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IN THE HIGH COURT OF DELHI AT NEW DELHI

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O.M.P. 35/2009

UNION OF INDIA

..... Petitioner

Through: Mr. Bhagvan Swarup Shukla, CGSC
with Mr. Shekhar Gehlot and Mr. Shambhu
Chaturvedi, Advocates.

versus

SATYA PRAKASH & BROS PVT.LTD

..... Respondent

Through: Ms. Anusuya Salwan with Mr. Abhishek
Pundir and Mr. Kunal Kohli, Advocates.

CORAM: JUSTICE S.MURALIDHAR

ORDER

22.03.2017

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1. This is a petition by the Union of India, under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act'), challenging the impugned Award dated 31st July, 2008 passed by the learned sole Arbitrator in the disputes between the Petitioner and the Respondent Satya Prakash & Bros. Pvt. Ltd. arising out of a Contract Agreement dated 21st November, 2000 whereby the Contract of Construction of 6-Lane Marginal Bund Road from Vikas Marg to NH-24 Bypass (Phase-I), S.H. Road work, Footpath Work, Drainage Work and Retaining, was awarded by the Petitioner to the Respondent.

2. The work was to be completed in nine months' time. The stipulated date

of completion was 30th August, 2001. The actual date of completion was 17th May, 2004. Extension of time ('EOT') for completion of work was granted by the Petitioner on several occasions. On each occasion, the EOT granted was without prejudice to the rights of the Petitioner to recover liquidated damages (LD). Further at the time of grant of each EOT, it was made clear that the Contractor would not be entitled to escalation. The last EOT was granted on 31st March, 2004 up to the actual date of completion i.e., 17th May, 2004. The total extended period was, therefore, 32.5 months.

3. Over six months after the date of completion, a letter was written by the Respondent to the Petitioner on 23rd November, 2004 which reads as under:

"In continuation to submission, of Extension of time for the above mentioned work, we affirm as under please:

We have not suffered any loss on account of delay in completion of this work.

We, therefore, requested that our extension of time case may please be decided on priority and accounts finalized."

4. Thereafter, on 11th March 2005, the Respondent wrote to the Executive Engineer, Public Works Department ('PWD') pointing out that withholding by the Petitioner of payment due to the Respondent was adversely affecting it. The Respondent, accordingly, requested for release of payment in a fortnight along with 24% interest payable from the date of completion. The Petitioner replied on 23rd March, 2005 pointing out that in case the Respondent had suffered huge losses, it should have stopped the work as soon as the contract period got completed. Further, the EOT was sanctioned without escalation and the Respondent had given an undertaking that it had

not suffered any losses due to prolongation of the contract period. Also, no interest was payable. It was stated in the said reply that and as soon as the required formality was completed, the payment in respect of the final bill would be made.

5. It appears that another letter was written by the Respondent to the Petitioner on 3rd August, 2005 making a claim under Clause 10CC of the General Conditions of Contract ('GCC'). The said letter adverted to the claim in respect of plasticizers used in the execution of Item No. 6.4. According to the Petitioner, the said item of work was to be carried out as per the job mix formula worked out by the Central Road Research Institute ('CRRI') or a similar agency. It was, therefore, contended that nothing extra was payable on that score. No claim on account of hindrances that occurred during the work was accepted either.

6. Aggrieved by the rejection of its demand, the Petitioner sought reference of the disputes to arbitration. A sole Arbitrator was appointed by the Petitioner on 30th June 2006. Before the learned Arbitrator, the Respondent made the following claims:

Sl. No.	Claim description	Amount claimed
1.	The amount withheld by the department from the 20 th and last bill	Rs. 10 lakh
2.	Use of plasticizers in Item No. 6.4	Rs. 6.40 lakhs
3.	The amount not paid in respect of item of Item 8.2 regarding bitumen hot sealing compound	Rs. 36,100
4.	Extra expenditure on account of hindrance	Rs. 88,39,000

