

IN THE HIGH COURT OF DELHI AT NEW DELHI
(Not reportable)
O.M.P. 442 of 2006

LABH CONSTRUCTION AND
INDUSTRIES LIMITED

.....Petitioner

Through: None.

Versus

M/S NARESH KAPOOR

..... Respondent

Through: Mr. Raman Kapur, Senior Advocate
with Mr. Dhiraj Sachdeva, Advocate.

CORAM: JUSTICE S. MURALIDHAR

ORDER
25.09.2012

1. Labh Construction and Industries Ltd. ('LCIL') has filed this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act'), challenging an Award dated 13th April 2006, passed by the learned sole Arbitrator in the disputes between LCIL and the Respondent M/s Naresh Kapoor except to the extent that the learned Arbitrator allowed Counter Claim No. 2 of LCIL in the sum of Rs. 11,92,179.

2. LCIL states that it is a leading construction company based in Ahmedabad. In the year 1998, it was awarded the contract for construction of 2014 one room tenements for economically weaker sections ('EWS') and 504 shops using hollow concrete block masonry, including internal water supply, sanitary and electrical installation along with internal development in Sector-4, Rohini, Delhi for a value of about

Rs. 1906 lakhs. The project was for rehabilitation of *jhuggi jhonpri* dwellers in Motia Khan, Delhi by the Delhi Development Authority ('DDA').

3. In terms of the agreement with the DDA, the date of commencement of the project was 15th September 1998 and the date of completion was 14th December 1999.

4. LCIL states that by the first week of January 2000, it executed 34% of the total contract. At this stage it decided to enter into a Memorandum of Understanding ('MoU') with the Respondent on 12th January 2000 for execution of the remaining part of the work. Clause 14 of the MoU stated as under:

“For the foregoing arrangement M/s. Naresh Kapoor hereby agrees to pay as consideration 19% of the value of gross work done in respect of items of work identified to be executed by him.”

5. According to LCIL it agreed to the above condition because a 19% return on the value of gross work done by the Respondent was an attractive offer for a government contract where LCIL did not have to do anything and also was relieved of any hidden risk on account of cost escalation, labour management etc.

6. The case of the Respondent is that in terms of the MoU, a separate bank

account was opened at the Global Trust Bank Ltd. ('Bank'), Vasant Vihar for encashment of cheques received from the DDA. Mr. Naresh Kapoor, the Partner of the Respondent was authorized to operate the said account. It was agreed that the account would remain operational during the currency of the contract. On 23rd May 2000, the Respondent wrote to LCIL suggesting modification of the payment to be made by the Respondent under the MoU dated 12th January 2000. The Respondent offered to pay 15% for the civil work and 14% for the electrical work instead of 19% for the entire work. It is the case of the Respondent that for the period between February and May 2000, it was operating the account and had drawn considerable amount of money. However, on 26th May 2000 when the Respondent sought to draw Rs. 5 lakhs to meet the day-to-day expenses, the Bank declined to permit it to do so. The Respondent then learnt that without any prior notice to it, LCIL had instructed the Bank that the authority of Mr. Naresh Kapoor stood withdrawn.

7. On the same day, i.e., 27th May 2000 LCIL wrote to the Respondent about defects observed by the DDA and called upon the Respondent to rectify the said defects and till then not to take up further execution of the work.

8. The disputes that arose between the parties led to the Respondent filing

a petition under Section 11 of the Act in this Court. By an order dated 14th March 2001, a former Judge of this Court was appointed as sole Arbitrator to adjudicate the disputes between the parties.

