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IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. 884/2012

DELHI JAL BOARD Petitioner
Through: Mr. L.K. Singh, Mr. S.K. Singh &
Ms. Saira Parveen, Advocates.

versus

RAJORA BUILDERS Respondent
Through: Mr. Sandeep Sharma, Ms. Risha Mittal &
Mr. Aditya Vashishth, Advocates.

CORAM: JUSTICE S.MURALIDHAR

ORDER

03.12.2016

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1. The challenge in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') filed by the Petitioner, Delhi Jal Board ('DJB') is to the impugned award dated 15th May, 2012 passed by the learned Arbitrator in the disputes between the Petitioner and the Respondent, Rajora Builders, arising out of the contract agreement dated 27th April, 1998 for the work of construction of 33 MGD Sewage Pumping Station at Sarita Vihar, New Delhi. The value of the work awarded was Rs. 2,98,86,326.31. The date of commencement of the work was 18th December, 1997.

2. The case of the Respondent was that despite repeated requests, drawings to start the work were not made available even till 28th January, 1998. Ultimately, a set of three drawings was sent on 20th March, 1998. Even these were neither correct nor complete. It is further stated that during the course of execution of the works, the Respondent also faced the problem of

subsoil water level (SSWL) and with a view to avoid its liability for payments of huge amounts, the SSWL was not correctly recorded and intimated by the DJB. This was contrary to the soil investigation report and the factual position of the site. According to the Respondent, as of the stipulated date of completion, the work only of the value of Rs. 1,15,45,276.4 could be completed. Due to various reasons, the work completely stopped thereafter. Later, on 16th May 2000, DJB requested the Respondent to resume the work. Thereafter, the work was completed in December 2002.

3. According to the Respondent, the Petitioner informed it that the accounts would be settled only after extension of time (EOT) was granted. The first EOT was communicated by letter dated 23rd May 2006. The letter invoking the arbitration clause was ultimately sent by the Respondent to the DJB on 1st January, 2009. DJB was called upon to make the following payments:

- (i) Payment on account of wrong/less measurement of quantities of work executed at site amounting to Rs. 46,96,211.87.
- (ii) Payment on account of cartage of steel from SAIL stockyards at Okhla and Samaipur Badli amounting to Rs. 8,909.34.
- (iii) Payment on account of extra items executed for bailing out of water as per letter no. 121 dated 18th June 1998, work done on approach road as per our letter no. 125 dated 30th June 1998 and work done for removal of silt and water as per our letter No. 145 dated 12th October 1998 amounting to Rs. 7,11,332.51.
- (iv) Consolidated losses and damages on account of non-supply of decisions, drawings and stipulated material as detailed above in clause 9 and 10 amounting to Rs. 55,77,000.

(v) Expenses borne by us on behalf of the department for watch and ward and structural security amounting to Rs. 8,00,100.

(vi) Interest on the aforesaid amounts @ 2% per month from the date on which the respective amounts became payable till the date of payments.

4. The disputes were referred to the sole Arbitrator before whom the Respondent filed its statement of claims. *Inter alia* the Respondent mentioned the various running account bills (RA Bills) that were submitted for payment and the delay in settling such RA Bills. *Inter alia* it was pointed out that on 7th September, 2001 the Respondent submitted its 20th RA Bill for net payable amount of Rs. 98,53,785.87. This was followed by escalation bill for Rs. 11,38,325.25 sent on 5th March, 2002. The extension was sought upto 31st July, 2002.

5. It is not in dispute that the work was completed by 24th December, 2002. By its letter dated 23rd May, 2006, the DJB informed the Respondent that EOT has granted upto 24th December, 2002 without levy of compensation but escalation benefits were restricted upto 11th March, 2002. By its further letter dated 5th October, 2006, the DJB required the Respondent to accept/counter sign the final bill so that the account could be finalized. It is stated that the DJB has unilaterally worked out the amount payable and this was not consistent with the actual work executed by the Respondent. Consequently, there was no question of the Respondent accepting such final bill.

