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* IN THE HIGH COURT OF DELHI AT NEW DELHI
F-258

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OMP 479/2009

MUNICIPAL CORPORATION OF DELHI Petitioner
Through: Ms. Mini Pushkarna, Standing counsel
with Ms. Anushruti and Ms. Vasundhara Nayyar,
Advocates.

versus

M/S. ASIAN TECHS-PROGRESSIVE CONSTRUCTIONS
JOINT VENTURE & ORS (ATL & PCL) Respondent
Through: None.

CORAM: JUSTICE S.MURALIDHAR

ORDER
06.01.2017

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1. The Petitioner, Municipal Corporation of Delhi ('MCD') has, in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') challenged the impugned award dated 3rd April, 2009 passed by the learned sole Arbitrator in the disputes between it and the Respondent, M/s. Asian Techs Progressive Constructions Joint Venture and Others (ATL & PCIL) arising out of the Work Order executed between the parties on 7th June, 1991.

2. The contract was for construction of multi-level underground car parking, Opposite LNJP Hospital between J.L. Nehru Marg and Asaf Ali Road, Delhi. Initially, the tenders were invited on 10th October, 1990. Subsequently, certain deviations and amendments were made in the NIT

conditions and the tenderers were invited to submit fresh bids. Pursuant thereto, the Respondent submitted a revised tender bid on 19th December, 1990.

3. In terms of the agreement executed between the parties on 7th June 1991, the date of commencement of the contract was 17th June, 1991 and the stipulated period of contract was 24 months with the stipulated period of completion being 16th June, 1993.

4. According to MCD, due to slow progress of work, the contract had to be extended for 83 months and the work was actually completed on 28th April, 1998.

5. The disputes between the parties were initially referred to the arbitration by Justice H.C. Goel, a former Judge of this Court. After the completion of the recording of evidence, Justice Goel showed his inability to continue. Subsequently, Mr. S.P. Rai, a former IAS officer was appointed as sole Arbitrator by the Commissioner, MCD.

6. It is the case of MCD that Mr. Rai did not hear either of the parties. He simply asked them to file their written submissions and further documents and passed the impugned Award on that basis. It is further submitted that the cross-examination of the MCD witness which had taken place before Justice Goel was not available on the record before Mr Rai and, therefore, was not considered by him while passing the impugned Award.

7. By the impugned Award, the learned Arbitrator allowed the Claims 1, 2,

3, 8, 10 and 15 and dismissed the remaining claims.

8. This Court has heard the submissions of Ms. Mini Pushkarna, learned standing counsel appearing for MCD. Despite one pass over, none appeared on behalf of the Respondents. This Court has nevertheless considered the reply filed by the Respondents to the present petition.

9. At the outset, it was submitted by Ms. Pushkarna that a preliminary objection raised by MCD before the learned Arbitrator regarding maintainability of the statement of claims by only one of the parties to the Joint Venture ('JV'), viz., . Asian Techs Ltd. (ATL) and not by the other JV partner, Progressive Constructions Ltd. (PCL) was wrongly rejected by the learned Arbitrator. learned Arbitrator has held that "claimants have filed due authorization and this objection has no legal force and is rejected as such."

10. In the considered view of the Court, the learned Arbitrator ought to have not made a short shrift of the above objection. It is the JV which was a party to the arbitration agreement. The statement of claim ought to have been filed by the JV and just not by one of its constituent entities viz., ATL.

11. Ms. Pushkarna further pointed out that while despatching a copy of the Award, the learned Arbitrator marked a copy thereof to "Aban Constructions Pvt. Ltd." which is not even a party to the arbitration agreement. While this is indeed an irregularity, it does not vitiate the Award on that score.

12. As regards Claim No. I, for a sum of Rs. 23,48,545.76 pertaining to difference in payment and price variation payments, according to the

Respondent, the stipulated base month for the purpose of Clause 10 CC of the Agreement should have been October 1990 since the date of tender as originally stipulated was 10th October, 1990. The case of MCD, on the other hand, was that the base month ought to be December 1990 since all the contractors were given an option of revising their financial bids by its letter dated 5th December, 1990. The contractors were therefore free to revise their price bid taking into consideration the escalation in price between October 1990 and December 1990.

