

IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. 131 of 2013

Reserved on: January 6, 2015

Decision on: January 15, 2015

MARINERS BUILDCON INDIA LTD. Petitioner
Through: Mr. Neeraj Malhotra with
Mr. Prithu Garg and
Mr. Vierat K. Anand, Advocates.

versus

K.V. MAKKAR CONTRACTS Respondent
Through: Mr. Rajesh Tyagi, Advocate.

CORAM: JUSTICE S. MURALIDHAR

J U D G M E N T

15.01.2015

1. The challenge in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') is to an Award dated 24th September 2012, passed by the sole Arbitrator in the disputes between Mariners Buildcon India Ltd., and the Respondent K.V. Makkar Contracts arising out of an agreement dated 4th May 2009 for construction of a residential building at Sector 87, Faridabad, including forty-eight residential flats, two penthouses at top floor, apart from the basement at stilt level. In terms of the agreement, the construction was to be completed by the Petitioner in one year. The total cost of the project was Rs. 9,94,05,000.

2. An important aspect of the contract was that the rates at which the Respondent was to be paid for the work floor-wise. The rates were specified in the contract as under:

“i) Rate of typical floors (all heights) Rs. 675/- per Sq ft.

ii) Rate of Stilted and Mumty	Rs. 450/- per Sq ft.
iii) Rate of Basement	Rs. 675/- per Sq ft.”

3. Another significant aspect of the contract was Clause 4 which stipulated that steel and cement was to be supplied by the Petitioner to the Respondent at a basic rate of Rs. 32,000 per metric ton and Rs. 225 per bag of cement. Another stipulation was that a minimum M-20 concrete mix was to be used and the maximum was to be as per design.

4. The case of the Petitioner was that the Respondent failed to bring sufficient manpower, machines, tools and tackles for effective progress of the construction work. It was also alleged that the Respondent did not get sufficient and required machines, tools and shuttering, scaffoldings etc. as were required for the timely construction of the project. It was alleged that the said position continued till the Respondent abandoned the work and left the site midway. It was further stated that as per the drawings submitted by the Petitioner to the Respondent, the strength (equivalent cube strength) of the columns was required to be of 35 N/mm². It was alleged that the Respondent did not deploy reinforced mix concrete (RMC) and used a manual mixing machine for the construction of columns as a result of which the columns did not achieve the required strength. As per the report of the Scientific Age Research & Testing Lab, the strength of the certain columns was in the range of M18 to M34 which reflected the poor workmanship of the Respondent. The Petitioner stated that it had to incur an additional expenditure of Rs. 29,58,964 for the reinforcement of the columns. Another complaint was that the Petitioner had to undertake the work of back-filling at the site for which it incurred Rs. 57,600. The

Respondent also failed to consume the total construction material and attempted to shift the blame to the Petitioner unfairly. It is stated that after encashment of the third cheque issued by the Petitioner on 17th September 2010, the Respondent without prior intimation to the Petitioner stopped the work and abandoned the project midway causing substantial losses to the Petitioner.

5. A show cause notice dated 18th October 2010 was issued by the Petitioner to which the Respondent replied on 23rd October 2010. The Petitioner terminated the contract by a letter dated 15th December 2010.

6. The Petitioner then engaged another contractor, M/s Sagar Constructions who carried out certain remaining jobs and raised a bill of Rs. 2,59,347.30.

7. The Respondent invoked the arbitration clause and filed an arbitration application, being Arb.P. No. 58 of 2011. By an order dated 16th March 2011, this Court appointed a Local Commissioner (LC) to take measurements of the work executed and prepare an inventory of the material lying at the project site. The LC's report was submitted on 29th March 2011. The Court then appointed the sole Arbitrator to adjudicate the disputes between the parties.

8. The Respondent, in its statement of claims, sought the following reliefs:

- “1. Award the payment of Rs. 2,09,67,639/- as detailed in Schedule I, accruing as 5.6.2010 alongwith interest @24%, compounded monthly, w.e.f. 5.6.2010 to the claimant, towards the outstanding bills of the work rendered in pursuance of the agreement dated 4.5.09 in favour of the

claimant against the respondent.