6. Following up on the invocation of the arbitration clause, the Respondent filed Arbitration Petition No. 151 of 2009 and after receipt of the notice of such petition, the DJB appointed the sole Arbitrator. Before the learned

Arbitrator the Respondent filed seven items of claim as under:

- (i) Claim No. 1 was for a sum of Rs. 46,96,211.87 on account of wrong/less measurement of quantities of work. The total payment of Rs. 1,01,28,288.07 was claimed which included escalation under Clause 10 (c) (c) of the contract agreement.
- (ii) Claim No. 2 was for a total payment of Rs. 8,909.34 on account of cartage of steel from sail stockyards at Okhla and Samaipur Badli.
- (iii) Claim No. 3 was for payment of account of extra items executed for bailing out of water, work done on approach road and work down for removal of silt and water amounting to Rs. 7,11,332.51.
- (iv) Claim No. 4 was for payment of Rs. 55,83,632.29 on account of consolidated losses and damages due to non-supply of decisions drawings and stipulated material.
- (v) Claim No. 5 was for payment on account of expenses incurred by the Respondent for watch and ward and structural safety for the period from 18th August, 1999 to 1st September, 2000.
- (vi) Claim No. 6 was for interest at 18% per annum
- (vii) Claim No. 7 was for Rs. 2 lakhs on account of cost of arbitration and fees.

7. By the impugned Award dated 15th May, 2012 the learned Arbitrator awarded the following claims:

- (i) As regards Claim No. 1, Rs. 50,42,549.17 in respect of the work executed and Rs. 19,12,504.07 towards escalation under Clause 10 CC of the Contract Agreement;
- (ii) In respect of Claim No. 2, Rs. 2266.48 towards cartage of steel;
- (iii) Claim No. 3 was rejected;
- (iv) Rs. 38,65,700 under Claim No. 4;

(v) Rs. 1,52,400 under Claim No. 5,

(vi) simple interest @ 10% per annum from 24th June, 2003 till the date of the Award and if the payment was not made within two months, then interest even for the post-award period in terms of the Act.

(vii) The parties were directed to bear their respective costs.

8. Learned counsel for the Petitioner, DJB, has in the first place assailed the impugned Award on the ground that claim was barred by limitation. Referring to the letter dated 1st January, 2009 written by the Respondent invoking the arbitration clause, it is submitted that claims in para 12 thereof were not different from the final bill of the Respondent as referred to in its letter dated 17th July, 2003 addressed to the Petitioner where a complaint was made about non-payment of final bill. Referring to para 11 of the impugned Award, learned counsel for the Petitioner pointed out that the learned Arbitrator noted that the work was completed on 24th December, 2002 and the final bill for the gross value of Rs. 2,89,81,244.36 including three extra items was submitted by the Respondent thereafter. Therefore, according to learned counsel for the Petitioner, the Respondent also prepared a final bill even earlier on 17th July, 2003 and thus the claim was said to have been made more than five years later by letter dated 1st January, 2009, which was no different from that raised in the final bill. Hence, it was barred by limitation.

9. Countering the above submissions, learned counsel for the Respondent submitted that the above plea was not raised by the Petitioner either in the reply to the statement of claim or even in the present petition under Section 34 of the Act. Nevertheless, it is submitted that under the Contract

Agreement, the preparation of the final bill was to be done by DJB after the work was completed and the completion certificate was issued. Till such time, the Respondent could not even seek to invoke the arbitration clause. According to him, since the final bill was prepared only on 5th October, 2006, which was not acceptable to the Respondent, a cause of action for raising claims arose only thereafter. Therefore, according to him, the claims could not said to be barred by limitation.

10. In order to appreciate the above submissions, it is first necessary to refer to Clause 25.4 of the contract which reads as under:

“25.4 It is further provided by agreement that the party desiring to invoke arbitration clause shall distinctly specify the disputes sought to be determined by arbitration. Only dispute or disputes, out of such disputes shall be referred to the arbitration, as may be determined by the Commissioner or his nominee as arising out of and relating to the contract.”

11. The invocation of the arbitration clause by the Respondent no doubt took place on 1st January, 2009 where it made certain specific claims as noted hereinabove. However, it is not clear whether the above claims were already made by the Respondent prior to sending the final bill to the Petitioner.

