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IN THE HIGH COURT OF DELHI AT NEW DELHI

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O.M.P. 72/2012

AIRPORTS AUTHORITY OF INDIA

..... Petitioner

Through: Mr. Sunil Ahuja, Advocate.

versus

M/S. SATISH BUILDERS & ANR.

..... Respondent

Through: Mr. Sunil K. Mittal with Mr. Rajesh Pandey and Mr. Anshul Mittal, Advocates.

CORAM: JUSTICE S. MURALIDHAR

ORDER

19.01.2017

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1. The Airports Authority of India ('AAI') has filed this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') challenging an Award dated 26th September, 2011 passed by the sole Arbitrator in disputes between the parties arising out of a contract awarded by AAI to the Respondent for construction of CISF Barracks at Bijwasan, IGI Airport, New Delhi by a letter dated 2nd August, 2005 for a tender amount of Rs.7,26,83,509.82.

2. The completion period was 9 months and the work was to be executed by 11th May 2006. The actual date of completion was 10th October, 2006. By an order dated 9th May, 2007 in Arbitration Petition No. 110/2007, a former Judge of the High Court was appointed as sole Arbitrator. The Respondent filed 9 claims as under:

Claim	Amount	Reason
Claim No. 1	Rs. 3,46,73,039	For not recording measurements correctly, non-payment at correct rate for deviated quantity beyond deviation limit, less payment for extra and substituted items and wrong recoveries.
Claim No. 2	Rs. 82,97,286.12	On account of interest @ 18% p.a. on due amounts impounded wrongly, delayed payments.
Claim No. 3	Rs. 49,49,605	For damages during extended period for unutilized/under utilized deployment of machinery tools, plants etc.
Claim No. 4	Rs. 3,10,500	For damages during extended period for deployment of establishments, site staff supervisors etc.
Claim No. 5	Rs. 44,000	For employing guards for 55 days after completion.
Claim No. 6	Rs. 43,59,500.08	Under Clause 10 CC
Claim No. 7		For release of deposited bank guarantee amount in lieu of deducted secured deposits during the currency of the works.
Note:	This claim 7 was withdrawn by the respondent claimant during the arbitral proceedings as after	

	completing the defect liability period on 10.10.07, the bank guarantee was released to the claimant on 18 th October, 2007.	
Claim No. 9	Rs. 2,00,000	For arbitration proceedings
Claim No. 9	Interest @ 18% on the amounts	

3. Initially, an Award dated Nil was passed by the sole Arbitrator. Subsequently, on 26th September, 2011, the learned Arbitrator passed a correction Award under Section 33 of the Act correcting the figure of Rs.1,50,000 in place of Rs.15,00,000 as mentioned in the earlier Award for Item 12 under Statement No. 11.

4. As far as the present petition is concerned, the extent to which the challenge has been raised is depicted by AAI in a tabulated form as under:

S. No.	Statement No. with item	Claimed Amount (Rs.)	Awarded Amount (Rs.)	Challenged/not challenged
Issue/Claim No.1				
1.	Statement No. 1 for all items	87,34,245.35	87,34,245.35	Challenged
2.	Statement No. 2 i. Item no.1 ii. Item no.4	34,123.00 16,34,825	34,123.00 16,34,825	Challenged Challenged
3.	Statement No. 6 i. Extra Item no. 15 ii. Extra Item no. 17 iii. Extra Item	4,76,490.57 2,21,713.51 25,999.06	54,188.09 2,21,713.51 25,999.06	Not challenged -do- -do-

	no.19 iv. Extra Item no.20 v. Extra item no.29 vi. Extra item no. 40 vi. Extra item no.41 ii Extra item no. 67	49,137.48 3,96,881.14 4,42,555.77 27,488.64 25,238.91	49,137.48 6,289.80 4,42,555.77 27,488.64 25,238.91	-do- -do- -do- Challenged Challenged
4.	Statement No. 9 i. Item No. 10(i)	2,52,942.84	97,343.00	Challenged
5.	Statement No. 11 i. Withhold amount clause 7B for not laying cable. ii. Non execution of LT cables in cable ducts item 10. iii. Refund under Item 12.	21,46,549.24 45,000.00 1,50,000.00	21,46,549.24 45,000.00 1,50,000.00	Challenged -do- Not challenged
Issue/Claim No.2				
1.	Statement No. 1			

