

12.1.2016

## IN THE HIGH COURT OF JUDICATURE AT BOMBAY

## ORDINARY ORIGINAL CIVIL JURISDICTION

## ARBITRATION PETITION NO. 1215 OF 2012

State of Maharashtra, through

the Director, Health Services

Government of Maharashtra

.....Petitioners

V/S.

1. M/s. G.H. Khatri &amp; Co.

New Mumbai Sports Complex, Club

Housing Building No. E, F &amp; G Blocks,

Sector-4, Vashi, New Mumbai-400 701. ....Respondent/Claimant

2. Hon'ble Shri. P.B. Vijay,

Hon'ble Learned Presiding Arbitrator,

Former Director General,

CPWD, A-39/B, DDA Flats,

Munirka, New Delhi-110 067.

3. Hon'ble Shri. M.C. Bhide,

Hon'ble Learned Co. Arbitrator and

Retd. Chief Engineer of Indian Railways,

9, Greenland Co.op Housing Society

Raikar Marg, Off. Shitaldevi Temple Road,

Mahim, Mumbai-400016.

4. Hon'ble Shri. N.V. Merani,

Hon'ble Learned Co. Arbitrator and

Retd. Principal Secretary, PWD,

Flat No. 1344, Building No.A-47,

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Adarsh Nagar, Worli, Mumbai-400 025. ....Formal Respondents

Mr. J.S. Saluja, AGP for State.

Mr. F.Reis, Sr.Adv.a/w. Mrs. Anita Agarwal i/by. J.S. Jinsiwale, Adv.for resp no.1.

CORAM :- SMT. R.P. SONDURBALDOTA, J.

DATED :- 12TH JANUARY, 2016.

**JUDGMENT :-**

1). State of Maharashtra has filed this petition under Section 34 of the Arbitration and Conciliation Act (hereinafter referred to as “the Arbitration Act”) to challenge the arbitral award dated 9th August, 2010. Respondent no.1 the original claimant has filed Execution Application No. 300 of 2012 in this Court and had applied for warrant of attachment of the properties of the petitioner in execution of the Award. Thereafter, the petitioner approached this Court with the present petition. There was delay of 157 days in filing the petition which has been condoned by the order dated 5th September, 2012.

2). The petitioner had invited tender for construction of Arogya Bhavan building comprising of 9 floors. Respondent no.1 was the successful bidder. The contract was issued to it on 27th December, 2002 for the total price of Rs.12,62,79,256/-. The project was scheduled for completion on 26th December, 2004. It was, however, actually completed on 30th November, 2005. According to respondent no.1, the main reasons for the delay in completion of the work were, (i)Clear possession of the site was not given because of the trees at the work site. (ii)delay in, plinth check and “work done certificate” by Brihanmumbai Municipal Corporation., (iii)changes in the levels of pile caps, (iv)changes in the founding levels of UG tank and Pump House., and (v)hold on the work ordered by the

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petitioner vide letter dated 12th August, 2004 in part of the area above the 8th floor.

3). The facts constituting the delay alleged by respondent no.1 were not disputed by the petitioner. It was, however, claimed that the delay due to those reasons had not seriously hindered execution of the work. According to it, the work was delayed primarily on account of poor management and slow progress on the part of respondent no.1.

4). As per Clause-24.1, the decisions as regards the payments to be made for the work done by respondent no.1 was to be taken by the Engineer of the petitioner. In case, respondent no.1 was dissatisfied with the decision of the Engineer, Clause-25.1 and 25.2 of the Contract provided that, he could approach the Adjudicator. Under Clause-36, the Adjudicator was to adjudicate upon the differences between the Engineer and respondent no.1. In case of dis-satisfaction with the decision of the Adjudicator, the contract provided for resolution of the dispute by reference to the panel of arbitrators consisting of 3 arbitrators, one to be nominated by the petitioner, one to be nominated by the respondent and the third, the presiding Arbitrator to be nominated by the President, Institute of Engineers (INDIA).