2. Award the payment of Rs.16,16,677/- as detailed in Schedule II, towards the bills of the work rendered in pursuance of the agreement dated 4.5.2009 in favour of the claimant against the respondent.
3. Award the payment of Rs. 1,55,06,799/- as detailed in Schedule III, towards the dewatering expenses, re-shuttering done owing to damage due to rainwater, shuttering, scaffolding and machinery rentals, upgradation of concrete mix, idling of staff, change of slab shuttering and steel reinforcement, loss of profit and electrical expenses on the work rendered in pursuance of the agreement dated 4.5.09, in favour of the claimant against the respondent.
4. Litigation expenses incurred in the appointment of arbitrator to the tune of Rs. 1 lac be awarded in favour of the claimant against the respondent.
5. Award pendente lite and future interest on the entire awarded amount @24%, compounded monthly, to the claimant, against the respondent till the date of realisation.
6. Costs of the arbitration proceedings be also awarded in favour of the Claimant and against the Respondent.
7. Pass such other order/orders, which this Hon'ble Tribunal may deem fit and proper under the facts and circumstances of the present case."

9. Along with its reply to the Respondent's claims, the Petitioner filed a counter-claim in which it stated *inter alia* that after termination of the contract, it had appointed an agency for valuation of the work done. The value of the work got executed by the Petitioner was Rs. 69,58,350. Stating that the Respondent had already received Rs. 1,00,86,000, i.e., an excess payment of Rs. 31,27,650. Further, steel and cement to the extent of Rs. 72,25,740 had to be recovered. The Petitioner also claimed liquidated damages (LD) of Rs. 5 lakhs, Rs. 2,89,347.30 for completion of the unfinished

works, Rs.57,600 for back filling, Rs. 29,58,964 for re-strengthening of the columns, Rs. 10,00,000 for loss of reputation and goodwill and Rs. 15 lakhs towards arbitration costs.

10. During the pendency of the arbitral proceedings, the Respondent filed the affidavits of Vimal Makker (CW1) and Mr. Arshad Khairi (CW2). These witnesses were also cross-examined by the Petitioner. For the Petitioner, the affidavits of Mr. Swarnabh Paliwal (RW1) and Mr. Harjot Singh Anand (RW2) were filed. They were cross-examined by the Respondent.

11. In the impugned Award, the learned Arbitrator formulated the main issues for determination as under:

- “i) the quantum of works done in carrying out the contract and payments thereof.
- ii) the quality and sufficiency of the works w.r.t. to the use of M35 concrete in the columns and any deductions / costs appurtenant thereof,
- iii) the reasons for delay, onus is on which party and whether any additional costs or damages or escalation payable against the same to either party under the terms of the contract
- iv) and finally the cost entitlements.”

12. On an analysis of the evidence, the learned Arbitrator recorded the following findings:

- (i) The documents admitted by both parties included the contract documents, the Record of Steel supplied at site and the report of the LC.
- (ii) It was not disputed that the Respondent had received Rs.

1,00,86,000 from the Petitioner.

- (iii) There was no checking of bills submitted by the Respondent.
- (iv) There was no systematic payment schedule for the stages of payment against stages of work done.
- (v) There was no written order for change in specification from M 25 to M 35 whereas the contract stated that M 20 concrete had to be used for the columns. The drawing dated 1st August 2009 supplied by the Petitioner to the LC stated that the columns had to be of M 35. However, none of the said drawings were signed or issued by the Petitioner or its representatives or the architect or the structural engineer.
- (vi) No record was produced by the Petitioner for proving the claimed insufficiency of manpower deployed in terms of the site records, instructions or letters.
- (vii) There was no communication addressed to the Respondent by the Petitioner regarding the delay in completion of the work or on issues of quality.

