

IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. 165 of 2012

Reserved on: April 18, 2012

Decision on: May 3, 2012

DELHI JAL BOARD

..... Petitioner

Through: Mr. Suresh Tripathy, Advocate.

versus

M/S RAJORA BUILDERS & ANR

..... Respondent

Through: Mr. Sandeep Sharma with
Ms. Kanika Singh and
Mr. Anuj Malhotra, Advocates.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

03.05.2012

1. The challenge by Delhi Jal Board ('DJB') under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') is to an Award dated 26th September 2011 passed by the sole Arbitrator in the disputes between DJB and Respondent No.1 M/s. Rajora Builders arising out of an work order dated 30th August 2000 whereunder Respondent No.1 was to replace the old damaged AC/PVC/CI water lines by 100/150 mm dia water lines in various parts of West Zone in Delhi.

2. The total cost of the works was Rs.7,22,31,217. The stipulated date of start of the work was 10th September 2000 and the date of completion was 9th September 2002. According to DJB, even though there was no impediment in the execution of the work, Respondent No.1 delayed the execution because of poor planning and mismanagement. According to DJB, specific reasons for the

delay in execution of the work were non-deployment of specified labour, delay in construction of chambers for sluice valves, inter-connection with existing network. DJB states that it wrote a number of letters to Respondent No.1 regarding timely completion of work. The work was ultimately completed on 6th December 2003. DJB claims that during the execution of the work, complaints of poor quality were received. DJB wrote several letters in vain to Respondent No.1 to come for a joint investigation.

3. After six months of completion of the work, Respondent No.1 on 8th June 2004 invoked the arbitration clause. DJB then appointed the Arbitrator on 6th July 2004 and the learned Arbitrator entered upon reference on 30th July 2004. The learned Arbitrator concluded the hearing on 4th September 2010 and delivered the impugned Award on 26th September 2011.

4. By the impugned Award dated 26th September 2011, the learned Arbitrator awarded the Respondent No.1 a sum of Rs. 1,73,95,936.10 together with interest at 9% per annum from 5th June 2004 till the date of payment. The said sums were awarded against Claim Nos.1, 2, 3 and 6. The counter claims of DJB were rejected.

5. On the basis of an admission by DJB in its reply to the claims filed by Respondent No.1 that DJB owed Respondent No.1 a sum of Rs.22,67,944.50, Respondent No.1 sought an interim Award to that extent. By an order dated 10th January 2005, the learned Arbitrator directed the DJB to pay Respondent No.1 Rs.22.68 lakhs. The impugned Award notes that Respondent No.1 was paid Rs.22,67,944 by DJB pursuant to the said interim Award.

6. The learned Arbitrator framed the following issues apart from the one concerning the interim payment:

“(ii) Are the claimants entitled to a sum of Rs.1,60,76,167.31 for the work done but not paid including escalation but excluding extra items?

(iii) Are the claimants further entitled to a sum of Rs.27,39,355.10 towards escalation for work done?

(iv) Are the claimants also entitled to a sum of Rs.73,74,786.76 towards losses (labour cost) involved within the contract period?

(v) Are the claimants further entitled to a sum of Rs.14,19,686/- towards losses incurred during the contract period.

(vi) Are the claimants also entitled to an amount of Rs.86,32,299/- towards extra payment for change in alignment/length?

(vii) Are the respondent entitled to a sum of Rs.1,41,088/- towards compensation under clause 2 of the contract agreement?

(viii) Are the respondents also entitled to compensation for bad work, inferior quality of material/rectification of defects?

(ix) Are the parties entitled to interest @ 24% p.a. on their respective claims.

(x) Are the parties entitled to arbitration cost?”

7. The learned Arbitrator held that the delay in completion of the project could not be attributed to Respondent No.1. Consequently, it was held that a sum of Rs.1,41,088 claimed by DJB as compensation by way of counter claim with its reply dated 22nd September 2004 was not sustainable.

8. The learned Arbitrator then took up issues (ii) and (viii). The case of the Respondent No.1 was that the work of the value of Rs.7,96,16,169.81 had been executed by it. After deducting the payments made from time to time, DJB still owed Respondent No.1 a sum of Rs.1,38,11,222.81. According to DJB, however, Respondent No.1 had executed the work of the value of only Rs.6,67,34,649.