9. On 25th April 2001 the Respondent submitted its claim statement before the learned Arbitrator. The Claims read as under:

- “1. Claim No.1 Rs. 53,42,600/- on account of amount due and payable as per 29th & 30th R/A bill and also for work actually executed at site but not measured in the R/A Bills.
2. Claim No.2 Rs.32,77,664/- on account of amount payable towards escalation under clause 10(CC) of the agreement.
3. Claim No.3 Rs.21,00,000/- on account of amount payable to the Claimants being withheld by way of part rates from the rubbing bills.
4. Claim No.4 Rs.15,36,074.51 on account of balance amount payable against electrical work done by the Claimants
5. Claim No.5 Rs.13,38,956/- on account of cost of materials lying at site which were arranged by the Claimants for use in the work.
6. Claim No.6 Rs.109 lacs on account of loss of expected profit @ 15% on the quantum of balance work which could not be executed by the Claimants due to breach of agreement by the Respondents.
7. Claim No. 7 Interest @ 18% per annum
8. Claim No. 8 Rs.2 lacs towards costs of arbitration proceedings.”

10. Apart from filing a reply to the above claims, LCIL also filed counter-

claims as under:

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| “1. Claim No.1 | Rs.43,87,204.34 on account of rectification and defects. |
| 2. Claim No.2 | Rs.19,06,474.63 as per details given below |
| | A. Rs.17,08,986.63 for material given by respondent to the Claimant-Annex.2A. |
| | B. Rs.56,000/- labour for fabricated steel given to the claimant by respondent Ann. 2B |
| | C. Rs.1,23,190/- cartage of stipulated material (steel, cement, CI/GI pipe) Ann. 2C. |
| | D. Rs.18,298/- cost of repairing of block masonry due to hollow block damage by the claimant. |
| 3. Claim No.3 | Rs.17,157.91 as per details given below:- |
| | A. Rs.14,348.36 on account of recovery due to recision of rates by DDA for certain SCI S&S fitting as substitution items. Ann.3-A. |
| | B. Rs.2809.36 on account of interest on excess payment made by DDA for certain CI fitting in Bill No.24 on 24.2.2000 & Bill No.26 on 30.3.2000. Ann. 3-B. |
| 4. Claim No.4 | Rs.11,91,301.00 on account of hire charges of T&P & shuttering/scaffolding materials as details given in Ann.4A, 4B, 4C and 4D. |
| 5. Claim No.5 | Rs.90,000.00 Electricity Bill. |
| 6. Claim No.6 | Rs.6,68,029.00 claim for Income Tax Deducted at Source-Ann. 6-A. |
| 7. Claim No.7 | Rs.8,98,49,007.94 as per details given below:- |
| Annexure 7-A | Rs.5.00 crores. Loss of reputation. |
| Annexure 7-B | Rs.190.60 lacs. Anticipatory liquidated damages |

by DDA.

Annexure 7-C Rs.3861958.00 loss of Sales Tax on work contract.

Annexure 7-D Rs.1705297.00-loss of 19% consideration on escalation to be done by claimant after 31st March.

Annexure 7-E Rs.13289744.00-loss of 19% consideration on the balance work.

Annexure 7-F Rs.1932008.00 loss of escalation for balance work after 31.3.2000 to be done by Respondents

8. Claim No.8 Rs.13,86,126.64

A. Rs.12,39,145.44-shortage of material Ann. 8-A.

B. Rs.1,46,981.20-repair work Ann. 8-B

9. Claim No.9 Rs.2 lakhs towards cost of arbitration proceedings.

10. Claim No.10. Interest @ 18% per annum.”

11. Disputes arose between the parties when DDA handed over a cheque in the sum of Rs.12,71,641 to Mr. Naresh Kapoor, a partner of the Claimant and thereafter LCIL did not permit the Claimant to draw further money. Under Claim No.1, a sum of Rs.53,42,600 was claimed towards amount due and payable as per 29th and 30th R.A. bill for work executed at site and not measured. The details were given in Annexures C-1A, C-1B and C-1C as under:

“(i) Annexure C-1A Rs.39,99,988.00

(ii) Annexure C-1B Rs.9,53,104.75

(iii) Annexure C-1C	<u>Rs. 3,89,407.41</u>
Total	<u>Rs.53,42,600.26”</u>

12. As per the calculation of the Claimant, a sum of Rs.39,99,988 was due after deducting 15% payable as per the agreement dated 7th May 2000 and the letter dated 27th May 2000. Again, as far as the 30th R.A. bill was concerned the Claimant deducted 15% and arrived at a figure of Rs.9,53,104.75 in Annexure C-1B. As regards the excess recoveries for the materials supplied by DDA, the Claimant in Annexure C-1C claimed Rs.3,89,407.41.

