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IN THE HIGH COURT OF DELHI AT NEW DELHI

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O.M.P. 616/2013

Reserved on : April 24, 2015

Date of decision: May 20, 2015

IDEB PROJECTS PVT. LTD Petitioner
Through: Mr. V. Seshagiri with Mr.
Alok Tiwari, Advocates.

versus

AIRPORTS AUTHORITY OF INDIA Respondent
Through: Mr.Digvijay Rai, Advocate.

AND

O.M.P. 698/2013

AIRPORTS AUTHORITY OF INDIA Petitioner
Through: Mr.Digvijay Rai, Advocate.

versus

IDEB PROJECTS PVT. LTD Respondent
Through: Mr. V. Seshagiri with Mr.
Alok Tiwari, Advocates.

CORAM: JUSTICE S. MURALIDHAR

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JUDGMENT

20.05.2015

1. These two petitions under Section 34 of the Arbitration and Conciliation Act, 1996 seek the setting aside of the arbitral Award dated 30th January, 2013 of the Sole Arbitrator.

2. Airports Authority of India (AAI) awarded the contract of construction of the New Terminal Building Complex at Khajuraho Airport to IDEB Projects Pvt. Ltd. (IDEB) A contract was entered into between the parties on 15th June, 2007. The work was to commence from 24th June, 2007 and was to be completed within 15 months from that date i.e. on or before 23rd September, 2008. The works under the contract included civil and electrical works including fire fighting, fire detection and alarm system, HVAC, PA system etc. of the main Terminal Building, sub-station, overhead tank, sewage and water treatment plants, car parking and roads. Provisional extensions of time (EOT) were granted by AAI to IDEB up to 30th November, 2008, 31st December, 2008, 31st January, 2009 and finally up to 28th February, 2009. A further extension was sought by IDEB up to 31st October, 2009, which was declined by the AAI and vide letter dated 23rd February, 2009, AAI cancelled the contract. On 15th April, 2009, IDEB invoked the arbitration clause and the Chairman, AAI appointed the Sole Arbitrator.

3. IDEB filed its statement of claims (SoC) on 14th September, 2009 in which the following claims were raised:

Sl. No.	Claim	Amount (in Rupees)
1	Interest on delayed payments	5,84,319.70
2	On Site Overheads & Head Office Overheads	2,60,80,008.00
3	Loss of Productivity from T & P and Underutilization Men,	72,59,692.50

	Machinery Equipments	
4	Interest on Margin Money of Bank Guarantees/Performance Guarantees/Security Deposits/etc.	14,76,444.00
5	Unpaid amount of Extra items/Deviated Quantities Etc.	14,42,970.34
6	Loss on account of deletion of Sewage Treatment Plant	7,37,873.10
7	Loss of profit @ 10% of cancelled works	4,99,11,275.99
8	Loss of Reputation and Goodwill	5,78,13,024.59
	TOTAL	14,53,05,608.22
9	Interest @ 18% p.a. from the date of this claim petition till the date of payment of the same.	
10	Award cost of these proceedings; and	
11	Grant such other relief/s as this Hon'ble Arbitral Tribunal may deem fit on the facts and circumstances of the case.	

4. Para 2.9 of the SoC was titled 'Illegal Termination/Rescission of Contract'. In para 2.9.4 it was stated that the termination letter dated 23rd February, 2009 was not only wrongful but also issued without proper authority.

5. AAI filed its statement of defence, in which inter alia it denied that the contract had been wrongly terminated. It is denied that there were breaches committed by AAI. There were 13 counter claims filed by the AAI.

6. An application was filed by IDEB before the learned Arbitrator on 18th February, 2011 under Section 23(3) of the Act, seeking permission to amend the statement of claims by adding 4 items. However, the application was dismissed by the Arbitrator. IDEB filed an affidavit of evidence of its Chairman/Managing Director, who was cross-examined by the counsel for AAI. The Assistant General Manager of AAI filed an affidavit and was cross-examined by the counsel for IDEB.

7. The first issue dealt with by the learned Arbitrator was 'reasons and responsibility for delay'. On this issue, he came to the following conclusions:

(i) The site was handed over on 1st August, 2007 i.e. 38 days after the stipulated date of commencement of 24th June, 2007. However, in terms of clauses 13.2 and 13.3 of General Conditions of Contract (GCC) no notice for the delay in handing over the site was given by the IDEB to the Engineer-In-charge (EIC). Consequently, the delay in handing over the site was held not to have contributed to the delay in construction;

(ii) Although, IDEB alleged that there was delay in the drawings to be supplied, it was unable to complete the major items for which drawings were supplied soon after the work was awarded. Therefore, it could not be said that the work was delayed at any stage for want of drawings.

