

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

Date of decision: February 12, 2016

+ O.M.P. 10/2016, IA 2096/2016

B. KAPOOR

..... Petitioner

Through: Mr. Amit Dubey, Adv.

versus

UNION OF INDIA THROUGH: SR.DEN/C/NORTHERN
RAILWAY

..... Respondent

Through: Mr. J.K. Singh, Standing
Counsel for Railway

CORAM:

HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J. (Oral)

IA 2096/2016

This is an application filed by the petitioner seeking condonation of four days delay in filing the instant petition. The delay of four days is beyond the period of three months but before the expiry of 30 days thereafter.

For the reasons stated in the application, the delay stands condoned. Application is disposed of.

O.M.P. 10/2016

1. The challenge in this petition under Section 34 of the Arbitration & Conciliation Act, 1996 is to the Award dated October 14, 2015, passed by the learned Sole Arbitrator, whereby, the learned Arbitrator has granted

the following reliefs to the petitioner herein:-

(i) for execution of work for Rs.96,643/- allowed.

(ii) for PVC bill for Rs. 2,00,000/- allowed.

(iii) refund of Earnest Money Rs.1,10,000/- allowed.

(iv) refund of Performance Guarantee Rs.2,94,200/- allowed.

(v) refund of Security Deposit Rs. 1,84,056/- allowed.

Further, interest @ 9% per annum is allowed on the aforesaid amounts from the date of the award till realisation.

2. The challenge in this petition, as urged by the learned counsel for the petitioner, is limited to the item no.2 above; rejection of the plea of cost and to the denial of interest pendente lite.

3. Insofar as the claim of the petitioner to the PVC bill over and above Rs.2 Lacs is concerned, I note that the learned Arbitrator has granted the said amount to the petitioner herein i.e claim No.3 on the following finding:-

“And that being so a sum of Rs.2, 15,373/- is payable to the claimant on account of price variation under the contract dated 02.08.2010. However, as the claimant has claimed Rs. 2 lacs on account of PVC in his statement of claim and also in his affidavit, he is entitled to Rs. 2 lac only. Accordingly the claim is allowed for Rs. 2,00,000/- only.

4. Suffice to state, the Award of Rs.2 Lacs is on the basis of the claim

made by the petitioner in his claim petition. The plea of the learned counsel for the petitioner that the finding of the learned Arbitrator is utter disregard to evidence on record, which is reflected by the admission of the respondent that an amount of Rs.2,15,373/- was paid and forfeited would not hold good in view of the claim itself. Nothing precluded the petitioner to amend the claim accordingly. Given the reasoning of the learned Arbitrator, the same cannot be held to be illegal. I do not see any merit in this regard. The same is dismissed.

5. On the issue of payment of cost is concerned, the learned Arbitrator has rejected the claim of the claimant for cost, which is akin to one of the claims of the claimant under claim No.8 as cost of litigation. The learned Arbitrator has, under claim 7 & 8 referred to the fact that the petitioner in his affidavit has detailed the various amounts paid as professional charges and miscellaneous expenses, however no such details have been given in the statement of claim. The learned Arbitrator also held that the claim on account of litigation cost, the statement of claim and the affidavit do not match. It may be highlighted here, the claimant in his statement of claim had made a claim of Rs.2 Lacs as cost, whereas, in the affidavit, the petitioner had made a claim for Rs.35,000/-.

6. The learned Arbitrator was right in noting the difference in the claim statement and the affidavit. The plea of the learned counsel for the

petitioner that the petitioner had to incur cost of the litigation before the appointment of the learned Arbitrator, inasmuch as despite directions, the respondent had not appointed Arbitrator and the stand of the petitioner having been accepted and the learned Arbitrator has granted the claims to the petitioner, the learned Arbitrator should have granted the cost is concerned, suffice to state, grant of claim of cost by the learned Arbitrator need to be adjudicated keeping in view the finding of the learned Arbitrator against issue No.1, which is as under:-

Issue No.1 Whether the respondent was responsible for not completion of the contract by the extended dated i.e. 30.09.2011 and, if so , to what extent? OPC

The finding of the learned Arbitrator on issue No.1 was that “*the respondents were not responsible for non-completion of work under the Contract by the extended date*”. In other words, the learned Arbitrator held, even if certain claims of the petitioner have been granted, the same have been granted not on a finding that the respondents were responsible for non completion of work under the Contract by the extended date, which means, the petitioner was responsible for non completion of the work under the Contract by the extended date. On such a finding, even if the petitioner had approached this Court earlier for appointment of Arbitrator, cannot be a reason justifying the award of cost.