5.	Non-utilization of T&P, Machinery and idle staff	Rs. 78,97,500
6.	Loss of profitability due to prolongation of contract period	Rs. 2,75,75,00
7.	Interest	18%

7. In addition to filing a statement of defence, the Petitioner filed a counter-claim to the extent of Rs. 5 lakhs.

8. By the impugned Award dated 31st July 2008, the learned Arbitrator decided the claims and counter-claims as under:

- (i) A sum of Rs. 10 lakhs was awarded in respect of Claim No. 1 i.e. withholding of the above sum against the 20th and last bill;
- (ii) A sum of Rs. 6,50,494 was awarded as regards use of the plasticizers by the Respondent in executing Item No. 6.4;
- (iii) A sum of Rs. 36,100 was awarded against Claim No. 3 regarding bitumen hot sealing compound;
- (iv) The entire period of delay was held to be on account of continuing hindrances which were to be removed by the Petitioner. Further it was held that notwithstanding the letter dated 23rd November 2004, the Respondent was not precluded from raising claims. The extra expenditure on account of the delay was required to be compensated. While Clause 10 CC *per se* was not applicable, it constituted a good parameter and methodology to calculate such damages.

(v) The costs indices approved for Delhi by the Director General (Works) were applied and 50% of the escalation during the extended period of work, which worked out to Rs. 41,60,000, was awarded.

(vi) As regards the claim for T&P, machinery and idle staff, the Delhi Analysis of Rates ('DAR 97') was applied. After a detailed calculation the total amount payable for idle staff was determined as Rs. 25.40 lakh. Keeping in view that staff could be adjusted depending upon the requirement of work at site, a sum equivalent to 40% of the sum of Rs. 25.40 lakh was considered to be appropriate. The total amount awarded under Claim 5 was Rs. 27 lakhs.

(vii) Claim No. 6 for loss of profitability was rejected.

(viii) 10% simple interest per annum on Rs. 42,31,036 for the period from 17th November, 2004 to 22nd March, 2005 and on the principal amount of Rs. 85,46,594 at 10% interest from 24th February, 2006 till the date of payment was awarded.

(ix) The counter-claim of the Petitioner was rejected. No award was made as regards costs.

9. This Court has heard the submissions of Mr. Shekhar Gehlot, learned counsel for the Petitioner and Ms. Anusuya Salwan, learned counsel for the Respondent.

10. It is pointed out at the outset that during the pendency of the present petition, the Petitioner paid the Respondent the sum awarded under Claim

No. 1. No objection was filed to the award in respect of that claim. Learned counsel for the Petitioner clarified that the challenge in the present petition to the impugned Award is confined to Claim Nos. 2, 4 and 5.

11. Claim No. 2 was for reimbursement of the cost of plasticizers used in the execution of Item 6.4. Learned counsel for the Petitioner submitted that it was made clear throughout to the Respondent that payment for the plasticizers was included in the rates of items and nothing extra was payable. He referred to the report of CRRI and submitted that it was not mandatory that the plasticizers had to be used for execution of the work. It is submitted that there was, therefore, no justification for awarding the said sum.

12. It is pointed out by learned counsel for the Respondent, and as has been noted in the impugned Award, that the design mix of required grade, which envisaged the use of plasticizers, was approved by CRRI. It was not prepared by the Respondent.

13. The Court notes that although the documents themselves may not have mandated the use of the plasticizers, the Respondent were required to abide by the approved mix design, which provided for the use of plasticizers. As observed in the impugned Award, the Respondent was left with no choice as its use. Considering that the Respondent was obliged to execute Item No. 6.4 in terms of the approved mix design and plasticizers were not covered under agreement Item 6.4, the Respondent had to be reimbursed for the use of plasticizers. The view of the learned Arbitrator, therefore, cannot be said to be based on a misreading of the clauses of the Contract. It was a plausible

view to take.

