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IN THE HIGH COURT OF DELHI AT NEW DELHI

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O.M.P. 331/2014

UNION OF INDIA

..... Petitioner

Through: Mr. Manish Mohan with
Ms. Hina Shaheen and Ms. Puja
Sarkar, Advocates.

versus

KTECH ENGINEERS BUILDERS

PVT. LTD. & ANR.

..... Respondents

Through: Mr. Akhil Sibal with Mr.
Nikhil Chawla, Mr. Sushant Singh and
Mr.P.C.Arya, Advocates.

CORAM: JUSTICE S. MURALIDHAR

ORDER

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11.05.2015

1. The challenge in this petition by the Petitioner Union of India ('UOI') is to an Award dated 16th December 2013 passed by the learned sole Arbitrator in the disputes between the parties arising out of the award of a contract by the Petitioner to the Respondent Ktech Engineers Builders Pvt. Ltd., for the construction of Army Mess and Auditorium at Delhi Cantt.

2. The facts in brief are that the contract was entered into on 22nd March 2006 and the date of the commencement of the work was 13th

April 2006. The scheduled date of completion was 12th October 2007 and the actual date of the completion was 14th December 2010.

3. When the disputes arose between the parties, a sole Arbitrator was appointed to adjudicate them. Nine claims were preferred by the Respondent of which five were rejected. There were four claims of the Petitioner which were rejected by the learned Arbitrator. No grounds appear to have been urged in the present petition as against the rejection of the Petitioner's claims. The claims that were allowed in part were the Respondent's Claims No.1,2,5 and 8 and it is those claims which form the subject matter of the present petition.

4. Mr. Manish Mohan, learned counsel for the Petitioner submitted that the learned Arbitrator erred in allowing Claim No.1 for a sum of Rs.26,87,549 for reimbursement of increase in price of cement. It was submitted that this claim had already been raised by the Respondent in the first round of arbitration in which an interim Award was passed and even payment had been made. Secondly, it was submitted that a letter written by the Respondent to the Petitioner on 16th March 2006 made a mere reference to the hike in the price of cement and requested the Petitioner to “keep this abnormal increase in consideration during currency of contract”. By the said letter the Respondent had merely extended the validity of the tender till 25th March 2006. There was no agreement as such between the parties regarding increase in the price of cement. It is further submitted that the decision in *FCI v. Ram*

Kesh Yadav AIR 2007 SC 1421 referred to by the learned Arbitrator was not applicable to the facts of the present case.

5. In reply, it is pointed out by Mr. Akhil Sibal, learned counsel for the Respondent, that in the first round of the arbitral proceedings an identical issue of increase in the price of cement was raised and an interim Award dated 28th August 2009 was passed in favour of the Respondent for the increase/difference in the price of the cement used till 31st December 2008. The present claim was for the further period up to the actual date of the completion i.e. 14th December 2010. The petition challenging the interim Award under Section 34 of the Act was dismissed. The Petitioner's further appeal to the Division Bench and the Special Leave Petition ('SLP') in the Supreme Court were dismissed on the ground of limitation.

6. The above submissions have been considered. The learned Arbitrator noted that at the time of the Respondent submitting its bid, the price of a cement bag was Rs.145. This considerably increased even by the time of extension of the validity of the offer by the Respondent by its letter dated 16th March 2006. In fact this was not the only extension letter. There were at least four extension letters earlier sent by the Respondent on the request of the Petitioner by letters dated 31st October 2005, 3rd November 2005, 29th November 2005 and 27th December 2005. The final extension of offer made by the letter dated 16th March 2006 by the Respondent was accepted by the Petitioner by

its letter dated 26th March 2006 without rejecting the request of the Respondent. The learned Arbitrator upon discussing the aforementioned evidence came to the conclusion that the Petitioner did accept the condition stipulated by the Respondent.