13. The learned Arbitrator noted that she personally went to the site on three occasions and “there was no evidence of proper drawings nor a systematic method of site management in place, with proper issue, receipt of drawing, site record and/ or instruction book”, and further “no drawings nor any instruction duly receipted by the Contractor/Claimant were either made or presented with regard to instruction regarding specification or change of specifications, quality of workmanship in general or the columns in specific.”

14. As regards the testing of the columns for the quality of the

concrete used, the learned Arbitrator returned the following finding:

“15.The hammer tests provided by Respondent show testing only of Stilt level columns. They show varying strengths higher than M 35 for several columns ranging upto M 45 for about 21 columns, in the range of M 18 and upto M 34 for remaining columns.

16. The testing done by Sri Ram Institute of Industrial Research took random samples of one core each from 3 columns in Block A basement and stilt, and one core each from 3 columns in Block B basement and stilt level. The random samples show M strength to be in the ranging from M20 to M 29 in 6 cases and below M 20 in 6 cases.

17. The concrete in the sample core tests from the columns is not of M35, from the hammer tests it ranges from M 41 to M 18. While this does not prove that all the columns were not M35 it does point to the fact some or several of the columns may not be of M35.”

15. As regards the retaining walls, it appeared that the concrete used was not M35 but it was closer to M25 which showed that not all of the concrete was M35 as claimed by the Respondent. The learned Arbitrator concluded:

“24.....a proper organisation structure, supported with the requisite technical resources and mechanism that are required to manage the performance of such nature and scale of contract to manage time lines and quality were not in place as per general practices from the Respondents side. That consistency and permanence is not evidenced in terms of a technical management team at site.”

16. Considering that no bills had been produced by the parties and no rates or methods were given in the contract for “partial works done”, the learned Arbitrator explained in the Award itself the methodology adopted for determining the values of the works as under:

“i) assess the value due against work done, as per the contract and in case of items not covered by the contract, to arrive at same by reasonable industry norms and

market rates.

- ii) Make deductions against recoveries, incomplete works such and payments.
- iii) From the same determining whether there should deductions against quality of work, and the same may be deducted from the amount assessed.
- iv) Assess the total value so determined against payment received by the Claimant and the balance so determined is receivable by one party from the other”

17. The learned Arbitrator also explained in the Award that during the course of the arbitral proceedings, she had asked parties to substantiate their claims “with sound technical calculations as per the industry norms and/ or as per CPWD methods for determining rates and rate analysis”. Even before filing of written submissions, she had asked the parties to be present with their respective technical persons. However, the learned Arbitrator noted that “despite opportunity and direction given to them they did not present satisfactory, technically analysed rates, methods and calculation against their claims in most cases.” Wherever learned Arbitrator used current market rates in terms of industry norms, she corrected those for the lower rates that would have prevailed at the time of the contract, i.e., 2009-10. Using the above methodology, she worked out in great detail the amount to be awarded against each of the items of claims.

18. Also, as will be noted hereafter, it was not as if the entire counter-claim of the Petitioner was rejected. Also, not all of the claims of the Respondent were allowed. Importantly on the issue of the specification of M35 in the columns and the defects in columns for strengthening those works, the learned Arbitrator found that both

parties were careless and liable for omissions and lack of diligence and both should therefore share the burden of rectification. As far as the delays at the site during the progress of the work, the learned Arbitrator found that the entire lapse could not be attributed to the Respondent and therefore the Petitioner was not entitled to LD or any other claim against loss of goodwill. The Petitioner's counter-claim in this regard was not allowed.

19. The Respondent's claims for dewatering expenses for labour, shuttering damages due to rainwater in the basement area, shuttering and scaffolding rental from January 2010 to July 2010, idle engineering staff and labour, stilt slab shuttering and steel reinforcement change, loss of profit on balance work, electrical expenses for installation, were all rejected. On the question of the value against re-strengthening of the columns by the Petitioner, a one-time penalty of Rs. 10,00,000 was charged and deducted from the sums awarded to the Respondent.