9. After analysis of the evidence the learned Arbitrator held that the following quantities had been executed by Respondent No.1 under item No.5 of the bill of quantities ('BOQ'):

"a) 100 mm dia	80117.95 meters
b) 150 mm dia	9692.15 meters
c) 200 mm dia	84 meters

10. Likewise, the learned Arbitrator dealt with each item and determined the quantities that were to be paid for by DJB to Respondent No.1. The learned Arbitrator discussed the BOQ items in respect of which submissions were made by the parties and for which there was evidence on record to support the claims. For the remaining items, the Arbitrator "felt that it was proper to award quantities as submitted by the Petitioner (i.e. DJB) or the claimant (Respondent No.1 herein) as may be lower for each of these items." Each of the said items were thereafter discussed.

11. Under issue No.ii, a detailed tabulation was set out by the Arbitrator in the impugned Award in Para 132. In Para 134 it was held as under:

"134. So the total amount awarded under this claim to the claimant is as under:

I. Value of work executed (excluding extra items and withheld amounts): Rs.7,74,20,596.25

Less already paid by respondent: Rs.6,54,80,574.00

Payable Now: Rs.1,19,40,022.25

Amount payable under this claim **Rs.1,19,40,022.25**

II. Add amount for Extra items: Rs. 19,557.26

Add release of withheld amount: Rs. 4,87,432.00

Add release of Security amount: Rs. 5,00,000.00

Total **Rs. 10,06,989.26**

Total payable in the final bill
(I & II) **Rs.1,29,47,011.51**

This then would be the total payable to the claimant by the respondent. However, it is clarified that the amount awarded under this claim is Rs.1,19,40,022.25 only against Rs.1,38,11,222.81 claimed by the claimant. The rest of the amounts are for undisputed amounts to be released by the respondent.”

12. The Arbitrator thus awarded Respondent No.1 Rs.24,22,135.59 under claim No.2 towards escalation for the work done.

13. Under issue No. (iv), the learned Arbitrator awarded Respondent No.1 towards losses (labour cost) Rs.20,26,733 (being 33% of Rs.61,41,615 which was the reduced amount claimed by Respondent No.1). The claim of Rs.14,19,686 under claim No.4 by Respondent No.1 towards losses incurred during the contract period was disallowed. Claim No.5 for Rs.86,32,299 towards extra payment for change in alignment was also rejected. The learned Arbitrator awarded 9% interest on the sums awarded in favour of

Respondent No.1 from 5th June 2004 i.e. after completion of the defective liability period till the date of actual payment. The costs and fees were directed to be shared equally by the parties.

14. This Court has heard the submissions of Mr. Suresh Tripathy, learned counsel for the Petitioner and Mr. Sandeep Sharma, learned counsel for Respondent No.1.

15. It is first submitted by Mr. Tripathy that Clause 17 of the Special Conditions of Contract ('SCC') states specifically that no extra amount will be admissible in respect of an item in the BOQ which is not executed at the site. It is submitted that Respondent No.1 had been paid for the executed work after withholding certain amounts. It is submitted that the claim for a sum of Rs.7,74,39,119.17 by Respondent No.1 by its letter dated 28th July 2003 was without any supporting documents. It is submitted that since this document was imaginary and without a final bill with supporting documents, the measurement recorded by the Engineer-in-Charge ('EIC') must be recorded as final. It is submitted that the learned Arbitrator ignored Clauses 7 and 8 A of the contract.

16. It is pointed out by Mr. Sandeep Sharma that the final bill was never prepared by DJB and, therefore, was not fully paid. It is pointed out that the work was completed in June 2003 and a final bill was submitted in July 2003. It is denied that there is no evidence or document produced in support of Claim No.1.

17. A perusal of Paras 53 to 56 of the Award revealed that the Arbitrator discussed at length the documents on record before

coming to the above conclusion. In Para 54 it was noted by the learned Arbitrator as under:

“After completion of the work the final bill, as was submitted by the claimant with the letter dated 28.7.2003 (C-133) through Punjab National Bank, was to be verified and processed for payment by the respondent. This was not done. Only a statement as Annexure-B (Annexure-D with the written arguments) is enclosed with the reply by stating that the claimant executed the work only of Rs.6,67,31,237/-. The details of each and every item of BOQ executed by the claimant given under claim No.1 in the written arguments dated 7.9.2009 and the respondent did not respond to the same. Despite directions dated 6.8.2005 the respondent did not file any drawing in these proceedings to show that the work only of Rs.6,67,31,237/- was required to be executed.”