	i. Item No.1	94,197.66	Interest @ 12%	Challenged
	ii. Item No.3	1,98,811.55	-do-	-do-
	iii. Item No.4	8,12,486.63	-do-	-do-
	iv. Item No.5	22,36,686.90	-do-	-do-
Issue No.7/Claim No.6				
Award for Recalculating the Escalation under clause 10CC for material and labour considering the awarded claims under issue/claim No. 1				Challenged
Issue No. 9/Claim 8 & Issue No. 10/Claim 9				
The arbitration costs expenses and Interest awarded 12%				Challenged

5. As regards the Award of Rs. 87,34,245.34 under Claim No. 1, the submission on behalf of AAI is that the learned Arbitrator wrongly relied upon a letter dated 22nd June, 2005 relating to modes of payment of Running Accounts ('RA') bills, ignoring the fact that the pre-final and final bills were to be paid for the executed BOQ quantities at agreed quoted rates. It is submitted that Clause 12 of the contract provided for extra/substituted quantities/items, and the formula prescribed under Clause 12 and Clause 12A was to be invoked for extra/substituted items being executed. Instead, the learned Arbitrator took the total quantity at quoted rates by holding that the letter dated 22nd June, 2005 superseded the terms and conditions of the contract.

6. In response, it is pointed out by Mr. Sunil K. Mittal, learned counsel appearing for the Respondent that AAI has to meet a high threshold for persuading the Court to reject the Award as the findings returned are purely factual findings. He submitted that the Award in respect of Claim No. 1 was passed after a detailed discussion by the Arbitrator of the evidence on record as well as the applicable clauses and, therefore, does not call for inference.

7. The learned Arbitrator noted that the negotiation letter dated 22nd June, 2005 contained the proposal/offer of the Respondent which was accepted and acted upon by AAI. When this letter was read with the tender letter dated 2nd August, 2005, it was evident that “a specific agreement was arrived at between the parties which would override all other general terms and conditions regarding mode of payment of running bills on the one hand and pre-final and final bills on the other hand.” In dealing with the submission of AAI that the negotiation letter was confined only to the running bills including deviation limit up to 25%, the learned Arbitrator pointed out that “the expression ‘justified rate of all items of bills’ occurring twice in the penultimate para of the negotiation letter clearly points out to the contrary that running bills of all items of bill, including the item of extended deviated quantity would be paid at justified rates, as that was lower of the two under a comparative statement.”

8. Consequently, the learned Arbitrator understood the agreement between the parties to be that the running bills of all items would be paid at justified rates minus 15.5% i.e., at 84.5% whereas the pre-final and final bills would

be paid at the quoted rates. It is on this basis that Claim No. 1 was allowed after the learned Arbitrator returned a factual finding that AAI paid the agreed rate only for the agreed quantity plus 5% of the deviated quantity whereas the remaining was paid at a lesser rate of Rs. 115.08 for item 1/1.2 of Statement No. 1 of the modified statement, whereas for the entire quantity of 6810.12 CUM, payment had to be made at quoted rate in the final bill.

9. The Court finds that the learned Arbitrator has not only discussed the evidence in sufficient detail but has accounted for the principle behind Clause 12 of the agreement while returning the above findings. The Court is unable to discern any legal infirmity as regards the Award in respect of Claim No. 1.

10. It is next submitted that in awarding the claim towards earth work and RCC work, the learned Arbitrator ignored Clause 16. The focus here was on Item No. 1 and Item No. 4 under Statement No. 2. It is submitted that the Arbitrator wrongly awarded the amount of Rs. 16,34,825 for the entire quantity of 5819.73 CuM of RCC work although the contractor had not raised any written objection in terms of Clause 16 of the contract that the measurements for the RCC work had been wrongly recorded. It is further stated that while awarding Rs.34,123 for the digging of trenches, the learned Arbitrator did not consider the fact that the said work was never executed at site. The inadvertent recording of such measurement was cancelled in the measurement books ('MBs') and was duly accepted by the Respondent Contractor.

