

\$~R-2

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

%

Judgment delivered on: 16.12.2013

+

CS(OS) 1339/2009

RADICAL BUILDERS (INDIA) PVT. LTD.

..... Plaintiff

Versus

**PHARMACEUTICAL EMPLOYEES CO-OPERATIVE
GROUP HOUSING SOCIETY LTD.**

..... Defendant

Advocates appeared in this case:

For the Plaintiff: Mr Shiv Khorana & Mr Abhishek Sharma, Advs.

For the Defendant: Mr.B.S. Arora, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J (ORAL)

CS(OS) 1339/2009 & IA No. 15559/2009 (Objections)

1. The plaintiff before me, i.e., Radical Builders (India) Pvt. Ltd. (RBIPL) has filed the captioned suit under Sections 14, 17 and 29 of the Arbitration Act, 1940 (in short the 1940 Act) seeking a direction from this court that the award dated 03.07.2009, passed by the learned sole arbitrator, be made a rule of the court and a decree be passed in terms of the award with interest at the rate of 18% per annum from the date of the decree till its actual payment.

2. As against this, the defendant has filed objections, which are numbered as IA No. 15559/2009, under Sections 30 and 33 of the 1940 Act

qua the award dated 03.07.2009.

3. Arguments in the matter have been heard on several dates. Upon hearing arguments in the matter, the point in issue got confined to a very narrow aspect, which would be known as I proceed further. Before I do that, let me advert to the prefatory statement made on behalf of the defendant/objector.

3.1 Mr Arora, who appears for the defendant submits that while in the impugned award two claims of RBIPL had been allowed, the counter-claims of the defendant were rejected. It was Mr Arora's contention that he was, however, confining his objections only to the claims awarded in favour of RBIPL, and was not, thus, pressing his objections vis-a-vis the rejection of the counter-claims. As a matter of fact, this aspect has been recorded by me at the hearing held, on 11.12.2013, before this court.

4. The objection of Mr Arora to the impugned award is briefly as follows: He says that one of the claims awarded in favour of RBIPL pertains to 42nd Running Accout (RA) bill, pertaining to civil works; and 18th RA Bill, related to sanitary works. Mr Arora says that vide the impugned award RBIPL, has been granted, in respect of claim no.1, a sum of Rs. 95,49,370.38/-.

4.1 It may be pertinent to note, that the 42nd RA bill, which pertains to civil works, was valued at Rs.1,34,27,558/-, while the 18th RA bill, pertaining to sanitary work, amounted to Rs.35,48,690/-. Both bills are dated 25.08.1993.

4.2 It may also be pertinent to note that, pursuant to the orders of this court, these bills were got verified by an architect, i.e., M/s G.C. Sharma & Sons, who had verified the 42nd RA bill, pertaining to civil work, for a sum

of Rs. 66,41,651.23/-, while the 18th RA Bill, pertaining to sanitary work, was verified for a sum of Rs.17,17,719.15/-.

4.3 In this context, Mr Arora's objection is that both the 42nd RA bill for civil work and the 18th RA bill for sanitary work, contained a component, which related to escalation on account of material and labour and, the corresponding profit, apparently, lost by RBIPL, on the said escalation. It was Mr Arora's contention that in terms of the contract obtaining between the parties, no escalation or profit on escalation could have been granted by the learned arbitrator.

4.4 Mr Arora's submission before me is that : the learned arbitrator, contrary to the agreement obtaining between the parties, in particular, clause 30, had granted escalation and/or profit on escalation despite a specific bar in respect of the same.

4.5 It was also, Mr Arora's contention that, apart from anything else, the logic and the rationale supplied by the learned arbitrator for awarding the amount under claim no.1 was flawed to the extent that it was pivoted on a letter dated 09.12.1985 which, erroneously, the arbitrator noted, succeeded the contract executed between the parties.

4.6 Mr Arora was at pains to point out that the contract obtaining between the parties was executed on 14.01.1986, whereas the letter, on which the learned arbitrator had placed reliance, to support his reasoning that RBIPL was entitled to escalation of material, labour and therefore, also the corresponding profit, was based on the contents of letter dated 09.12.1985.

4.7 Mr Arora, thus contended before me that, the consequential relief, granted by the learned arbitrator with regard to interest was also flawed.

5. To be noted, on account of interest on claim no. 1, the learned

arbitrator has awarded a sum of Rs.56,82,838/-.

5.1 I may only note that the learned arbitrator has, apart from the above, also awarded certain sums towards security deposit and earnest money under each of the two works. In respect of security deposit and earnest money relating to the civil work, the learned arbitrator has directed the defendant to pay a sum of Rs.9.50 lacs and Rs.20,000/- respectively to RBIPL, while in respect of sanitary works, he has directed, similarly, the payment of Rs.1.80 lacs and Rs.50,000/- towards security and earnest money respectively to RBIPL. This apart, claim no. 5 has also been allowed in favour of RBIPL. The sum awarded under claim no. 5 is Rs. 2,91,000/- towards rectification work carried out by RBIPL on account of damage caused by the electrical contractor. In so far as these directions are concerned, the defendant has raised no cavil.

6. Therefore, as indicated above, the parties were at lis only vis-a-vis the amount awarded under claim no.1, which is a sum of Rs.95,49,370.38/- and the consequential direction to pay interest amounting to Rs.56,82,838/-.

6.1 I may only note that all other claims of RBIPL were rejected by the sole arbitrator.

6.2 Mr Khorana, learned counsel for the RBIPL, does not dispute these aspects.

7. Controversy thus, narrowed down to whether the reasoning supplied by the learned arbitrator for directing payments qua escalation of material and labour cost and corresponding loss of profit on escalation was sustainable. The consequential direction to pay interest would therefore quite naturally stand or fall with the view taken vis-a-vis the main controversy etched out above.

