto 3/8th of the work had to be completed within 1/2 of total time allowed. The parties were, therefore, conscious of the fact that strict punctuality had to be maintained by the petitioner with regard to the execution of the work and it was not open to the petitioner to claim that they could complete the work in the remaining half tenure, when, in the first half of the contract term, the petitioner had not done any work at all.

16. The next submission of the learned counsel for the petitioner is that the respondent was not entitled to forfeit the EMD or encash the

performance guarantee furnished by the petitioner, as no loss had been caused to the respondent. In support of his submission, the petitioner relies on a Supreme Court decision in ***Union of India v. Rampur Distillery & Chemical Co. Ltd., AIR 1973 SC 1098***. In my view, this decision is of no avail to the petitioner. In the facts of that case, the Supreme Court had observed that the contractor had supplied the stipulated quantity of rum at the contractual rate, though belatedly. In this light, the Supreme Court held that no loss has been caused to the appellant, Union of India and no attempt had been made by Union of India to establish that they had suffered any loss or damage on account of the breach committed by the respondent/contractor.

17. In the facts of this case, the contract having been rescinded, there was no question of the petitioner performing the work at all. On account of the failure of the petitioner to perform the contract under the contractual terms, the respondent was entitled to encash the performance guarantee and forfeit the EMD.

18. The last submission of the learned counsel for the petitioner is that the petitioner has been wrongfully denied the claim towards loss of profit. He places reliance on the Supreme Court decision in ***M/s A.T. Brij Paul Singh & Ors. v. State of Gujarat, AIR 1984 SC 1703***. This decision is of no avail to the petitioner. Herein the breach of the contract was committed by petitioner himself, as held by the learned Arbitrator. The arbitrator held that a party who is in breach

cannot certainly claim damages towards loss of profit, the petitioner cannot be given any relief.

19. The petitioner has made no other submission. The award appears to be well reasoned and no part of the same appears to be in conflict with the public policy of India. None of the findings of the learned arbitrator can be said to be founded on an erroneous understanding of the law. For the aforesaid reasons, I find no merit in this petition and the same is accordingly dismissed.

JULY 09, 2010
sr

VIPIN SANGHI, J.