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

+ **O.M.P. (COMM) 567/2016**

THE COMMISSIONER, TRANSPORT

..... Petitioner

Through: Mr. Guru Krishnakumar, Senior Advocate
with Mr. Gautam Narayan, Mr. R.A. Iyer,
Mr. Mohan Raj & Ms. Shruthi P.,
Advocates.

versus

BSC-C&C JV

..... Respondent

Through: Mr. Navin Kumar, Ms. Rashmeet Kaur &
Ms. Arpana Majumdar, Advocates.

CORAM: JUSTICE S.MURALIDHAR

ORDER

16.12.2016

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IA No. 15580/2016 (for exemption)

1. Allowed, subject to all just exceptions.

IA No. 15582/2016 (for condonation of delay in re-filing the petition)

2. For the reasons stated in the application, the delay in re-filing the petition is condoned.

3. The application is disposed of.

IA No. 15581/2016 (for condonation of delay in filing the petition)

4. For the reasons stated in the application, the delay in re-filing the petition is condoned.

5. The application is disposed of.

O.M.P. (COMM) 567/2016 & IA No. 15583/2016 (for stay)

6. Notice. Mr. Navin Kumar, learned counsel appearing for the Respondent accepts notice.

7. At the request of the learned counsel for the parties, the petition is taken up for final hearing.

8. The challenge by the Commissioner, Transport, Government of NCT of Delhi in the present petition under Section 34 of the Arbitration & Conciliation Act, 1996 (Act) is to an Award dated 14th December, 2015 passed by the sole Arbitrator in the disputes between the Petitioner and the Respondent BSC-C&C JV, a joint venture between BSCPL Infrastructure Limited and C&C Construction Limited arising out of the contract awarded to the Respondent for the “Construction of works related to widening/modification of roads to create multiple lanes of existing carriageway for High Capacity Bus System (HCBS) between Ambedkar Nagar to Delhi Gate covering a distance of 14 kilometres.”

9. The Respondent's bid was accepted by the Petitioner on 1st August, 2006. The date of commencement of work as per contract was 5th September, 2006. It was to be completed in fifteen months, i.e. by 7th December, 2007. The actual date of completion was 26th November, 2009. After the ‘Engineer’ rejected the claims of the Respondents, it approached the Dispute Resolution Expert (DRE). However, the Petitioner did not accept the recommendations of the DRE and the matter had to be referred to Arbitration.

10. In its statement of claims before the sole Arbitrator, the Respondent contended that the delay in completion of the project was solely attributable to the Petitioner resulting in time overruns and additional costs and losses being incurred by the Respondent. The breaches of the contract by the Petitioner, as cited by the Respondent in its statement of claim and for which it was seeking compensation, were as follows:

- “a. Delay in handing over of the complete Site on the start date.
- b. Delay in issuance/approval of drawings and designs.
- c. Non-clearance of hindrances throughout the work Site.
- d. Frequent and large scale changes in designs, specifications and scope of the work by the Engineer.
- e. Non-supply of control points.
- f. Stoppages of work and instructions to delay the work by the Engineer and
- g. Wrongful withholding of rightful dues leading to cash flow problems.”

11. The case of the Petitioner, on the other hand, was that notwithstanding the grant of extension of time (EOT) without levy of liquidated damages (LD), Clause 27 of the conditions of contract required the claimant/Respondent herein to execute the work in terms of the programme as agreed. It was contended that the Respondent deliberately avoided upgrading the programme and resource planning in spite of reminders from ‘Engineer’. The Petitioner claimed before the learned Arbitrator that the project camp site handed over to the Respondent on 8th September, 2006 and not on 8th September, 2007 as claimed by the Respondent.

12. The learned Arbitrator has, after analysing the evidence placed on record, concluded as under in the impugned Award:

i. Minutes of the pre-bid meeting held on 17th March, 2006 indicated that the full site was not available with the Petitioner (Department)s at the start of the work.

ii. The Department did not mention the date on which the entire site was handed over to the Respondents.

iii. The statement of the Petitioner that it was for the claimant/Respondent to get the site by clearing the hindrances and encroachments and shifting of the public utilities by coordination with other Government Departments was 'thoroughly misplaced'.

iv. The contention of the Petitioner that its obligation was deemed to have been discharged on payment of the item of work pertaining to site clearance was not correct.

v. When time was the governing factor and there was a stipulated period on the basis of which the contractor's rates were based, there was an implied term that work drawings would be submitted at the proper time and changes would be communicated so as to not affect the planned progress of the work. The full site was, in fact, not made available by the Petitioner to the Respondent at the start of the work. The Petitioner also failed to contradict the contention of the Respondent that changes in the drawings were made frequently resulting in a wastage of time.

vi. The correspondence showed that the Respondent had made an effort to get the site cleared of encroachments and hindrances. However, the onus of getting the site clearance was with the Petitioner to ensure a hindrance free site on the day of the start of the work. The correspondence also showed that there had been major deviations in the design specifications and scope as a result of which the delay occurred.