12. The learned Arbitrator has dealt with the issue of limitation in paras 11, 12 and 13 of the impugned Award, which read as under:

“11. The work was completed on 24th December, 2002. Thereafter, the final bill for gross value of Rs. 2,89,81,244.36 including 3 extra items submitted by the Claimant. After completion of the claimant by the letter dated 19th June 2003 (C-118) requested the Executive Engineer to issue completion certificate. As payment of the final bill was not made request was made by the letter dated 17th July 2003

(C-120) pointing out therein that the reasons for non-payment of the final bill stated non-approval of extension of time by the Competent Authority. So the claimant requested for grant of extension of time upto 24th December 2002 by the letter dated 17th July 2003 (C-120). Extension of time having not been granted, another request by the letter dated 13th December 2003 (C-121) was made. The Respondent informed the Claimant by the letter dated 23rd May 2006 (CA-2 with the rejoinder) that time upto 24th December 2002 granted without levy of compensation with escalation benefits restricted upto 11th March 2002. But even then the final bill was not settled. On the other hand letter dated 21st November 2006 (R-24) written by the Respondent with regard to non-testing of structure hydraulically as 2% of the relevant RCC items was withheld. The claimant in response stated that the record of the water tightness test was prepared by the Respondent themselves and was in their possession. It was further stated that the letter was merely an excuse as the structure has been in operation since 2002 and there is no complaint regarding water tightness. It was also stated that the satisfactory completion of water tightness test is a condition precedent for commissioning and as commissioning has been done there is no logic behind any amount being withheld.

12. The Respondent by the letter dated 5th October, 2006 (CA-3 with the rejoinder) asked the Claimant to accept/counter sign the final bill. This was not accepted by the Claimant as according to the claimant various amounts payable were not included therein. However, no payment was made and claimant by the letter dated 1st January 2009 (C-139) invoked the arbitration.

13. The aforesaid factual position is not in dispute. The Respondent prepared the final bill only in October 2006 as informed. The arbitration was invoked on 1st January, 2009. Thus the claims of the claimant are within limitation. However the plea of limitation taken by the Respondent by taking the shelter of Section 478 of Delhi Municipal Corporation Act and under the provision of Section 96 of Delhi Jal Board providing the period of limitation of 6 months. The Claimant filed on record the judgment in the case of Lucky Star Vs. Delhi Development Authority which is also on this point and submitted that the Hon'ble Division Bench held that the period of limitation provided in Section 53B which is same as Section 478 of

Delhi Municipal Corporation Act and under the provision of Section 96 of Delhi Jal Board. Thus it is held that the reliance on Section 478 of Delhi Municipal Corporation Act and under the provision of Section 96 of Delhi Jal Board is incorrect. The claims of the Claimant are not barred by time.

13. Learned counsel for the Petitioner has laid emphasis on the sentence in para 11 that “thereafter the final bill for gross value of Rs. 2,89,81,244.36 including 3 extra items submitted by the Claimant.” According to him, this indicated that the final bill was in fact prepared and submitted by the Respondent to the DJB. He further stated that such bill was prepared prior to 17th July, 2003.

14. In the first place, it requires to be noticed that the plea regarding limitation although raised by it before the learned Arbitrator as well as in the present case, was not raised in this particular form. This was not denied by learned counsel for the Petitioner. Therefore, this itself should be a sufficient ground for the Court not to permit the Petitioner to raise it for the first time in his argument. Nevertheless, the Court has examined the statement of claims in great detail. The letter dated 17th July, 2003 which was obviously marked as C-120 is not as it is sought to be suggested by learned counsel for the Petitioner. That letter reads as under;

“The abovementioned work was completed by us in the last calendar year however our final bill has not been paid till date. On enquiry it was found that the bill is pending because of lack of approval of competent authority for the extension of time. In this regard reference is made to our letter No. RB/SV/2002/103 dated 5th March 2002 in which detailed reasons for the delay in completion of the work have been given, copy of the same is annexed herewith for your ready reference.

In view of above, it is requested that the required extension of time till the completion of work, i.e., 24th December 2002 may kindly be

granted and our final bill be paid immediately as the payments are long over-delayed.”

15. The above letter only refers to the fact that “our final bill has not been paid till date.” The next sentence states that on enquiry the Respondent found that “the bill is pending because of lack of approval of the competent authority for the extension of time”. In other words, it refers to the fact that the preparation of the final bill was pending with the Petitioner. This is consistent with the clause of the Contact Agreement which requires the Petitioner to prepare the final bill and not the Respondent. Therefore, reference to “our final bill” in the above letter is to the final bill that was pending preparation by the Petitioner and not the final bill prepared by the Respondent.