7. The Court is of the view that even though the reliance on the decision in *FCI v. Ram Kesh Yadav* (supra) appears misplaced since that was a case of compassionate appointment, the conclusion reached by the learned Arbitrator cannot be said to be suffering from any illegality, perversity or failure to consider the relevant evidence or to apply the law correctly. The Court is unable to accept the plea of the Petitioner that Claim No.1 was entirely outside the purview of the contract. The exchange of correspondence between the parties and the fact that interim Award that allowed a similar claim for the period up to 31st December 2008 has attained finality and has been implemented, the Court sees no error having been committed by the learned Arbitrator in allowing this claim of the Respondent.

8. Claim No.2 was for a sum of Rs.13,20,45,000 for various breaches on the part of the Petitioner including short payment due to freezing of price index. Relying on the decision in *Ramnath International Construction Pvt. Ltd. v. Union of India 2007(2) SCC 453*, it is submitted by Mr. Manish Mohan that the learned Arbitrator erred in holding that the dispute was not an 'excepted matter' since the Petitioner was not justified in granting extension of time by referring

to Condition 11(A) of the contract (IAFW 2249) only with a view to invoke Condition 11(C) to avoid payment of compensation. Mr. Mohan submitted that both the parties agreed to Condition 50 of the contract at the time of agreement. He submitted that in ***Ramnath International Construction Pvt. Ltd. v. Union of India*** (supra), the Supreme Court held that Condition 11(C) prevented the contractor from claiming any compensation arising out of the extension of time for completion of the work. He submitted that Conditions 7 and 9 were not applicable to the present dispute.

9. In reply, it is submitted by Mr. Sibal that the learned Arbitrator rightly noted that the extension of time granted by the Petitioner was protested by the Respondent since it referred to Condition 11(C). Referring to the decision in ***Asian Techs Ltd. v. Union of India***(2009) **10 SCC 354**, Mr. Sibal submitted that as held by the Supreme Court in the said decision, a clause like Condition 11(C) was a bar only as regards the department and not the Arbitrator. He also referred to the judgment of this Court in ***Simplex Concrete Piles v. Union of India*** (2010) **ILR 2 Delhi 699**, where it was held that clauses which prohibit the entitlement to rightful damages were hit by Section 23 of the Contract Act, 1872.

10. In the impugned Award, the learned Arbitrator first dealt with the question of arbitrability of Claim 2 and Claim 5 which was for labour escalation for high rise buildings. With respect to Claim No. 2, it was

held that the contention of the contractor that the extensions were due to him under Conditions 7 and 9 and not under Condition 11(C), was itself an arbitrable dispute. As regards Claim No. 5, it was observed that the claim involved interpretation of various Government notifications and this was not within the exclusive domain of the 'Accepting Officer'. It is also noted that the decision of the 'Accepting Officer' was conveyed to the contractor by a letter dated 16th May 2012 by which time the arbitration clause had been invoked and the Arbitrator himself had been appointed on 14th May 2012. Consequently, the learned Arbitrator held that both Claims 2 and 5 were arbitrable.

11. Having considered the submissions of Mr. Mohan and Mr. Sibal on the question of arbitrability, the Court finds that the learned Arbitrator has extensively discussed the applicable case law and come to a conclusion which was a plausible view to take, considering the arbitrability of Claims 2 and 5. The decision in ***Ramnath International Construction Pvt. Ltd.*** (supra), turned on an important fact that in that case the Court found the delay could be attributable either to the contractor or the employer or to both. If in those circumstances, the contractor seeks and obtains extension of time for execution, he will not be entitled to claim compensation of any nature. However, as noted by the learned Arbitrator the subsequent decision of the Supreme Court in ***Asia Tech Ltd. v. Union of India*** (supra)

interpreted Condition 11 C where it was held that the bar on arbitrability was only as regards the department and not the Arbitrator.