vii. Learned counsel for the Petitioner avoided specific pointed answers regarding making available the site and drawings. As a result the Respondent were unable to make any worthwhile programme to execute the work. The major deviations suggested rendered the work already done redundant. The changes ordered by the Engineer on the stretch between 8 kms and 8.5 kms of the work site resulted in the work already having to be dismantled and redone.

viii. Precious time was also lost as a result of the instructions of the Engineer regarding stoppage of work as a result of which the Respondent money got blocked and its cash flows seriously affected. From the evidence placed before the Arbitrator it transpired that there was a delay between 20 and 157 days in handing over the stretches of the work. Thus, it was the Petitioner who was primarily responsible for the delay in completion of the work.

13. Mr. Guru Krishnakumar, learned Senior Advocate appearing for the Petitioner, assailed the impugned Award and in particular the above finding of the learned Arbitrator that the Petitioner was primarily responsible for the delay in completion of the work. He urged that the

learned Arbitrator proceeded on a misreading of Clauses 21 and 28 of the contract read with Clause 44 and Clauses 110.1 and 110.5 of the General Conditions Contract. Clause 21 of the agreement reads as under:

“21. Possession of the Site

21.1 The Employer shall give possession of all parts of the Site to the Contractor. If possession of a part is not given by the date stated in the Contract Data the Employer is deemed to have delayed the start of the relevant activities and this will be Compensation Event. The contractor shall be responsible for coordinate with service provider/concerned authorities for cutting of trees, shifting of utilities and removal of encroachments etc. And making the site unencumbered from the project construction area required for completion of work. This will include initial and frequent follow-up meetings/actions/discussions with each involved service provider/concerned authorities. The contractor will not be entitled for any additional compensation for delay in cutting of trees, shifting of utilities and removal of encroachments by the service provider/concerned authorities. Payment for cutting of trees and shifting of utilities as required by the concerned department shall be made by the Employer.”

14. While Mr. Krishnakumar kept emphasising the portion of the above clause, which states that the Contractor would not be entitled to any “additional compensation for delay in cutting of trees, shifting of utilities and removal of encroachments.....” and contended that it was entirely up to the Respondent to ensure that the site was free from all encumbrances, he failed to refer to any material on record, which would indicate that the Petitioner did give possession of “all parts of the site” to the Respondent. He also took exception to the fact that an adverse inference was drawn by the learned Arbitrator merely on account of EOTs having been granted by the Petitioner without the LD.

15. EOT is contemplated under Clauses 28.1 and 28.2 of the contract. He referred to the letters dated 27th March, 2008 and 28th November, 2008 written by the Petitioner to the Respondent in this regard. In the letter dated 27th March, 2008, the Respondent was informed that it was being granted EOT up to 30th September, 2008 without LD as contemplated by Clause 29 of the Agreement but on the specific stipulation that this extension will not enable it for any compensation by way of claim “towards idle labour, idle supervision, idle deployment of machinery and plant, additional overhead charges or any other similar item.” The subsequent letter dated 28th November, 2008, granting EOT up to 30th November, 2008 is identically worded. These are unilateral declarations by the Petitioner and cannot be said to be binding on the Respondent. In any event there is nothing to indicate that the Respondent waived its right to question the above declarations. This was in fact the subject matter of the dispute which was referred to arbitration.

16. It was then contended that under Clause 24.1 if the Respondent was unhappy with the decision of the Engineer as regards EOT, it should have raised a dispute within 30 days thereof. The fact remains that the Respondent did raise the dispute in respect of the delays on the part of the Petitioner that resulted in the timelines being breached. The matters were indeed referred to the Engineer in the first place then to the DRE and finally to arbitration.

17. Clauses 110.1 and 110.5 virtually repeat the wording of clause 21 and therefore do not particularly help the case of the Petitioner as regards the factual finding that possession was given of the clear site only in stages

and not in one go at the time of entering into the contract. The impugned Award shows that since the Petitioner was not forthcoming with a clear answer as to when exactly the possession of the site had to be given the Arbitrator was constrained to prepare a questionnaire seeking specific answers from counsel for the parties. The fact of the matter was that there was no clear evidence placed before the Arbitrator and even before this Court to substantiate the claim of the Petitioner that the entire site was made available to the Respondent in September 2006 as is claimed by the Petitioner.

18. The Court is, therefore, not persuaded to hold that the learned Arbitrator's finding that it was the Petitioner who was responsible for the delays is perverse or contrary to the evidence on record.

19. At this juncture it is required to be noticed that under the Act as amended with effect from 23rd October, 2015, the scope of interference has been considerably restricted. Explanation 2 to Section 34(2) of the Act makes it clear that for the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute." The high threshold for what could be said to be "in conflict with the public policy of India" is set out in the amended Explanation 1, which reads as under:

"Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

- (i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or
- (ii) it is in contravention with the fundamental policy of Indian law;

or

(iii) it is in conflict with the most basic notions of morality or justice.”