13. The Claimant examined Mr. Naresh Kapoor and Mr. Surinder Singh as witnesses. The Respondent examined Mr. Ajayan Nair and Mr. Jai Prakash Mangatani its Managing Director as a witness.

14. The learned Arbitrator discussed the evidence in great detail. Referring to Ex. R-2 produced by the witnesses for LCIL which gave summary of the work undertaken by the Claimant and the work undertaken by LCIL, the learned Arbitrator opined that “there is absolutely no supporting material to prove what is stated in Ex. R-2”. The learned Arbitrator also illustrated how LCIL had with a view to bolster up its case, prepared Annexure 1-D and compiled Ex. R-2 .The learned Arbitrator had “no hesitation in rejecting Ex. R-2 and rejecting the details in Annexure 1-D”. The statement of LCIL was also rejected. Further, the

details given in Annexure C-1A and C-1B were not questioned by LCIL. However, the learned Arbitrator held that without there being any concession of reduction in the percentage payable by the Claimant, “the Claimant is bound to pay 19% out of the total amount arrived at.” Consequently, as regards Annexures C-1A, C-1B and C-1C the learned Arbitrator held that the Claimant was entitled to Rs.47,64,857.75 (Rs.38,11,753 plus Rs.9,53,104.75). However, the claim under Annexure C-1C was rejected.

15. As regards Claim No. 1, the ground urged by LCIL is that the Claimant had unreasonably committed itself to a high margin of 19% which was a “grave mistake” and therefore the Claimant wrote a letter to reduce the commitment by offering 15% on civil and 14% on electrical works which LCIL refused. While this case is sought to be made out for the first time in the petition under Section 34 of the Act, the evidence led before the learned Arbitrator does not support this contention at all. LCIL was unable to persuade the learned Arbitrator to hold that the work performed by the Claimant was defective or that the amounts claimed by it under Annexures C-1A and C-1B were not payable.

16. The decision on Claim No. 1 turned on an appreciation of the evidence and analysis of the clauses of the agreement. The learned Arbitrator has considered the evidence in great detail in the light of the documents

placed before the Court. The view taken by the learned Arbitrator was a plausible one and this Court is not persuaded to hold that it suffers from any patent illegality. The Award in respect of Claim No. 1, therefore, does not call for interference.

17. Claim No. 2 was for a sum of Rs.33,25,401.172 towards escalation. The learned Arbitrator held that the Claimant was entitled to two quarters of escalation and after deducting 19% of the amount claimed, the sum awarded was Rs.26,93,575.39.

18. The learned Arbitrator noted that in his cross-examination the witness of LCIL admitted that in the contract of the DDA escalation due to increase in wages and labour and price of material was payable and that LCIL received the escalation amount after the Claimant had left the work. The claim was only with reference to two quarters from January to June which was the 30th R.A. bill period.

19. On this aspect again the learned Arbitrator seems to have gone by the deposition of the witnesses. This issue is, therefore, a matter of appreciation of evidence and does not call for interference.

20. Under Claim No. 3 a sum of Rs.17,08,006 was claimed towards the amount withheld by DDA towards part rates from running bills. The case put forth by LCIL that deductions were made on account of defects or

incomplete work was not believed by the learned Arbitrator. Nothing was placed by LCIL on record to show that DDA or LCIL had quantified the defects. Moreover, if the works were defective LCIL would not have allowed the Claimant to raise an amount to the tune of Rs.1.3 crores approximately after deducting 19%. From the amount claimed, the learned Arbitrator allowed a sum of Rs.16,27,629.30. This again was a matter of appreciation of evidence and the reasoning given by the learned Arbitrator cannot be said to be erroneous.