18. It was specifically noted in Para 56 that the plea of DJB regarding non-supply of purchase vouchers and test certificates was contrary to the record. It was also noted in para 57 that Respondent No.1 prepared a detailed report of 33 pages after scrutinising the Measurement Books ('MBs'). DJB did not file any comments in respect of the said report. Each entry in the MBs was explained by Respondent No.1 during arguments. The learned Arbitrator examined the MBs and noticed that for most of the measurements “abstract of payment are not signed by the claimant.” As far as Clause 8 A of the contract is concerned, the Petitioner was unable to show that any notice was given by the EIC to the contractor.

19. In the circumstances, it is not possible to agree with the contention of the learned counsel for the Petitioner that the Award of the learned Arbitrator under claim No.1 suffers from any patent

illegality.

20. It was then contended by Mr. Tripathy that by letter dated 21st January 2003 Respondent No.1 had admitted that 92% of the work (out of a total 87 Km) was complete as on the stipulated date of completion i.e. 9th September 2002. According to the Petitioner, Respondent No.1 had already been paid Rs.6,06,56,255. Therefore, it was unfair that a sum of Rs.1,19,40,022.25 should be asked to be paid to Respondent No.1 for a mere 8% of the balance work. In reply, it is pointed out by Mr. Sandeep Sharma that the amount claimed was for work executed but not paid and not against 8% of the balance unfinished work.

21. The learned Arbitrator had found as a matter of record that the measurements entered into MBs were not correct. Indeed, what was claimed by the Respondent No.1 was the balance payment in respect of the 92% work and not payment for the 8% balance work.

22. It was then submitted that if 92% of the work was completed by September 2002, then obviously Respondent No.1 had no grievance regarding payment for the work executed till then. The delay, therefore, could not be attributed to DJB. This contention was negated by the Arbitrator who found to the contrary. He found that drawings were also not provided to Respondent No.1 by DJB in time. This being a finding of fact based on the evidence produced, does not warrant any re-appreciation by the Court for coming to a different conclusion.

23. It is then submitted that Respondent No.1 had accepted the

running account (RA) bills up to 16th RA bill. After that, the measurement was actually for the balance 5% work. It is contended that the Arbitrator erred in awarding under claim No.1 amounts for items not actually executed.

24. The learned Arbitrator decided the claim No.1 on the basis of the available material. Respondent No.1 had prepared a 33-page report after examining the MBs. There was no effective reply to the said report by DJB. The discussion in the impugned Award of the evidence is elaborate and thorough. This Court is not persuaded to hold that the Award suffers from any patent illegality.

25. The other grounds raised by DJB are an invitation to the Court to re-appreciate the evidence on record which is impermissible given the limited scope of the proceedings under Section 34 of the Act. For instance it is urged in ground 'O' that the learned Arbitrator allowed claims for the stacked pipes that were at site whereas what was to be paid for was the pipes actually used in the work. In response it was pointed out by counsel for Respondent No.1 that the stacked pipes were 88925.50 and 12647 metres for 100 and 150 dia mm respectively. In any event, this would be really a matter of re-appreciation of evidence.

26. As already noticed hereinabove, for those items of claims for which supporting documents were not produced, the learned Arbitrator relied on the lowest of the quantities given by both the parties. This was a reasonable approach to adopt.

27. As regards the Award in respect of claim No.2 towards

escalation, DJB insisted that the actual work executed was of the value of Rs.6,67,34, 649 when, in fact, the learned Arbitrator found that the exact work was of the value of Rs.7,74,20,596.25. Towards escalation the learned Arbitrator has awarded Rs.8,78,215.10. The discussion in the impugned Award as regards Claim No.3 towards losses (labour costs) is very detailed. The amounts therein were taken from the profit and loss accounts of Respondent No.1. Given that the actual date of completion, even according to DJB, was 6th December 2003, there ought to have been additional deployment of labour.

28. Consequently, this Court does not find any patent illegality having been committed by the learned Arbitrator in deciding the claims and counter claims. The award of interest at 9% also cannot be said to be excessive.

29. No ground has been made out for interference under Section 34 of the Act with the impugned Award of the learned Arbitrator. The petition is dismissed but in the circumstances with no orders as to costs.

S. MURALIDHAR, J.

MAY 3, 2012

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