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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 12.05.2017

Pronounced on: 17.07.2017

O.M.P. (COMM.) 226/2017

DELHI DEVELOPMENT AUTHORITY

..... Petitioner

Through Mr. Rajiv Bansal, Sr. Adv. with
Ms. Kanika Singh, Ms. Shantala
Sankrit and Ms. Juhi Souran,
Advocates.

versus

M/s. N.N. BUILDCON PVT. LTD.

.... Respondent

Through Mr. V.K. Jhanji, Sr. Adv. with
Mr. Vineet Jhanji, Ms. Jyoti
Mandiretta, Ms. Deeksha Ladi Kakkar
and Mr. Imran Moulaey, Advs.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

I.A. No. 5829/2017

1. This is an application filed under Section 5 of the Limitation Act seeking condonation of delay of 2 days in re-filing of the objections under Section 34 of the Arbitration and Conciliation Act, 1996. For the reasons stated in the application, the same is allowed. The delay of 2 days in re-filing the objections is condoned.

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2. This is a petition filed under Section 34 of the Arbitration & Conciliation Act, 1996 seeking to set aside the arbitral award dated 02.02.2017.

3. The brief facts leading to filing of the present petition are that the petitioner floated a notice inviting tender on 29.12.2009 for the work of "Construction of 5080/4740 EWS Houses at Village Siraspur, Narela, Phase-III, Delhi. SH - Construction of 920 EWS Houses Group - IV at Siraspur including internal development and electrification. The respondent was the lowest bidder and was awarded the tender at a negotiated amount of Rs.40,12,33,062/-. The negotiated amount was arrived at pursuant to various post bid meetings.

4. It is the case of the petitioner that on 07.05.2010 the respondent was informed about the stay order pending regarding the land forming part of the site and existence of encroachments. It is urged that the respondent agreed to execute the work in such conditions where the work might even be reduced or delayed due to the said stay/encroachment.

5. On 11.06.2010 the petitioner issued a letter of award in favour of the respondent again reiterating that the land where these houses are proposed to be constructed is under court stay/encroachment and the site will be handed over in part as and when made available. An agreement was also executed between the parties. It is noteworthy that the stipulated date for starting of the work was 21.06.2010. A period of 30 months was given to the respondent to complete the work, i.e. by 20.12.2012. The work was actually completed on 15.11.2015.

6. It is the case of the respondent that lay out plan was provided to the respondent on 14.07.2010. However, some area was marked as under injunction order of the court and some area was marked as under encroachment. Further, it is the case of the respondent that in spite of complete mobilization, no work was allowed to be carried out by local

residents on the plea that the land in question belongs to them. This problem of non-availability of workable site continued for a long time despite interventions and efforts of the police. The respondent claimed to have incurred financial losses on account of the idle tools and plant, machinery, staff, labour etc. Cost of material and labour went up. It is further stated by the respondent that after a long wait, part of the site was made available and EWS housing was approved by the screening committee of DDA. This was informed to the respondent by letter dated 26.08.2011 by the petitioner. The entire project had to be completed in 30 months. However, only a part of the site was made available on 26.08.2011 for construction of 520 EWS houses against the stipulated date of start, i.e. 21.06.2010. Further part site was handed over on 16.07.2012 for construction of another 240 EWS houses nearly 25 months after the stipulated date of start i.e. 21.06.2010 whereas the total time for completion of project was only 30 months. Hence, the respondent on 01.08.2012 wrote a letter that time of construction of these houses may be considered as additional 24 months and escalation be accordingly applied and paid in terms of the Clause 10(CC) of the agreement. On 06.10.2012, the petitioner wrote a communication that the matter for escalation under Clause 10(CC) payable for 240 houses is under consideration. Various other communications have been exchanged between the parties. The respondent on 19.11.2012 wrote to the petitioner that they are not able to continue with work on account of the abnormal rise in cost of men and materials beyond the stipulated period unless escalation is paid till actual completion. However, respondent continued to work. On 27.11.2013, the petitioner informed the respondent that the case is under consideration with higher authorities. On 28.01.2015 the petitioner informed the

respondent that their request for escalation under Clause 10 (CC) had been rejected. The work was finally completed on 15.11.2015. The time was extended by the petitioner upto 15.11.2015 without levy of compensation on the plea that the delay upto date of completion is justified and the department/DDA has suffered no loss. It is in these circumstances, the respondent invoked the arbitration clause. The learned arbitrator was appointed on 21.03.2016 and has passed his award directing the petitioner to pay the respondent a sum of Rs.7,14,12,740/- under the escalation clause. Being aggrieved by the present award, the present petition has been filed by the petitioner.

7. A perusal of the award would show that there is only one claim raised by the respondent for a sum of Rs.7,20,59,334/- on account of escalation for the period January, 2013 to December, 2014 and further for payment of escalation from January, 2015 till actual completion by using formula and methodology as stated in Clause 10(CC) of the agreement. Interest and cost of proceedings have also been sought.