14. As regards Claim No. 4 for costs on account of various hindrances, the learned Arbitrator undertook a detailed analysis of documents place on record before him including the Respondent's letter dated 23rd November, 2004. Specific to that letter, the learned Arbitrator observed as under:

“R-12 has been examined. Claimant has stated, "We have not suffered any loss on account of delay in completion of this work. It is, therefore requested that our extension of time case may please be decided on priority and accounts finalized." It is noted that the work was declared as completed on 17th May 2004 and as per Clause 9 of agreement final bill should have been paid within 6 months, i.e. by 17th November 2004. R-12 has been written a little later, i.e. on 23rd November 2004. Claimant requested vide his letter dated 11th March 2005 (Annexure-41) to expedite the final bill which was withheld for 10 months after completion of work. Final bill has been paid thereafter on 22nd March 2005.”

15. The further specific finding returned by the learned Arbitrator on this document was as under:

"Claimant had not stated unequivocally that he would not make any claim. It also seen that undertaking has been given at the stage of finalization of Extension of Time case and final bill so as to expedite matters, as will be seen from extract of R-11 dated 23.3.2005 reproduce earlier. As such, it is held that Claimant is entitled to raise claim for adjudication"

16. Learned counsel for the Petitioner took exception to the above conclusion of the learned Arbitrator. Relying on the decision of the Supreme Court in ***General Manager, Northern Railways v. Sarvesh Chopra 2002 (4) SCC 45***, he submitted that if the Respondent wished to repudiate the undertaking given by it, then it had to do so within a reasonable time

thereafter. Further, the Respondent could have made it clear to the Petitioner that the escalation of rates or compensation for the delay would have to be paid by the Petitioner. On the other hand, the Respondent clearly stated that it had not suffered any loss.

17. It is one thing to say that the Respondent had made a statement about not having suffered any loss. It is another thing to infer from that statement that the Respondent had given up all its claims. This distinction was kept in view by the learned Arbitrator. The decision in *Sarvesh Chopra (supra)* is therefore, distinguishable on facts. In the said decision, the Supreme Court was discussing a case where the Contractor gave an undertaking not to claim compensation for the delay in completion of the work. The Court proceeded to discuss a situation under which, notwithstanding the said undertaking, claims could be raised. In the present case, there is no undertaking by the Respondent that it was either giving up or was prepared not to make any claim on account of hindrances. Therefore, the Court is unable to find any legal infirmity in the above analysis or conclusion of the learned Arbitrator.

18. The learned Arbitrator has also discussed the decisions cited before him including several decisions of this Court. There is a factual finding that the entire period of delay in the present case accounted for the general hindrances which had to be removed by the Petitioner. It was held that the extra expenditure on account of delay was required to be compensated. Even as regards Clause 10 CC of the GCC, the learned Arbitrator was clear that while the said clause was *per se* not applicable, it could constitute a good parameter for calculating the damages. It is on that basis that the learned

Arbitrator proceeded to award a total sum of Rs. 41,60,000 which was only 50% of the total escalation worked out for the extended period of work.

19. The Court finds that the impugned Award is well-reasoned. It has analysed extensively the evidence placed on record as well as the clauses of the contract in light of the law explained in several decisions of the Supreme Court and the High Courts. There is nothing in the impugned Award which can be termed perverse or arbitrary.

20. As regards Claim No. 5 which is for T&P, machinery and idle staff, the learned Arbitrator has applied DSR 97 and undertaken a detailed exercise of calculating the amount payable. Again, the entire amount claimed was not awarded. As regards idle staff only 40% of what was found payable was awarded. The total sum awarded under Claim No. 5 is Rs. 27 lakhs. The Court is not sitting in appeal over the Award of the learned Arbitrator. It is not expected to interfere with the impugned Award only because a different view is possible on the evidence placed on record.

21. There is nothing in the impugned Award which can be said to be opposed to the fundamental policy of Indian law attracting any ground under Section 34 of the Act. The petition is, accordingly dismissed, but in the circumstances, no orders as to costs.

S.MURALIDHAR, J

MARCH 22, 2017

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