13. The learned Arbitrator accepted the claim on the ground that it was not necessary for the contractor to submit a revised bid. It was held that MCD could not compel the Respondent in this regard and where no revised bid was submitted, the base month ought to be October 1990. Further, since there was no dispute about the quantum or the method of calculation, the entire amount as claimed was allowed together with interest at 12% effective six months from the date of completion to the date of realization.

14. What the learned Arbitrator appears to totally overlooked is that the Respondent had, in fact availed of the option and submitted the revised bid. MCD has placed on record a copy of letter dated 19th December, 1990 written by the Respondent to the Executive Engineer (Project) of the MCD referring to MCD's letter dated 5th December, 1990 and submitting its revised price bid in a cover. It was subsequently stated by the Respondent that the original price bid submitted by its letter dated 10th October, 1990 "may likely to be treated as superseded by the revised price bid now submitted by us".

15. In this regard reference may be made to the decision in *Gammon India Limited v. Commissioner of Customs, Mumbai (2011) 12 SCC 499* whereby the Supreme Court held that a joint venture itself was a legal entity and, therefore, action by only one of the parties to the JV could not be construed as action on part of the JV. Reference in the said decision was also made to the earlier decision of the Supreme Court in *New Horizons Limited v. Union of India (1995) 1 SCC 478*.

16. Consequently, it is held that the learned Arbitrator erred in proceeding on the basis that there was no occasion for the Respondent to have exercised the option and submit the revised bid and that the base month ought to be taken as October 1990. Since this portion of the Award is based on a failure to take into account the evidence relevant to it, the impugned Award in respect of the Claim No. 1 is set aside.

17. Claim II was for a sum of Rs. 12,35,301.58 and related to deductions @ 2% of the issue rate of steel and cement by MCD from the Respondents towards storage charges. The case of the Respondent was that it had received cement and steel directly from the suppliers and stored the same on the site, hence there was no occasion for MCD to make any claim towards storage charges. The case of MCD, on the other hand, is that in terms of the contract, the Respondent was to be provided only the work site where actual work was to be executed. However, as a goodwill gesture, MCD requisitioned an adjoining park, which was utilized by it for its offices, and allowed the Respondent to have its offices therein, including a small living accommodation for its staff. Since the land where above space was created

belonged to MCD, and manned by MCD staff, storage charges were recovered.

18. The learned Arbitrator held that, “it does not sound reason to make someone pay for something which he never availed of.” It has been pointed out by Ms. Pushkarna that MCD had in its reply before the learned Arbitrator pointed out that clarification was made by its letter dated 3rd June, 1993 (Ex.C-107) that storage charges had to be recovered as per Clause 10 of the contract. There was no obligation of providing storage space. The Respondent having availed of the storage space provided by MCD as a goodwill gesture, there was justification in MCD in recovering 2% from the bills of contractors. The Court finds that the learned Arbitrator has failed to deal with the Ex.C-107 specifically referred to by MCD in its reply. There is no mention of the relevant clause in the contract as well. The fact that the contractors had availed of office space provided by MCD was not denied by the Respondents. There was no justification in the learned Arbitrator in allowing Claim No. 2 in the manner that he has. The Award in that regard is accordingly set aside.

19. Claim No. III was for a sum of Rs. 6,99,905.60 relating to reimbursement of transportation charges for bringing cement and steel for MCD’s stores to site. In this regard, a reference was made by Ms. Pushkarna to Clause 6 which specified that the contract was an item rate contract and would cover all the charges and profits including transport. With the storage facility being close by, there was no reason for the contractor to have to transport cement and steel, the costs of which were factored into the price

quoted. The Court is of the view that an Award of Rs. 6,99,905.60 against Claim No. 3 was also unjustified and deserves to be set aside.

20. Now, turning to Claim No. VIII for a sum of Rs. 8,79,450/- on account of the additional height of the scaffoldings. The case of the Respondent that on account of the delay in finalizing the cable ducts, drains, conduits etc., the basement filling for 1.8 mts. height could not be done. Therefore, the height of portion of floor from basement had been increased and the basement floor slab had to be placed without the filling.