11. Clause 16 of the contract stipulates that the contractor should give not

less than 7 days' notice to the Engineer for measurement of any work before it is covered up or placed beyond reach of measurement. A perusal of the Award reveals that the BOQ items in question provide that payment of Rs. 500 per CuM would be made if ready mixed cement concrete was provided with pump at the site in addition to the agreed rate of Rs. 3600 for providing and laying in position the machine batched machine mixed and machine vibrated design mixed cement concrete. Before the learned Arbitrator, it was not disputed that the ready mixed cement concrete was brought from a plant at the site and was laid with the help of pumps at the site. It was pointed out that the rate of Rs.3600 per CuM is payable for a joint activity, viz., for 'providing' and 'laying in position'.

12. The learned Arbitrator noted that laying of the ready mixed cement concrete with pumps at the site was a substituted item and altogether different from laying in position the machine batched machine mixed concrete at the site. It is in this context that the learned Arbitrator held that the Contractor was entitled to extra payment of Rs.500 per CuM and to a sum of Rs.16,34,825.

13. The Court is not persuaded to hold that this part of the Award lacks any analysis or reasons. The jurisdiction under Section 34 of the Act does not envisage a merit review.

14. Likewise, as regards the amount for digging of trenches in the sum of Rs.34,123, apart from the fact that the amount is insubstantial, the Court finds that AAI failed to establish that the pipes and cables were covered by earth by any agency. The fact that pipes were laid for discharging rain water

was not in dispute. Further, the Arbitrator found that the trenches for the purpose of protection of pipes and cables were necessary. The Arbitrator accepted the version of the Contractor that the excavation work had in fact been done although no measurement of such trenches was undertaken. This was a question of accepting what the learned Arbitrator considered to be a more convincing explanation. The view taken by the learned Arbitrator appears to be a plausible one not calling for any interference.

15. The next item of challenge is to the award in respect of extra Item No. 41 (fixing MS tower bolts) and extra Item No. 67 (exterior paint). Here again, the learned Arbitrator noted that there was no serious opposition by AAI. In making this part of the Award, Clause 12 of the contract was discussed in sufficient detail. Interestingly, there were several items of claims that were not accepted by the learned Arbitrator. There appears to be a detailed claim-wise analysis of not only the clauses of contract but the facts on record. Wherever any item has been awarded, the learned Arbitrator has given complete reasons and also discussed the corresponding evidence. The Court is, therefore, not persuaded to hold that in allowing these items of claims, the learned Arbitrator either proceeded contrary to the evidence or to the clauses of the contract.

16. The next item of challenge is to the award in respect of Item No. 10 for painting work not being smooth and even (under Statement No. 9) where the deduction amount was restricted to Rs. 97,343. Under Statement No. 11 as regards the final bill, a challenge is made again to the reliance by the learned Arbitrator on the negotiation letter dated 22nd June, 2005. For the reasons

already discussed, the Court finds no error having been committed by the learned Arbitrator in relying on the letter dated 22nd June, 2005. The Award in respect of the final bill cannot be faulted.

17. There is also a challenge raised to the Award in respect of Item No. 10 (Non-execution of LT cables) under Statement No. 11, the measurements for which were not to be found in the MB. A sum of Rs. 45,000 had been withheld for not fixing the LT cables and cable ducts, which the learned Arbitrator found to be not justified. This again was a pure finding of fact.

18. A challenge was further raised as regards Item No. 1 under Statement No. 1 (corresponding to Issue No. 2) with regard to the costs and interest which was awarded at 12% per annum on the withheld part. This again, the Court does not find to be unreasonable. The Court finds no error in the award of interest and costs.

19. None of the grounds under Section 34 of the Act can be said to be attracted warranting interference with the impugned Award.

20. The petition is dismissed but, in the circumstances, with no order as to costs.

S. MURALIDHAR, J

JANUARY 19, 2017

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