20. Keeping in view that there is no scope for a merit review and keeping in view that the Petitioner has to satisfy the Court that the three factors enlisted in Explanation 1 to Section 34(2) of the Act exist in the present case, the Court proceeds to examine the challenge to the specific findings on the individual claims.

21. Mr. Krishnakumar assailed the impugned Award in respect of Claim No.4, which was compensation due to time overrun on account of changes and delays caused by the Petitioner and breach of contractual obligations. As already noticed, the finding in this regard of the learned Arbitrator attributing the delays to the Petitioner has not been shown to be perverse or contrary to the evidence on record. The decision in respect of claim No.4 was therefore, consequential to the above finding. It was urged that the learned Arbitrator failed to notice that for the period of delay, the Petitioner had given the benefit of price variation to the Respondent in terms of Clause 47.1. According to Mr. Krishnakumar, in that view of the matter, there was no scope for giving the Respondent the benefit of compensation events in terms of Clause 44.1.

22. It is seen that the compensation events under Clause 44.1 include the employer not giving “access to a part of the site by the site possession date stated in the contract data” [clause 44.1(a)] or the Engineer not issuing drawings, specifications or instructions required for execution of works on time [clause 44.1(c)] both of which in the present case have been shown to

factually exist by the Respondent and were to be unable to be effectively countered by the Petitioner before the learned Arbitrator. Nothing in Clause 44.1 indicates that the benefit of those compensation events will not be extended if the Contractor is given the benefit of price variation under Clause 47.1. While the concept of price variation/price adjustment takes into account the “increase or decrease in rates and price of labour, materials, fuels and lubricants”, etc. the benefit of compensation for the contingency specified in Clause 44.1 need not include those very items and may be for idle machinery, idle work force and so on. Consequently the Court is unable to be persuaded to hold that the decision of the learned Arbitrator in respect of Claim No.4 suffers from any perversity calling for interference by the Court.

23. Mr. Krishnakumar took exception to the finding of the learned Arbitrator regarding the records maintained by the Respondent and its reliability. It is submitted that the Arbitrator proceeded on conjectures and surmises since sufficient documents were, in fact, not produced by the Respondent.

24. In this regard it is seen that the learned Arbitrator has proceeded on the basis that even if it is presumed that the records maintained by the Respondent were not trustworthy there was no denying of the fact that the delay had occurred and EOTs were granted on 8 occasions without levy of LD by giving a detailed discussion in this regard in the impugned Award. In particular it has been noted as under:

“Even if it is presumed that the records maintained by the contractor regarding idle man power and, idle machinery are not trust worthy,

there is no denying the fact that the delay, occurred in the completion of the work and the contract period was extended on 8 occasions without levy of compensation. It is pertinent to mention that the extension of time granted under clause 28 in conjunction with clause 32 and clause 44 entitled the claimant to financial compensation as per clause 45 (a), (c), (g) and (i). It is seen from the record that the first claim was submitted for the period 08.12.2007 to 30.09.2008 and the second claim was submitted from 01.10.2008 to 26.11.2009. The amount of the claim has been worked out by the claimant on page 38, Volume C-1 of S.O.C. The methodology of explanations on cost calculations in the Annexure for both the extension of time is indicated at page 39 at page 40 of the S.O.C. Volume-1. The contract data lays down that the whole site shall be handed over to the contractor on the start date. This requirement is indicated at serial no.17 of the agreement. There is no doubt that the whole site free from encumbrances was not available on the date of start of the work. In so far as the deployment of the machinery is concerned, the agreement vide page 05 lays down the no. of machines of different kinds. The Claimant has divided the claim into 4 components which are dealt as under.”

25. The learned Arbitrator has, on going through the said documents at great length, determined the amounts payable. It is not possible to undertake a merit review of the above findings in order to hold that the Award is opposed to the fundamental policy of Indian law. Likewise even as regards the grant of claim in respect of depreciation at 30% of what was claimed, it is not possible to undertake a merit review.

26. The Court has also perused the petition as drafted by the Petitioner where virtually every line of the Award and every finding is sought to be analysed threadbare. What the Petitioner intends to do is to treat the present forum as an appellate forum without appreciating that the scope of powers of the Court while examining a petition under Section 34 of the Act is not one of appeal. There is no question of the Court re-appreciating the

evidence and interfere with the Award only because a different view is possible on the evidence. Unless there is something shocking to the judicial conscience and where perversity is palpable and more importantly in the manner envisaged under Section 34 of the Act as amended with effect from 23rd October 2015, the Court is not expected to interfere with the arbitral Award.

27. The Court is not persuaded that the Petitioner has been able to make a case calling for interference with the impugned Award in the present case.

28. The petition and the application are dismissed but in the circumstances no orders as to costs.

DECEMBER 16, 2016

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S. MURALIDHAR, J.