5). Initially, one dispute described as Arbitration-I in the impugned Award, consisting of 11 claims was referred to arbitration for which the first hearing was held on 2nd August, 2004. Subsequently, disputes in Arbitration-II, III and IV were also referred to the same Tribunal. Arbitration-II comprised of five claims. Arbitration-III comprised of 13 claims and Arbitration-IV comprised of four claims. Since

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some of the claims in Arbitration-I, II and III were overlapping, the parties agreed for consolidation of all the claims and the final list of all the claims at Annexure-A to the Award was adjudicated upon by the Arbitral Tribunal. Since the contract provided for An Adjudicator to resolve the dispute between the Engineer of the petitioner and respondent no.1, the Arbitral Tribunal, during its second and third hearing, gave certain directions for dealing with the claims in accordance with the contract. It directed respondent no.1 to approach the Engineer for his decision on the payment to be made by the petitioner. The Engineer was to decide the claim within a period of 21 days. In case of failure on the part of the Engineer in giving the decision within the time granted or in case respondent no.1 disagreeing with the decision, it was to approach the Adjudicator for his decision within 21 days as prescribed under the agreement. Further, if the Adjudicator did not give decision within 28 days or if respondent no.1 disagreed with his decision, the Arbitral Tribunal was to resume the arbitral proceedings. The second Adjudicator gave his decision dated 28th September, 2005. Respondent no.1 disagreed with the same and the Arbitral Tribunal resumed its arbitration proceedings. None of the parties have led oral evidence. The Arbitral Tribunal has decided the dispute on the basis of the documents produced by the parties and the submissions advanced before it.

6). Out of 12 claims of respondent no.1, the Arbitral Tribunal has allowed six claims i.e. Claim-4, Claim-7(a), Claim-7(b), Claim-9(b) and Claim-10(b) which were partly granted and Claim-12 which is for interest. Respondent no.1 had claimed interest at the rate of 24% p.a. on the amount claimed by it. The Arbitral Tribunal held that, since both the

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parties were responsible for the delay, award of simple interest at the rate of 12% p.a. was reasonable. Accordingly, simple interest at the rate of 12% p.a. from the date of the first hearing of the respective arbitration is awarded to respondent no.1 till the date of payment.

7). Claim No.4 of respondent no.1 was of "Payment for extra item of Ornamental Cornices". According to respondent no.1, construction of Ornamental Cornices was not covered by any item under the contract but rate analysis for the same was submitted by respondent no.1. The Engineer of the petitioner by his letter dated 14th September, 2004 had informed respondent no.1 that the issue relating thereto was discussed and that the payment therefor would be made under Item-25 for "Canopy Concrete". This was not acceptable to respondent no.1. Adjudicator had also held that the concrete work needs to be paid extra. The Arbitral Tribunal considered the sketches of Ornamental Cornices and Window Cornices filed by respondent no.1 and held that it was apparent that a lot of extra work was required to be done during the shuttering and concreting in small sections including curvature, offsets etc. Thus, both the Engineer, as well as, the Adjudicator of the petitioner had accepted, in principal, the claim of respondent no.1. The only dispute raised was about the quantum of the payment to be made. This was decided by the Arbitral Tribunal by holding that, respondent no.1 is entitled to receive Rs.8,90,655/- for the work. Mr. Saluja, the learned AGP appearing for the petitioner submits that the Arbitral Tribunal ought to have awarded payment for extra work carried out by the respondent corresponding to the item described in the bill of quality at the stipulated rate therein and it could not have decided upon the amount to be paid for extra work. There can be no substance in

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this argument. Firstly, because undisputedly the ornamental work done by respondent no.1 was not provided for in the contract. Secondly, fixing up the quantum of the payment to be made being a question of fact, unless it is established by the petitioner that the finding of fact is perverse, there is no scope for interference with it by this Court in its jurisdiction under Section 34 of the Arbitration Act.

8). Claim no.7(a) of respondent no.1 is for "Removal of centering, shuttering and steel of top slab". By his letter dated 12th August, 2004 the Engineer of the petitioner had asked respondent no.1 not to carry out any work above 8th floor between Grid-N-Q/10-14 (C-18 to C-26, 54 and staircase) till further orders. Respondent no.1 by its letter dated 31st August, 2004 informed that the shuttering material and reinforcement already fixed was lying idle which was disputed by the Engineer with a contention that the shuttering and reinforcement could be utilised for the work in the rest of the area which was not stopped. Then, respondent no.1 had, by its letter dated 25th September, 2004 complained that the drawings for the balance columns at roof level, overhead water tank and lift machine room had not been furnished for the purpose of construction. By its next letter dated 5th November, 2004 it was also pointed out to the Engineers that the final stop level of lifts had not been decided due to which the work was held up. The Engineers of the petitioner responded more than 5 months thereafter, by his letter dated 29th April, 2005. He informed that the area between N-Q/10-14 would be cleared on or before 5th May, 2005 and the work should be kept suspended till then. Finally, the Engineer by his letter dated 9th May, 2005 informed that the existing lift with machine room was revised and requested respondent no.1 to