7. Insofar as the award of interest is concerned, the learned Arbitrator has granted interest at the rate of 9% per annum from the date of Award till realization, on a specific finding that the petitioner is not entitled to the interest till the date of Award. This is based on the following finding of the learned Arbitrator on interest:-

“Claim as to interest

The claimant has claimed interest @18% per annum till the date of actual payment in his statement of claim. In findings to issue no.1, it has been recorded that the respondents were not responsible for the non-completion of work, by the claimant. The claimant had closed the contract vide his letter dated 04.10.2011 Ex.C-5 and further when called upon to lead the material and apply for further extension of time vide their letter dated 05.10.2011 Ex. CW-l/D2, he did not respond as stated by him in his cross-examination. The claimant had unilaterally abandoned the work and considered end of the matter by writing letter dated 04.10.2011 Ex. C-5 followed by formal notice dated 17.10.2011 Ex. C-6 despite having been asked to lead the material vide letters dated 18.08.2011 and 22.09.2011 Ex. R-2. In view of the same the claimant is not entitled to interest till the date of the award, however, the claimant is entitled to future interest 'i.e. from the date of the award till realisation. Accordingly, the claim is allowed to that extent only and the respondent shall pay interest @6% per annum, from the date of the award and till realisation. And there shall be no order as to costs. All pending applications also stand disposed of.

A perusal of the aforesaid would reveal, the learned Arbitrator has denied the interest on a finding on issue No.1 that the respondents were not responsible for non-completion of the work by the claimant.

8. Even though, the learned counsel has sought to attack the finding of the learned Arbitrator on a reply received to a subsequent RTI query by the petitioner on December 1, 2015, which primarily relates to issuance of the release order for issue of material by the headquarters. It was the endeavour of the learned counsel for the petitioner to argue that in the absence of a release order from the headquarters, the petitioner could not have transported the material. Hence, finding of the learned Arbitrator in that regard is incorrect, suffice to state, that the reliance placed by the petitioner on an answer to RTI query subsequent to the arbitration Award cannot be taken into consideration. On the material available on record, the learned Arbitrator was justified inasmuch the witness of the respondents, on a specific query, put to him on behalf of the petitioner, has stated as under:-

“Q: I put it to you that there is no release order in respect of the material as mentioned in the aforesaid letters.

A: It is wrong to suggest that there is no release order in this regard . (Vol.) As a matter of fact, release order was issued by the Headquarter Vide No. 24.06.2011 issued under the signatures of Mr. D.K.Garg, AXEN/TSD/GZB, amongst others, pertaining to item No. (XX) J. Clamp 52 kgs.= 2500nos. From CBJ to SSB and locking bolt BG=600 nos. for which aforesaid authorization letters were issued later. It is correct that Mr. D.K.Garg under whose signature the said letter dated 24.06.2011 was issued does not sit in the head quarter. Vol. but he is the competent authority to issue

the said release order. It is incorrect to suggest that Mr. D.K.Garg is not the competent authority to issue the said release order. It is correct to suggest that the said release order does not have any reference to Mr. B. Kapoor, the claimant or his contract number. It is correct to suggest that there is no reference of the said release order in the pleadings of the respondent.”

9. A reading of the aforesaid, surely, does not suggest that the release order was not issued. The finding of the learned Arbitrator, in that regard, was justified.

10. I do not see any merit in the petition. The same is dismissed.

(V.KAMESWAR RAO)
JUDGE

FEBRUARY 12, 2016

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