16. Learned counsel for the Petitioner referred to the ‘final bill’ which runs into four pages each in the arbitral record, is found after Exhibit C-139, i.e., letter of invocation dated 1st January, 2009. Significantly, this document is not exhibited by the learned Arbitrator. Despite considerable time being given for this purpose, the learned counsel for the Petitioner was not able to demonstrate on what documentary basis the learned Arbitrator noted in para 11 of the impugned Award that “the bill for gross value of Rs. 2,89,81,244.36 including three extra items was submitted by the Claimant.” There is no reference of any letter or document or exhibit.

17. The Court therefore, finds no factual basis in the Petitioner’s contention which is being raised for the first time in his arguments before this Court that there was in fact a final bill prepared and submitted by the Respondent sometime prior to 17th July, 2003 which should be reckoned as

the starting point of limitation.

18. The admitted position appears to be that the final bill was prepared by the Petitioner only in October 2006 and therefore, this was shown correctly by the Respondent as the starting point of limitation as far as the Respondent's claim was concerned. On that basis, it cannot be said that claims of the Respondent were barred by limitation.

19. The Court, therefore, finds that no error has been committed by the learned Arbitrator as far as the point regarding limitation is concerned.

20. Learned counsel for the Petitioner then assailed the impugned Award on merits. His submission was that Claim No. 1 which was regarding measurement of SSWL was barred by limitation. Here again, it requires to be noticed that till such time the final bill was not prepared by the Petitioner, there was no communication whether the Respondent's RA bill which included such a claim was acceptable to the Petitioner or not. In other words, the dispute is as regards the claim that arose till such time the final bill was not prepared by the Petitioner. In ***Major (Retd.) Inder Singh Rekhi vs Delhi Development Authority (1988) 2 SCC 338*** the Supreme Court in the circumstances pointed out the period of limitation will not begin till the final bill is actually prepared. In the circumstances, it cannot be said that Claim No. 1 was barred by limitation.

21. As regards merits of Claim No. 1, the Court finds that the learned Arbitrator discussed the documents/exhibits in great detail and returned the purely factual finding as to what the Respondent was entitled to. The Court further notes that the entire amount as claimed was not awarded by the

learned Arbitrator but only a part thereof. Claim No. 2 is for an insignificant amount. Learned counsel for the Petitioner did not press for it being set aside.

22. As regards Claim Nos. 4 and 5, the Petitioner was not able to persuade the Court to hold that the Award in respect of two claims was perverse or contrary to the records. It appears to the Court that since these are purely factual findings, they could not be raised as a ground for interference in terms of Section 34 (4) of the Act.

23. The award in respect of simple interest @ 10% per annum under Claim No. 6 cannot be said to be excessive.

24. A statement was made that the Petitioner was not entitled to any compensation for delay in submission of drawings. A reference is made by learned counsel for the Petitioner to the following clause:

“2. Drawings

The tender drawings are preliminary in nature and for reference and information only for the Tenderers. The rates quoted shall hold good for all the final details for actual execution as shown on the drawings released for construction later on. No claim in regard to details on construction drawings being at variance with bid drawings shall be entertained.

The Contractor will have to proceed with the work on the basis of directions of Engineer-in-charge. Detailed drawing shall be supplied in Phases in accordance with the progress of the work. Contractor shall have absolutely no claim on the owner on the account of non-receipt of detailed drawings and will not be entitled for any compensation whatsoever on account of delay in release or issue of detailed drawings, revisions in drawings, etc. Efforts will be made however to release drawings progressively to have uninterrupted progress of construction.

It will be the responsibility of the contractor to prepare bar bending schedule based on structure drawings and get approved from Engineer-in-Chief before laying of reinforcement.”

25. In this regard, it is seen that in the impugned Award the learned Arbitrator has examined the above clause and upheld the furnishing of drawings beyond what is contemplated in the above clause. Consequently, the Court finds that no error has been committed by the learned Arbitrator in allowing Claim No. 4 to the extent indicated in the Award.

26. As regards the claim towards payment of watch and ward as well as structural safety, it appears to be entirely based on documents which proved the satisfaction of the learned Arbitrator. A reasonable estimate has been made for deployment of four watchmen by the Respondent (3 shifts + 1 reliever) at the rate of Rs. 400 per day for the same. It cannot be said that there is any unreasonable or improper for the above determination by the learned Arbitrator.

27. For all the aforementioned reasons, the Court finds that no ground is made out for interference under Section 34 of the Act. The petition is accordingly, dismissed but, in the facts and circumstances of the case, no orders as to costs.

S. MURALIDHAR, J.

DECEMBER 03, 2016/Rm