(iii) IDEB had engaged vendors even before formal approval by AAI and even before the terms and conditions were finalised. There was no correspondence on record to show that the IDEB had at any time informed AAI that the work would get delayed for want of approval of vendors. Therefore, the claim of IDEB that there was delay of 137 days on account of the alleged delay on the part of AAI in approving vendors, was not established. The failure of IDEB to engage a specialized agency for carrying out the structural glazing and aluminum work worth about 20% of the total contract value even 20 months after the work was awarded, for which there was no delay on the part of IDEB wiped out all other alleged delays and fundamental breaches attributed to AAI and conclusively established that IDEB alone was responsible for the delay in completion of the work.

(iv) IDEB failed to establish that the delay in completion of the work was due to the delay in AAI giving certain decisions.

(v) The claim of IDEB for extra time on the ground of additional cost of earthwork was not justified. While IDEB was required to perform various activities, which were 'not of a billable nature', for proper execution of the contracts such activities were spread over the entire duration of the contract. The claim that all such activities were completed by IDEB was not acceptable when a major part of the work itself was unfinished.

(vi) The case of IDEB that there was enormous delay in release of payments, was not substantiated. The delay in payment of only one bill was of 26 days.

(vii) There was no delay on account of omission of a portion of the contract pertaining to the STP. In any event, it did not amount to fundamental breach of the contract. Such omission did not make it impossible for IDEB to complete the rest of the work.

(viii) IDEB failed to produce any document to show that the work got delayed due to non-availability of STP.

(ix) There was no justification in the allegations of the IDEB that AAI had given the extensions of time on a piece meal basis or arbitrarily. IDEB neither gave notice in writing to the Engineer-In-charge nor used its best endeavours to prevent or make good the delay. IDEB failed to proceed with the work with due diligence as was expected under Clause 41(a) of the contract. Instead of working in two shifts as requested by AAI, IDEB was working in one shift only. Instead of completing all RCC works by 30th September, 2008 as mutually agreed, RCC works were far from complete even 4 months later. IDEB's action, or rather inaction, amounted to breach of the contract terms, particularly of Clauses 13, 13.1 and 13.2.

(x) IDEB had not correctly anticipated or assessed the particular site conditions and lack of facilities at site. Consequently, as a result of inadequate mobilization of resources by the IDEB, the delay in the physical progress of the work was attributable to IDEB.

8. The learned Arbitrator then dealt with one of the instances of 'fundamental breaches' of the contract as alleged by the IDEB, viz., the illegal termination of contract by AAI. He noted that as on February, 2009, the actual progress of work was 17.3%. Further IDEB's mobilization of resources was far from satisfactory. There was, therefore, enough justification for the AAI to cancel the contract. However, the EIC who issued the termination letter dated 23rd February, 2009 did not have the power to do so. Although, the notice of termination stated that the cancellation was done by Mr. Vinod Kumar Singh, EIC for and on behalf of the AAI, AAI failed to show that the competent authority i.e. the Chairman AAI had authorized it. AAI gave a written clarification on 27th November, 2012, in which it is stated that no such plea of lack of authority had been taken by IDEB. However, it was added that the Accepting Authority had authorized the EIC to issue the letter of termination. In para 20.33.5 of the impugned Award, the learned Arbitrator noted that the AAI did not produce any evidence to show that the Accepting Authority had authorized the EIC to issue the letter of termination.

9. The learned Arbitrator further held that the notice dated 5th September, 2008 did not specify the time period within which the work had to be completed. AAI had asked the contractor to show cause why 'an action under Clauses 41(a), 41(b) and 41(c) of the agreement should not be taken against it. IDEB had time till 23rd September, 2008, to finish the work. Only upon failure to complete the work within the time specified could the cause of action under Clause 41(j) have arisen. Therefore, the letter of cancellation dated 23rd February, 2009, which was purportedly in terms of Clause 41 was issued without following the prescribed procedure. The learned arbitrator came to the following conclusion:

“...although there may have been enough justification to cancel the contract, the contract was not cancelled in accordance with the procedure specified in the contract and was cancelled by an authority, who was not competent to do so. The cancellation is therefore illegal.”