21. On the other hand, the case of MCD was that the contractor was expected to quote rate for all height and depth and these were part of the NIT itself. In simply allowing the entire sum in favour of the Respondent along with interest @ 12% per annum, the learned Arbitrator did not discuss any evidence in this regard submitted by the MCD. Importantly, there was no discussion of Clause 6 which stated that no extra payment was to be made. Clause 8A gave the contractor a week's time to file objections to measurements recorded by the department. No such objection was in fact preferred by the contractor to the measurement taken by the MCD Engineers. Ms. Pushkarna also referred to the table of payments to which no objection was raised by the contractor.

22. The Court finds that neither the clauses in the contract nor the documents have been discussed by the learned Arbitrator in allowing Claim No. 8 in toto. It appears to be not based on the evidence on record and therefore, is not sustainable in law.

23. The major claim was in Clause No. X against which the learned Arbitrator awarded Rs. 2,84,22,855. The learned Arbitrator based his conclusion on the delay in completion of the project due to hindrances. Among the hindrances highlighted by the learned Arbitrator are dewatering of flooded trenches, delayed payment of bills, non-availability of adequate cement and steel resulting into idle time.

24. There was clearly an overlooking of the evidence as regards the above hindrances. The learned Arbitrator himself noted that under Claim no. II that the contractor directly collected cement and steel from the suppliers and brought them the site. Consequently, the non-availability of adequate cement and steel resulting into idle time simply did not arise. Further, the learned Arbitrator himself rejected Claim No. XII in toto for costs incurred in dewatering. Likewise, Claim No. XIII for delay in payment of various running bills has also been rejected. Surprisingly, there was no discussion under Claim No. X. The claim was not supported by any evidence. The entire approach of the learned Arbitrator appears to be contrary to the settled legal position in this regard. The award in respect of Claim X is accordingly set aside.

25. In *Bharat Coking Coal Limited v. L.K. Ahuja* (2004) 5 SCC 109, the claim for loss of profit was rejected on the ground that it was incumbent on the contractor to prove that had the Contractor received the amount due under the contract, he could have utilized the same for some other business. Further, the actual loss incurred on account of idle labour or other expenditure had to be approved by placing some material on record as was

held by this Court in *All India Radio v. M/s. Unibros* 2010 (6) RAJ 217 (Del). Likewise, in the decision of *Delhi Jal Board v. M/s. Esskay Kohli* 2007 (4) RAJ 188 (Del), this Court held that claim towards machine lying idle, salary to staff etc. cannot be awarded on the basis of conjectures and surmises.

26. In the present case, since the contract was completed, there was no question of applying the Emden's Formula without the contractor actually leading evidence that it had curtailed losses. As explained in *Delhi Jal Board v. Subhash Pipes Limited* 2005 (2) Arb. LR 213 (Del), where the contract is completed, the question of compensation for loss of profit does not arise. As rightly pointed out, the contractor accepted the payment against the final bill without protest. This was an additional factor why the claim in this regard ought not to have been accepted. The decision of the Supreme Court in *P.K. Ramaiah & Co. v. Chairman & Managing Director, National Thermal Power Corporation* 1994 Supp. (3) SCC 126 supports the case of MCD in this regard. The Court, accordingly, holds that awarding of interest on the above claims was also erroneous.

27. Claim No. XV was as regards two items (i) Rs. 3,95,060 to be released in Item No. 67 of BOQ i.e., aluminium works of doors and windows, and (ii) Rs. 1,51,762 towards refund of penal recovery of reinforcement steel. The Court finds that there is absolutely no reason given by the learned Arbitrator in simply agreeing "with the argument of the Claimants." There is no reason whatsoever given. The Award in respect of Claim No. XV is set aside as it is contrary to the statutory mandate of Section 31 (3) of the Act.

28. For the aforesaid reasons, the impugned Award is hereby set aside. The petition is allowed in the above terms with no order as to costs.

S. MURALIDHAR J.

JANUARY 06, 2017

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