12. As explained by the Bombay High Court in *Union of India v. Moti Enterprises 2005 (2) Mh.LJ 791*, the decision of the learned Arbitrator on whether Condition 11 (C) or Conditions 7 and 9 would apply was a decision on the interpretation of the clauses of the contract. It was not a matter that was outside the scope of the contract. Thus no error was committed by the learned Arbitrator in holding Claims 2 and 5 to be arbitrable.

13. Turning to the merits of Claim No.2, which was for a sum of Rs.13,20,45,000 for various breaches on the part of the department including short payment due to freezing of price index, the learned Arbitrator found as a question of fact that the Respondent had in fact applied for extension of time under Conditions 7 and 9. As rightly pointed out by Mr. Sibal, in *Ramnath International Construction Pvt. Ltd.* (supra) there was no issue that the contractor in that case had wrongly been granted extension under Condition 11 A read with 11 C. In the present case, however, it has been found by the learned Arbitrator as a matter of fact that as many as 97 changes were ordered by the Petitioner and some were ordered as late as 20th September 2010. The documents placed on record by the Respondent show that this in turn led to new material being purchased and consequent delay in completion of the contract. This clearly attracted Condition 7.

Condition 9 states that if the work is suspended for some reason, then the contractor becomes entitled equal to the period of extension and 25% more. The Arbitrator has, in more than one place, come to the conclusion that the delay was solely at the behest of the Petitioner and not due to the Respondent at all. Additionally when the Petitioner granted the extension with reference to Condition 11(C), the Respondent protested. In the circumstances, the Arbitrator was perfectly justified in proceeding proceeded to apply the Emden formula to compute the damages consistent with the law explained by the Supreme Court in ***McDermott International Inc. v. Burn Standard Co. Ltd. (2006) 11 SCC 181*** and reiterated recently in ***Associate Builders v. Delhi Development Authority 2014 (13) SCALE 226.***

14. The second limb of Claim No.2 concerned the freezing of the price index on the original date of completion. Admittedly, there was delay of 38 months in the completion of the project and this delay was not attributable to the Respondent. In the circumstances, the freezing of the price index on the date of the original contract was certainly unreasonable. As explained by the Supreme Court in ***M.K. Shah Engineers and Contractors v. State of M.P. (1999) 2 SCC 594***, the Petitioner cannot be permitted to take advantage of a situation brought about by itself when it has ordered several changes resulting in delay in completion of project. Also, there is no prohibition in the contract on payment of compensation on account of freezing of price index

particularly when extensions are granted on account of delays not attributable to the Respondent.

15. Much of Claim No.2 turned on findings of fact and those findings are not amenable to judicial review unless shown to be perverse or irrational. Having carefully perused the Award and the evidence on record, the Court is not persuaded to hold that the learned Arbitrator has committed any serious legal infirmity in allowing Claim No.2.

16. Turning to Claim No.5 which was for escalation for labour employed in high rise building, the Court is satisfied that the learned Arbitrator has come to the correct conclusion that the decision of the Accepting Officer on the issue could not be held to be finally binding for two reasons. One is that it involved interpretation of notifications issued by the Central Government under the Minimum Wages Act. Secondly, it was given after the Respondent had invoked the arbitration clause and even after the learned Arbitrator had been appointed. The Petitioner does not appear to be justified in denying the escalation in minimum wages which was statutorily mandated. There was no occasion to recover the reimbursement already made. Consequently, the Court finds no error having been committed by the learned Arbitrator in allowing Claim No.5 as well. Claim No.8 was for interest and costs and nothing has been shown to warrant interference with the impugned Award as regards the said claim.

17. Claim No.1 of the Petitioner, which was for alleged overpayment, was therefore rightly rejected by the learned Arbitrator on account of the decision to allow Claim No.5 of the Respondent in part. The other incidental claims of the Petitioner for interest and costs were also therefore rightly rejected.

18. For the aforementioned reasons, the petition is dismissed but in the circumstances with no order as to costs.

S. MURALIDHAR, J

MAY 11, 2015

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