20. Mr. Neeraj Malhotra, learned counsel appearing for the Petitioner took serious objection to the observations of the learned Arbitrator in the Award to the effect that compensation against the work done was due to the Respondent "at the justified value on the basis of *quantum meriut*". Relying on the decision of the Supreme Court in ***Alopi Parshad and Sons v. Union of India AIR 1960 SC 588***, it was submitted that when the rates were clearly specified in the contract, the question of applying the principle of *quantum meriut* did not arise.

21. Mr. Malhotra referred to the grounds specified in Section 34 (2)(b)(ii) of the Act and submitted that the Award was opposed to the

“fundamental policy of Indian law”, as explained by the Supreme Court in **ONGC Ltd. v. Saw Pipes Ltd. (2003) 5 SCC 705**, and reiterated in **Oil and Natural Gas Corporation Ltd. v. Western Geco International Ltd. (2014) 9 SCC 263**. He submitted that the impugned Award reflected a lack of judicial approach by the learned Arbitrator since she had overlooked the express terms of the contract, particularly with regard to the rates specified for different works.

22. Mr. Malhotra took a serious exception to the approach of the learned Arbitrator in not taking into account the calculations presented by M/s Aneja & Associates on the ground that it showed “no basis on the terms of the contract”. Mr. Malhotra submitted that the learned Arbitrator committed a factual error in recording a finding that in case of items not covered by the contract, the value of the work done be arrived at by reasonable industrial market rates. This was contrary to the provisions of Section 28(3) of the Act since the parties had expressly agreed that the Claimant must be paid on the basis of the work completed per sq. ft. with rates being specified in the contract itself. Reliance was placed on the decision in **Hindustan Zinc Limited v. Friends Coal Carbonisation (2006) 4 SCC 445**. It was submitted that by adopting the above methodology, not only had the Arbitrator ignored the provisions of the contract thus overlooking the mandate of Section 23(3) of Act, but had virtually written the terms of the contract. Reliance was also placed on the decision in **Polymat India Pvt. Ltd. v. National Insurance Co. Ltd. 2005 (9) SCC 174**.

23. The scope of interference by the Court under Section 34 of the Act with an Award has been explained with sufficient clarity in several decisions of the Supreme Court. The recent decision in **Oil**

and Natural Gas Corporation Ltd. v. Western Geco International Ltd. (supra), has summarised the position after reviewing the earlier case law, including ***ONGC Ltd. v. Saw Pipes Ltd.*** (supra). It has been explained that an Award could be set aside if it is contrary to the fundamental policy of Indian law or even the interest of India or justice or morality or “if it is patently illegal”. It has been further explained that the illegality “must go to the root of the matter”. An Award could also be set aside “if it is so unfair and unreasonable that it shocks the conscience of the Court”. The expression “fundamental policy of Indian law” was explained with reference to three distinct and fundamental juristic principles constituting part and parcel of the fundamental policy of Indian law. The first was that the arbitral tribunal was bound to adopt “a judicial approach” in the matter. This was to ensure that the “authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and its decision is not actuated by any extraneous considerations”.

24. The Court records that as far as the present case is concerned, the other two juristic principles highlighted by the Supreme Court, viz., the requirement to act in accordance with the principles of natural justice and the requirement for the authority “apply its minds to the attendant facts and circumstances”, have not been invoked by the counsel for the Petitioner. He has focussed his criticism to the alleged lack of judicial approach of the learned Arbitrator.

25. The Court finds merit in the submission of Mr. Rajesh Tyagi, learned counsel for Respondent, that there is a misconception in the submission of the learned counsel for the Petitioner in the understanding of the approach of the learned Arbitrator in the present case. It is not in issue that when the Respondent left the site, the

work was incomplete. It is the Petitioner's own case that the work had to be completed by engaging another contractor. The Respondent had left behind building materials, including scaffolding, shuttering etc. This was used by the Petitioner to complete the remaining works.