10. The learned Arbitrator then proceeded to deal with the claims. He rejected the claim for interest on delayed payments (Claim No.1), On-site overheads and Head Office overheads (Claim No.2), Loss of productivity from T & P and under-utilization of men, machinery equipments (Claim No.3), Interest on margin money of bank guarantees/performance guarantees/security deposits etc. (Claim No.4), loss of profit @ 10% of cancelled works (Claim No.7), loss of reputation and goodwill (Claim No.8), award cost of the proceedings (Claim No.10). The claim for extra items/deviated quantities (Claim

No.5) in the sum of Rs.97,478/- was awarded in favour of IDEB. For loss on account of deletion of the STP (Claim No.6) a sum of Rs. 3,68,937/- being 7 ½ % of the cost of STP was awarded. As regards Claim No.9 for interest at 18% p.a. from the date of the claim petition till the date of payment, a sum of Rs 1,57,687 was awarded.

11. As far as the counter claims of AAI were concerned, refund of the advance paid (Claim No.11) for an amount of Rs. 2,54,82,681/- and interest thereon @ 10% p.a. from 24th February, 2009 onwards (Counter claim No.12) and encashment of bank guarantees for plant and equipment advance and mobilization advance to the extent of Rs. 2,54,82,681/- (Counter claim No.13) were allowed.

12. As a result, the learned Arbitrator held:

- (a) IDEB was entitled to receive from AAI a sum of Rs. 6,24,102/- including interest up to the date of the Award in full and final settlement of all its claims and
- (b) AAI was entitled to encash the bank guarantees for plant and equipment advance and mobilization advance furnished by the IDEB to the extent of Rs. 2,54,82,681/- and in addition to get from the IDEB a sum of Rs. 1,00,25,515/- including interest up to the date of the Award in full and final settlement of all its counter claims.

13. IDEB filed OMP No. 616/2013 to the extent that the learned Arbitrator rejected Claim Nos. 2 and 7 and also rejected its prayer for being given credit for the price of shuttering material, which was not returned by the AAI. IDEB was also aggrieved by the impugned Award to the extent it allowed some of the counter claims of AAI.

14. On its part, AAI filed OMP No. 698/2013, challenging the impugned Award, to the extent it has held that the termination of the contract was illegal and to the extent that it has rejected Counter claim No.2 for liquidated damages and Counter claim No.10 for risk and costs.

15. Mr. Digvijay Rai, learned counsel for the AAI, submitted that the learned Arbitrator committed a serious error in concluding that the EIC had no authority to issue the termination letter. He pointed out that clause 3 (g) of GCC defines an EIC to be an engineer officer appointed by the Accepting Authority. He referred to the minutes of the meeting dated 11th February, 2009, which were approved and signed by the Chairman, AAI, in which a decision was taken to cancel the contract. Only thereafter the termination letter was issued. It is urged that no such specific ground was raised by the IDEB in its statement of claims before the arbitrator. A reference was made to the actual claims, which did not include a prayer for declaration of termination of the contract as illegal.

16. In reply, Mr. V. Seshagiri, learned counsel for IDEB, drew the attention of the Court to para 2.9 of the Statement of Claims (SoC), where the point regarding illegal termination on account of lack of authority of the officer issuing the letter had been raised. It is further submitted that AAI should not be permitted to bring on record at this stage a document which was not before the Arbitrator. This was the minutes dated 11th February 2009. Mr. Seshagiri referred to the order passed by this court on 4th March, 2014 in OMP No. 698/2013.

17. The learned Arbitrator noted in para 20.33.5 of the Award that AAI had not produced any document to show that the Accepting Authority had authorized the EIC to issue the letter of termination. Clearly, therefore, the minutes dated 11th February, 2009 were not produced before the learned Arbitrator. It is for this reason, AAI filed IA No. 11103/2013 seeking the permission of the Court to place on record a copy of the said minutes. By a detailed order dated 4th March, 2013, this court held that "it is not open to AAI to place on record any documents, which do not form part of the arbitral record and which pertain to the merits of the dispute between the parties". The application was dismissed. Consequently this Court cannot in light of the above order, which has attained finality, permit AAI to refer to or rely on the aforementioned minutes. The learned arbitrator appears to be justified in concluding that AAI was unable to show the authority of EIC to issue the termination letter.

18. As regards the submission of AAI that no such plea was raised by IDEB, the Court finds that in para 2.9 of the SoC, IDEB specifically raised the issue regarding illegal termination/rescission of contract. Further in para 2.9.4 it specifically urged that “termination was not only wrongful but also without property authority.” In the clarification issued by AAI dated 27th November, 2012 although it is stated that the Accepting Authority has authorized the EIC to issue the termination letter, no document was produced to show any authorization. Consequently, the conclusion of the learned Arbitrator, that the termination of the contract was not in accordance with the procedure under the contract, cannot be said to be erroneous or patently illegal.