8. In this background, it would be pertinent to note, amongst others, the rationale supplied by the learned arbitrator, while allowing claim no.1. The relevant observations are extracted hereinbelow for the sake of convenience:

“.....c) escalation material and labour cost has been mentioned in the letter of the claimant of 9th December, 1985. It is after the agreement. Therefore, the matter would be governed by the same. Copy of the said letter of 9th December 1985 has even been filed by the respondent. Therefore, to state that there could not have been any escalation would be incorrect...”

(emphasis is mine)

8.1 It may also be relevant, at this stage, to extract the clause obtaining in the contract, i.e., clause no. 30, on which reliance has been placed by the defendant:

“Fluctuations

Rates quoted in the bill of quantities shall be firm and shall not be subject to any price variations due to increase in labour wages, cost of materials etc. or any other price variation due to any reason whatsoever whether during the stipulated period of execution or during the extended period of completion if any except direct statutory increase by the act of government or local bodies.”

(emphasis is mine)

8.2 The learned arbitrator appears to have explained away the aforesaid clause 30 by adverting to the letter dated 09.12.1985 addressed by RBIPL to the defendant which, somehow he appears to record, succeeded the execution of the contract obtaining between the parties.

8.3. There is, however, no dispute that the contract succeeded the letter of 09.12.1985. It may be pertinent to note, by letter dated 09.12.1985, all that RBIPL communicated was, its offer for executing the work. The offer was

accompanied by a cheque in the sum of Rs. 50,000/- towards earnest money.
The basis of the tender, i.e., the offer, was as follows:

“...Our tender is based on the following assumptions:

- 1) Steel & Cement shall be supplied to us at site at your stipulated rates mentioned in your tender i.e.
 - a) Mild Steel - Rs. 6250 Per M.T.
 - b) Tor Steel - Rs. 6300 per M.T.
 - c) Cement - Rs. 55/- per Bag (Weight 50 Kg)
- 3) Mobilisation Advance - shall be paid to us at @ 4% of our Tender Value.
- 4) Our rates are based on present market rates for labour & material and if there is any increase in future, the same shall computed with 12.5% on the increase, as contractor's percentage.

We hope you will find our offer as most competitive and give us an opportunity to serve your esteemed organisation.

Thanking you & soliciting favour of an favourable response....”

(emphasis is mine)

9. What is significant from the point of view of RBIPL, is that, this letter bears the signatures of office bearers of the defendant. In so far as RBIPL is concerned, its stand is that, the said document became part of the contract. That apart, whichever way one were to look at the issue, one thing is certain, which is that, there appears to have crept in an error, in the award, in so far as, it is indicative of the fact that the learned arbitrator appears to have proceeded on the basis that the letter dated 09.12.1985 succeeded the execution of the contract; whereas the position was to the contrary. As indicated above, the contract is dated 14.01.1986, therefore, the letter dated

09.12.1985 could have only preceded the execution of the contract and not, succeeded it. This position, in fact, gains greater clarity, if one were to note the following observations made by the learned arbitrator while distinguishing a judgment cited on behalf of the defendant in the case of *State of Orissa vs S.C. Roy (dead) by LRs*. The observations of the learned arbitrator are as follows:

“....To rely on the decision of the Supreme Court in the case of **State of Orissa vs S.S. Rai** (2002) Vol 1 Recent Arbitration Journal 86 (Supreme Court) would be inappropriate. It has already been recorded that there was a letter of 9th December, 1985 (copy Exhibit R3). This was subsequent to the contract. There was no objection raised and, therefore, to fall back on the strict sense of the terms of the contract would be incorrect....”

(emphasis is mine)

10. A bare perusal of the aforementioned observations would show that the learned arbitrator somehow, was under the impression that, letter dated 09.12.1985, was executed subsequent to the contract. There is no dispute before me that apart from the contract dated 14.01.1986, there is no other written contract executed between the parties.

11. Having regard to the aforesaid circumstances, both counsels are agreed that the award, to the extent it allows claim no.1, pertaining to 42nd RA bill, related to civil works, and the 18th RA bill related to sanitary works, will have to be remitted to the learned arbitrator for fresh adjudication. This would also necessarily entail re-working of the interest, if any, payable with respect to the amounts, if any, that the learned arbitrator may determine, which may arise for payment after a re-examination of the matter. Though, I have not varied the award in so far as it pertains to the direction to pay

security deposit and earnest money, in respect of civil works and sanitary works; no direction is issued vis-a-vis the said works for payment, at this juncture, as the final quantification can take place only after the learned arbitrator re-examines the claim in issue, in the light of the directions given hereinabove.

12. It is made clear that the other aspects of the award are not interfered by this court, in particular, the aspect relating to engagement of services of an auditor by the name of M/s Lochan and Co. by the defendant. Accordingly, the proceedings/ award is remitted to the learned arbitrator for re-examination of the issue and thereafter re-determination of the amounts, if any, payable to RBIPL with regard to 42nd RA bill, pertaining to civil work, and the 18th RA bill, pertaining to sanitary work.

12.1 The learned arbitrator will also examine the aspect of interest, if any, payable to RBIPL. No further directions are called for. The suit and the pending application are, accordingly, disposed of in the above terms.

13. Accordingly, the registry will return the arbitration record to the learned arbitrator, i.e., Hon'ble Mr. Justice V.S. Aggarwal, a former Judge of this Court, who passed the award dated 03.07.2009. Parties and their counsels shall appear before the learned arbitrator on 31.01.2014 at 4.00 p.m. The learned arbitrator will re-hear the parties based on the material already placed before him and pass appropriate orders after according due opportunity in the matter.

RAJIV SHAKDHER, J

DECEMBER 16, 2013

kk