26. The learned Arbitrator herself noted in the impugned Award that she was called upon to assess the value of "incomplete works". What the agreement sets out are the rates for completed works. An example could be of a floor, that is, complete as far as the bare structure is concerned but not as far as the steps to be taken to complete it and render it fit for habitation. The question that arose was what would be the proportionate value of an incomplete work? The running theme of the Award pertained to this fundamental issue. This explains why the Arbitrator was justified in rejecting the calculations presented by M/s Aneja & Associates which obviously was an oversimplification since it merely applied the rates set out in the contract (for completed works) to the actual measurement in sq. ft. of the incomplete work. To the Court, it appears that had the learned Arbitrator merely gone by such a simplistic approach, it would not have been a judicial approach as it would have reflected the non-application of mind to a fundamental fact that the works were incomplete.

27. On the other hand, the Court finds that the learned Arbitrator has taken enormous pains in detailing the methodology adopted and why she had to mark down the rates given in the contract by 12 per cent. If one examines the detailed tabulation presented in the Award itself by the learned Arbitrator, it becomes evident that she has been careful not to apply the rate as specified in the contract for completed works but to use those rates as the basis for determining what the

rates would be considering that the work for which the claim was being raised was incomplete.

28. The Arbitrator has in the Award itself appended detailed explanatory notes for each of the items in the table. For instance, as regards the foundation, the Arbitrator has explained the methodology adopted as under:

“1. Foundation: In contracts of such nature where the contract is awarded on square foot rate of the floor areas, industry practice is to fix a percentage of the total value of tender cost as the payment stage for completion of foundation work since the foundation involves significant effort. The percentage so fixed is not an enhanced cost but however only a payment stage. These stages are set in a stage wise payment schedule. Typically the percentage kept for foundation work is in the range of 12 to 18%. For a 14 story structure on the conservative side it would be 12%, the claimant has also asked for 12% as per his own running bills 2 and 3, and has later enhanced it to 16% in his claim. This percentage of value is then subsequently deducted from each payment stage of completion of each floor slab. For determining this value the same method has been used, considering 12% for the basement as claimed by claimant in his running bills. Wherein, however he has failed to clearly deduct this 12% value from the payment for subsequent slabs.”

29. The learned Arbitrator is a qualified architect, aware of the industrial norms and practice. She was careful in not simply applying the industrial norms, but calibrating them wherever required. This is true for each of the items of claims decided by the learned Arbitrator.

30. The fact that many of the claims of the Respondent have been rejected, with detailed reasons, also points to the fact that the learned Arbitrator has carefully examined each claim before determining whether it was justified or not. Further the learned Arbitrator has

duly considered the counter-claims of the Petitioner. She has, as already noted, not rejected them outright. In fact, she has awarded Rs. 10 lakhs as lump sum penalty for the extra work that had to be carried out by the Petitioner for strengthening the columns.

31. The learned Arbitrator was not helped by either of the parties in carrying out the complicated exercise of determining the value of the partial works left incomplete by the Respondent. Neither party produced the bills or records. They could not even bring technical experts to substantiate their respective claims. It is indeed admirable that the learned Arbitrator has, despite the lack of assistance in this regard, been able to satisfactorily arrive at a reasonable basis for determining the costs of the various partial works. There is absolutely no basis for criticism of the impugned Award as being contrary to either Section 28(3) or 23(3) of the Act much less being opposed to the fundamental policy of Indian law in terms of Section 34 (2)(b)(ii) of the Act.

32. In a recent judgment dated 25th November 2014 in ***Associate Builders v. Delhi Development Authority 2014 (13) SCALE 226***, the Supreme Court has emphasised that on questions of fact, the view of the learned Arbitrator would be final. The following observations in the said decision are relevant:

"It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is

not arbitrary or capricious, then he is the last word on facts."

33. Having considered the submissions of the learned counsel for the Petitioner with reference to the impugned Award, the Court is satisfied that no grounds whatsoever have been made out for interference. The petition is accordingly dismissed with costs of Rs.10,000 which will be paid by the Petitioner to the Respondent within a period of eight weeks.

S. MURALIDHAR, J.

JANUARY 15, 2015

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