19. Turning to the rejection of IDEB’s Claim No.2 for on-site overheads and head office overheads, Mr. Seshagiri referred to the finding in para 27.33 of the impugned award which dealt with the issue of the STP, in which the learned Arbitrator had calculated 7 ½ % as a reasonable percentage, that had to be recompensed for the rejection of the STP work. It is submitted that unless it is held that IDEB was guilty of unreasonable delay, its claim for overheads could not be rejected by merely recording in para 23.10 of the Award that IDEB would be justified in making the claim only if the delay was on account of AAI.

20. The Court finds that in para 23.1 of the Award, the learned Arbitrator has adverted to the discussions in the earlier part of the

Award and has reached the conclusion that the AAI was not responsible for delay in completion of the work. The whole claim of the IDEB was based on the argument that AAI was solely responsible for the delay. Even before this Court it was sought to be contended that the with EOTs having been granted time was no longer the essence of the contract.

21. The above submission overlooks the numerous findings in the impugned Award that IDEB was responsible for the delay in completion of the work. The attempts by IDEB, to show that AAI was responsible for alleged delays, failed. IDEB was unable to substantiate its claim. There is a very detailed discussion on this aspect in the impugned Award. Cogent reasons have been given for the conclusions reached that AAI could not be held to be responsible for the delay in completion of work by IDEB. Consequently, the Court finds that rejection of Claim No.2 by the learned Arbitrator cannot be said to be illegal and does not warrant any interference by the court.

22. As regards Claim No.7, the learned Arbitrator noted in the impugned Award that IDEB had failed to give any evidence of having suffered loss of profit. On a perusal of the claim statement and the affidavit of the MD of the IDEB, the learned Arbitrator concluded that it was extremely doubtful if IDEB would have earned any profit at all even if the contract was not cancelled. The materials on record indicated that IDEB was already incurring heavy losses and would have probably continued to do so even if it had been allowed an

additional 8 months time to complete the work. This court is unable to find any error in the above conclusion of the learned Arbitrator.

23. The learned Arbitrator has already spelt out the reasons for rejecting the request for return of the shuttering material while dismissing the IDEB's application under Section 17 of the Act by order dated 6th November, 2010. The Court finds no reason at this stage, to direct AAI to give credit to IDEB for shuttering material.

24. As regards AAI's grievance regarding rejection of Counter claim No.2 for liquidated damages (LD), the submission of Mr. Rai is that the learned Arbitrator erred in concluding that the exact amount for which the LD is levied, was not mentioned. It is submitted that LD was not levied on IDEB because of its failure to achieve progress as per the milestone, but for not completing the work within time. A reference is made to Clause 41.2 of the GCC, which permits levy of LD after the cancellation of the contract. It is submitted that it is erroneously observed by the learned arbitrator that the letter dated 15th /20th June 2009 levying the LD was issued, not by EIC Khajuraho, but by the Senior Manager (Engineering) of AAI at Lucknow. It is further submitted that answer to question No.119 in the cross-examination of Mr. V.K. Singh was regarding the award of the fresh tender and did not affect its authority to issue the letter claiming LD.

25. It is submitted by Mr. Seshagiri that no notice was given by AAI to IDEB, prior to claiming the LD. Having granted EOT up to 31st October, 2009 there is no justification in AAI issuing the letter.

26. The learned Arbitrator discussed Counter claim No.2 at some length in the impugned Award. He concluded that a plain reading of the said letter gave the impression that the compensation was levied on account of delay in completion of the work. However, it did not indicate the exact period of delay, except stating that it was for 383 days. In any event, under clause 32(a) and 13.1 of the contract, LD could not have been levied for failure to achieve the milestones other than those mentioned in the said clauses. The principles of natural justice demanded that AAI should have issued a notice to IDEB indicating its specific breaches in achieving the milestones.

27. Although Mr. Rai may be justified in criticism of the impugned Award that the learned arbitrator erroneously held that Mr. V.K. Singh did not have authority to issue the letter for recovery, that is certainly not the only reason relied on by the Arbitrator. The Court finds that the other reasons for rejecting the said contract are sustainable in law and do not call for any interference.

28. Counter claim No.10 was for risk and costs. Here again, the learned Arbitrator found that AAI was required to arrive at the amount claimed with some certainty and was also required to give the details. Further no notice was issued under Clause 41.3 calling upon the IDEB

to pay the amount, although it was the specific requirement of the contract. According to the Court these two were sufficient reasons for rejection of the counter claim.

29. For the aforementioned reasons, this Court finds that no ground has been made out by either party i.e. AAI or IDEB to interfere with the impugned Award of the learned Arbitrator.

30. Both the petitions are dismissed with no order as to costs.

S. MURALIDHAR, J

May 20, 2015

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