8. The learned arbitrator noted the facts that normally the work was to start on 21.06.2010 and was to be completed within 30 months by 20.12.2012. Part site was made available to the respondent for construction of 520 EWS houses on 26.08.2011. Another site for 240 houses was made available on 16.07.2012, i.e. nearly 25 months after stipulated date of start being 21.06.2010 whereas the total time for completion was only 30 months. The learned arbitrator noted the correspondences exchanges between the parties. Finally, it noted that the entire controversy revolved around the clause 10 (CC) of the agreement. It concluded that handing over of the site or issue of foundation drawing to start work are critical activities

and any delay in such activity completely stops the work. It concluded that the time awarded to the respondent to complete 920 houses was 30 months, so proportionate time required for completion of 240 houses was calculated to be 235 days. Taking into account the nature of hindrances, the total delay in handing over encumbrance free site was taken as 763 days. This was concluded to be the minimum justified additional period required to complete the EWS houses for which encumbrance free site was handed over only on 16.07.2012, nearly 25 months after stipulated date of start. Hence, this period from 20.12.2012 to 22.01.2015 was the justified extended period. The Award also noted that the delay of 25 months in handing over the site in a contract whereas the total work was to be completed in 30 months, is an abnormal delay and the claim for escalation would be admissible. This is so as the respondent suffered losses due to escalation in the prices of material and labour during this extended period of contract. The Award concludes that the petitioner has committed breach of contract on account of non-fulfilment of fundamental obligations which resulted in extension of contract of stipulated time. Hence, based on the calculation given in Clause 10(CC) of the agreement escalation amount has been awarded with interest.

9. I have heard the learned counsel for the parties.

10. The learned senior counsel for the petitioner has vehemently argued that under Clause 10(CC) of the agreement, no escalation can be paid for extended period of the contract even if it was fault of the petitioner. It is urged that the learned Arbitrator has re-written this clause as otherwise no escalation could have been given to the petitioner. It is stressed that the respondent was aware of existing encroachments and litigation/interim order passed by the court regarding the land as is clear from the letter awarding the

contract to the respondent dated 11.06.2010 where it is clearly stated that the part of the land where houses are proposed to be constructed is under the court stay/encroachment and the site would be handed over in part as and when made available. Having full knowledge that the full land may not be made available to the respondent on time, the respondent chose to go ahead with the contract. Hence, it is urged that now the respondent cannot turn around and seek escalation in the cost. Reliance is placed on judgments of the Supreme Court in the cases of ***Rajasthan State Mines & Mineral Ltd. v. Eastern Engineering Enterprises & Anr., (1999) 9 SCC 283*** and ***Ramnath International Construction (P.) Ltd. v. Union of India, (2007) 2 SCC 453*** to submit that the learned arbitrator has added terms to the agreement between the parties and award is liable to be set aside as escalation has been awarded contrary to the terms of the contract.

11. The learned senior counsel appearing for the respondent has stressed that the award is as per terms of the contract. Reliance is placed on the judgments of the Single Benches of this court in the case of '***Union of India v. N.N.Buildcon Pvt. Ltd.***', OMP No.259/2015, dated 21.04.2015; '***Government of NCT of Delhi, PWD v. M/s N.N.Buildcon Pvt. Ltd.***', OMP (COMM.) No.14/2017, dated 16.01.2017 and a judgment of the Division Bench of this court in the case of '***Union of India v. M/s N.N.Buildcon Pvt. Ltd.***', FAO(OS) No.438/2015, dated 01.09.2015 to stress that grant of escalation of costs by the learned arbitrator is legal and valid and for a similar clause has been upheld by the court.

12. I will now deal with the submission of learned counsel for the parties. I may see the letter dated 11.06.2010 issued by the petitioner to the respondent awarding the contract. Relevant clause reads as follows:

“As part of the land where these houses are proposed to be constructed is under court stay/encroachment, the site will be handed over in parts as and when made available. Your letter dated 7.5.2010 regarding undertaking i.e. you will not claim any damage on account of reduction in the scope of work due to non-availability of land due to court stay/encroachment for the work under reference shall also form part of the agreement.”

13. It is the case of the petitioner that it is manifest from the above communication that the respondent contractor was well aware about the hindrances/encroachments at the site. As rightly held by the learned Arbitrator, in the above communication the respondent has only agreed to give an undertaking not to claim damages on account of reduction in the scope of work due to non-availability of land. There is no mention to give a go bye to the escalation clause.

14. Reference may also be had to Clause 10 (CC) of the Agreement which reads as follows:-

“10CC. If the prices of material (not being materials supplied or services rendered at fixed prices by the Department in accordance with clause 10 & 34 thereof) and/or wages of labour required for execution of the work increase, the contractor shall be compensated for such increase as per provisions detailed below and the amount of the contract shall accordingly be varied, subject to condition that such compensation for escalation in prices shall be available only for the work done during the stipulated period of the contract. No escalation shall be paid for work executed in extended contract period even if extension of time is granted without any action under clause-2 and also no such compensation shall be payable for a work for which the stipulated period of completion is 18 months or less. Such compensation for escalation in the prices of materials and

labour, when due shall be worked out based on the following provisions.