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obtain techno commercial proposal from the lift vendor. This claim was also principally accepted by the Adjudicator. He had, by his order dated 25th April, 2004 remarked that the claim was not totally denied by the petitioner and had advised the parties to negotiate on the issue. Apparently, no negotiations had taken place between the parties and the Arbitral Tribunal, on considering the nature of work, the period of hold and details of claims opined that 50% of the amount claimed by respondent no.1 was justified. Accordingly, it awarded Rs.68,993/- under the claim to respondent no.1. This finding is again a finding of fact and there is nothing to indicate that it is perverse. Therefore, there is no question of interference with it by this Court.

9). Claim-8(b) is for “Underutilisation of overheads up to 27th December, 2004”. It was the contention of respondent no.1 that, it was fully mobilised to undertake the work. However, because of the delay caused by the petitioner in execution of the work, he was entitled to the compensation for underutilisation of the overheads. The petitioner had contested the claim by disputing the calculations of compensation. The Arbitral Tribunal held that, the delay in the work was attributable to both the parties. It noted that the claim had not been established through any documentary evidence. There was delay in casting of eighth floor slab because of the hold ordered by the petitioner in some area as brought out under Claim 7(a). Though the hold was for a period of 8 to 9 months, the Arbitral Tribunal opined that the delay of 3 months may be allowed for the loss of overheads and granted an amount of Rs.7,89,245/- to respondent no.1. There is nothing unreasonable or perverse about the award of this claim, hence the same cannot be interfered with.

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9). Claim 9(b) is for “Underutilization of machinery upto 27th December, 2004 less the amount awarded claimed”. It was the intention of respondent no.1 that for executing work it had deployed its own machinery of three concrete mixtures, one JCB, sand washing machine, six vibrators, two mechanical hoist, a compressor and two dumpers, which were lying idle for the period upto 27th December, 2004. The petitioner had contested the claim contenting that there was no need to keep the JCB beyond May-2003 as the excavation was complete. Similarly, the concrete being bought from RMC plant there was no need for the concrete mixtures. Further, there was no use of dumpers and mechanical hoist after the excavation was complete. The petitioner had also alleged that the claim was not supported by documentary evidence. The Arbitral Tribunal accepted the contention of the petitioner that the claim was vague and awarded 25% of the claim amount in the circumstances of the case. Accordingly, an amount of Rs.14,38,400/- was awarded against the claim. There is nothing unreasonable or perverse about the award of this amount to respondent no.1. Therefore, no interference is called for with it.

10). Claim no. 10(b) is also for “Unutilization of labour force upto 27th December, 2004 less awarded claim”. This claim was contested by the petitioner on the same grounds as Claim no.9(b) and the Arbitral Tribunal for the same reasons as for claim no.9(b) awarded 25% of the claim as adequate compensation. Accordingly, an amount of Rs.14,69,553/- was awarded against the claim. Once again there is nothing unreasonable or perverse about award of this claim.

11). Claim no.12 is for interest. The interest awarded by the Arbitral Tribunal is reasonable. It is of simple interest at the rate of 12%

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p.a., which is not to be interfered with by this Court, in the obvious jurisdictional limitation of this Court under Section 34 of the Arbitration Act.

12). No case, whatsoever, has been made out by the petitioner to disturb the Arbitral Award. That there is no merit in the challenge to the arbitral award is obvious from the award itself. The facts giving rise to the claim of respondent no.1 are not disputed. The Engineer of the petitioner, who was to certify the work done and decide the payment for it, as well as, the Adjudicator have acknowledged the relevant facts, as well as, the liability in principle. This would amount to admission of the liability. Thus, the Arbitral Tribunal has awarded claim only in respect of the admitted liability. The quantum awarded is also extremely reasonable. Under the circumstances, the chances for the petitioner to succeed in the challenge to the arbitral award were virtually nil. Unfortunately, despite this position the State chose to litigate at the cost of public money. The decision by the concerned officers of the State Government to litigate in such matter can be either incompetency or disregard to the duties to people or lack of accountability which must be abhorred. In the process, respondent no.1 has also been put to unnecessary and avoidable expenses. It is therefore entitled to be compensated with costs. Hence, the petition is dismissed with costs. The petitioner shall pay costs quantified at Rs.50,000/- to respondent no.1.

[Smt. R. P. SondurBaldota]