21. Under Claim No. 4 a sum of Rs.15,36,074.51 was claimed for the electrical work done. The 10th R.A. bill was for electrical work and after accounting for the sum received from LCIL, the balance due to the Claimant was totalled to Rs.15,36,074.51. After deducting 19% the balance payment was quantified as Rs.12,44,220.36. The discussion as regards Claim No.4 in the impugned Award also turned entirely on the appreciation of the evidence and documents placed on record. The Court is not inclined to re-appreciate the evidence only to come to a different conclusion.

22. Claim No. 5 was rejected. Claim No. 6 was for loss of profit at the rate of 15% on the balance work which according to the Claimant could not be executed by it due to breach committed by LCIL. The sum claimed was Rs.109 lakhs. The fact that under Counter Claim No. 7 LCIL was

itself claiming Rs.1,32,89,744 towards loss of 19% consideration of the balance work made the task easier for the learned Arbitrator. The question was whether the Claimant was entitled to the amount claimed towards loss of profit on the sum of Rs.6,99,46,021. After referring to the decisions in *M/s A.T. Brij Paul Singh & Bros. v. State of Gujarat AIR 1984 SC 1703*, *M/s Rawla Construction Co. v. Union of India ILR (1982) 1 Delhi 44* and *Shri Villayati Ram Mittal v. Union of India 1986 (I) Arb.LR 328*, the learned Arbitrator held that the Claimant was entitled to a sum of Rs.1,04,91,903. The learned Arbitrator appeared to have gone by the accepted formula as claimed by the Claimant. The claim was decided on the basis that there was no breach of the contract committed by the Claimant but by LCIL. The yardstick adopted by the learned Arbitrator was a reasonable one and consistent with the law explained in the aforementioned decisions. Consequently, the Award in respect of Claim No. 6 also does not call for interference.

23. Claim No. 7 was towards interest and the award of interest by the learned Arbitrator at 10% per annum was reasonable. Under Claim No. 8, the award of Rs. 2 lakhs towards costs of arbitration was also reasonable.

24. As regards the counter-claims, the learned Arbitrator has only allowed Counter Claim No. 2 finding the Petitioner to be entitled to Rs. 11,88,579.98 and has rejected the other counter-claims. The discussion in

respect of each of the counter-claims is fairly detailed and exhaustive evidence has been analysed in coming to the said conclusion. There are two basic grounds on which the counter-claims have been rejected. The first was that no evidence was adduced by the Petitioner in support of its counter-claims and second that the documents that had been produced were otherwise not substantiated and appeared to be prepared only for the case. The learned Arbitrator also examined the oral evidence adduced by the parties. For instance, the learned Arbitrator found that no evidence had been produced by the Petitioner herein in support of the claim of Rs. 17,08,986.63 under Counter Claim No. 2 which was under four heads. Only the sum of Rs. 11,92,179.98 which the Respondent admitted was allowed. Likewise, there was no evidence in support of Counter Claim No. 3. As regards Counter Claim No. 4, the Petitioner did not refer to any clause of the contract between the parties that permitted payment of hire charges. For the claim of Rs. 90,000 towards Counter Claim No. 5 for electricity charges, neither did the Petitioner produce any bill nor did R.W.1 and R.W.2 depose in support thereof. As regards Counter Claim No. 6 for the sum of Rs. 6,68,029 towards income-tax deducted at source, the learned Arbitrator discussed the relevant Clause 16 of the MoU and concluded that it was for the Petitioner to have deducted tax at source and deposit it in the Government Treasury. With the Petitioner having failed to do so, it could not claim the said sum.

25. Counter Claim No. 7 was for approximately Rs. 8.98 crores under heads A to F. With reference to each of the sub-heads, the learned Arbitrator has discussed whatever evidence was produced by the Petitioner, and found the claim to be not substantiated. It was on this basis that the counter-claims, except Counter Claim No. 2 to a limited extent, were rejected by the learned Arbitrator.

26. This Court is unable to find any patent illegality in the impugned Award of the learned Arbitrator as regards the rejection of the Petitioner's counter-claims, other than Counter Claim No.2.

27. Consequently, there is no merit in this petition and it is dismissed as such, with no order as to costs.

S. MURALIDHAR, J

SEPTEMBER 25, 2012

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