- (i)
- (ii)"

15. This is the clause under which the learned Arbitrator has awarded escalation of price. The learned Arbitrator has observed that the site was not made available to the respondent for an initial period of more than 14 months. The site for construction of 520 houses out of 920 was made available on 26.08.2011. The second instalment of site was handed over nearly 25 months after the stipulated date. The learned Arbitrator further holds that the period of delay in critical activities is more than 25 months in a contract of total period of 30 months. Treating this to be an abnormal delay, the learned Arbitrator holds escalation clause to be admissible. It also concludes that the respondent has suffered losses due to escalation in prices of material and labour during the extended period of contract. It also notes that a person cannot take advantage of non-fulfilment of a condition performance of which has been hindered by himself. It was the responsibility of the petitioner to handover the free site to the contractor to enable him to execute the work. The delay of few months would be tolerable but not a delay of 25 months for a contract extended up to a period of only 30 months. Based on the above interpretation of the contract, the learned Arbitrator has awarded a sum of Rs.7,14,12,740/- using the formula and methodology of Clause 10 CC of the agreement which calculation is said to have been duly verified by the petitioner.

16. Reliance of the learned senior counsel for the petitioner on the judgment of the Supreme Court in the case of *Ramnath International*

Construction (P.) Ltd. v. Union of India (supra) does not support the case of the petitioner. That was a case in which the contract provided that no claim in respect of the compensation arising, as a result of extension of time will be admitted. The Supreme Court held that no compensation for the extension could have been claimed. In the present case, the contract itself provides for escalation of prices during the stipulated period. The learned arbitrator has interpreted the same to mean the date from which the site was handed over to the respondent. Hence, the said interpretation cannot be faulted with.

17. I may now deal with the judgment relied upon by the learned senior counsel for the respondent.

18. This court in the cases of ***Government of NCT of Delhi, PWD v. M/s N.N.Buildcon Pvt. Ltd.***(supra) while interpreting a similar escalation clause held as follows:-

“ 17. At this stage, it is relevant to mention that this Court while considering a petition under Section 34 of the Act does not act as an appellate court and it is not open for this Court to supplant its view over the view of the arbitrator. The only questions to be considered are whether the arbitrator had exceeded his jurisdiction and/or the award passed is opposed to the public policy of India. In this case, the view taken by the arbitrator is clearly a plausible and a reasonable view. The substratal rationale of Clause 10CC is to compensate the contractor for any variation in the price that may occur during the period of the contract. Thus, the period of the contract cannot be limited to the original period as contemplated, if additional works are awarded to the contractor after execution of the contract; plainly, some reasonable time must be provided for completion of the additional works and it is only reasonable that the said period be included while computing the stipulated period for

completion of the contract. In this case, the arbitrator found that in terms of the contract - and as accepted by GNCTD - a period of 168 days was justified on account of additional works. However, the arbitrator only allowed escalation upto the date of actual completion of civil works which was 04.03.2011. The said view cannot be stated to be perverse or patently illegal and thus, no interference is called for on this count.”

19. The above judgment would apply to the facts of the case. In the present case the learned Arbitrator has added the period when land was not made available to the respondent to commence construction and treated it to be part of the stipulated period of the contract. The view is a plausible view.

20. Interpretation of the contract is within the domain of the arbitrator. It is settled legal position that the court shall not ordinarily substitute its interpretation of the terms of the contract with the interpretation of the arbitrator. A reference may be had to the judgment of the Supreme Court in the case of *Swan Gold Mining Ltd. v. Hindustan Copper Ltd.*, (2015) 5 SCC 739. The court held as follows:

“19. The words “public policy” or “opposed to public policy”, find reference in Section 23 of the Contract Act and also Section 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996. As stated above, the interpretation of the contract is matter of the arbitrator, who is a judge, chosen by the parties to determine and decide the dispute. The Court is precluded from re-appreciating the evidence and to arrive at different conclusion by holding that the arbitral award is against the public policy.”

21. Similarly, the Supreme Court in *National Highways Authority of India vs. ITD. Cementation India Limited*, (2015) 14 SCC 21/(MANU /SC/0490/2015), held as follows:

“25. It is thus well settled that construction of the terms of a contract is primarily for an arbitrator to decide. He is entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the contract. The court while considering challenge to an arbitral award does not sit in appeal over the findings and decisions unless the arbitrator construes the contract in such a way that no fair minded or reasonable person could do.”

22. Accordingly, the present petition is without any merit and is dismissed.

JULY 17, 2017/v

JAYANT NATH, J.