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IN THE HIGH COURT OF DELHI AT NEW DELHI

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FAO(OS) (COMM) 106/2017

Date of decision 1st September, 2017

IRCON INTERNATIONAL LTD Appellant
Through Mr. Chandan Kumar and Mr.
Rahul Kumar, Advocates.
versus

SATYA PRAKASH BUILDERS LTD Respondent
Through

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE NAVIN CHAWLA

SANJIV KHANNA, J. (ORAL)

The records of the single Judge have been requisitioned and perused.

2. We have heard the counsel for the appellant in this intra-Court appeal under Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Division of the High Courts Act, 2015 read with Section 37 of the Arbitration and Conciliation Act, 1996 (A & C Act, for short) impugning order dated 13th April, 2017 by which the objection of the appellant under Section 34 of the A & C Act has been dismissed.

3. The undisputed position is that the appellant, Ircon International Limited, had entered into a contract with the respondent Satya Prakash Builders Limited dated 20th December, 2004 for construction of 811 dwelling units for the Married Accommodation Project of the Ministry of Defence at New Cantonment, Allahabad.

4. The scheduled date of completion of work was 20 months after the date of the contract i.e. 4th July, 2006. However, the contract was completed on 31st December, 2008. According to the appellant, 51st Running Account Bill and Final Bill were submitted by the respondent on 20th April, 2009 and were paid on 20th October, 2009 and 21st November, 2009.

5. As certain disputes arose during the pendency of the contract, the respondent-contractor had invoked clause 31 of the supplementary agreement whereby disputes or differences were referred to the Committee for resolution through mutual discussions, deliberation, negotiations etc. Pursuant to the letter of the respondent-contractor dated 9th June, 2006, the Committee appointed for dispute resolution examined the disputes and differences and gave its decision which was unacceptable to the respondent-contractor.

6. The respondent-contractor thereafter wrote a letter dated 25th December, 2006 for appointment of an Arbitrator. In that letter, the respondent had reserved their right to refer any further disputes that may arise between the parties to arbitration. The Competent Authority, namely Managing Director refused to appoint an Arbitrator. This decision was communicated to the respondent-contractor vide letter dated 24th January, 2007.

7. The respondent-contractor thereafter had filed petition under Section 11 of the A & C Act, which was disposed of vide order dated 1st May, 2009, directing the Managing Director to offer a panel of three retired employees of the respondent-contractor. The respondent-constructor was entitled to nominate one of them as the sole

Arbitrator. The sole Arbitrator, it was observed, would go into the claims and counter claims, if any, of the parties in accordance with law.

8. Following the aforesaid procedure, Mr. A.A. Khandey, a retired Project Director of the appellant was appointed as the sole Arbitrator vide letter dated 8th March, 2010. Paragraph 1 of the said letter states that the Managing Director of the appellant was pleased to nominate the Sole Arbitrator to adjudicate disputes/claims mentioned by the respondent-contractor in their letter dated 9th June, 2006, a copy of which was enclosed. However, paragraph 2 of the said letter states that the Arbitrator would undertake adjudication of the disputes/claims of the respondent-contractor, if any, under the A & C Act and as per the relevant clause of the contract.

9. The first objection raised by the appellant is that the learned Arbitrator had permitted and allowed the respondent-contractor to modify the amount claimed in the letter dated 9th June, 2006 and also add new claims to the claim petition.

10. The aforesaid objection raised by the appellant was considered by the Arbitrator and has been rejected in the following words:-

“Honourable High Court, in its direction to MD/IRCON has not restricted the scope of arbitration to the issues and amounts contained in the letter of 9/6/06. In fact it has **“directed that the sole arbitrator shall go into the claims and counter claims, if any, of the parties in accordance with law”**. MD/IRCON in the letter of the appointment (Dated 08.03.2010) has also requested the sole arbitrator to “undertake the adjudication of the disputes/claims of the claimant and the counter claims of the respondent, if any, under Arbitration & Conciliation Act, 1996 and as per the relevant clauses of the contract agreement between the parties”. If the intention was to restrict the claims as in petitioner’s letter of

09.06.2006, then Counter Claims of respondent could not be included in the order. Therefore the objection of respondent is not in order.

Besides more than 60 % work was executed during the intervening more than two years period after this letter. The claimant has added only those claims and amounts that could arise during the intervening period. Therefore the objection of respondent was overruled. Claimant as well as respondent was advised to submit claims and counter claims respectively in line with directions of the Honourable court, covering the complete duration of the project i.e. from start to end (5/11/2004 to 31/12/2008).”

We are in agreement with the findings recorded by the Arbitrator, which have been also affirmed by the single Judge. As noticed above, the date of completion of work, as accepted, was 31st December, 2008. The first letter invoking arbitration clause was written during the pendency of the contract on 9th June, 2006. Petition under Section 11 of the A & C Act was filed in 2007, which was again before the completion of work. While disposing of the petition under Section 11 of the A & C Act, Delhi High Court vide order dated 1st May, 2009, had directed that the Arbitrator shall go into the claims and counter claims, if any, of the parties in accordance with law. The court order did not restrict and restrain the Arbitrator to only examine and decide the claims in terms of the letter dated 9th June, 2006.

11. The next contention of the appellant pertains to claim No.1 in respect of clearing of jungle at the site of work. As per the respondent-contractor, this work was not included in Bill of Quantity (BOQ, for short) and, therefore, the respondent-contractor was entitled to Rs.7,64,740/-. This claim has been partly allowed by the Arbitrator recording the following reasons:-

7.1 Claim No. 1:- Amount Rs. 7,64,740.00

Payment of extra work done in clearing the site full of jungle & vegetation.

7.1.1 The claimant has submitted that respondents vide letter dated 23.11.2004 (Exhibit C-1/2) 18 days after award of contract on 05.11.2004, directed the claimant to ensure that site layout of all the sites in New Cantt forming part of the contract should be completed by 28th December 2004 for the approval of the Sub-area Commander. The claimant has submitted that the area was a jungle, covered with bushes and vegetation. The layout could be given only after the jungle is cleared. The contractor has further submitted that they informed the client regarding jungle clearance vide letter dated 21.12.2004 (ex.C-1/3). It is further submitted that since the item is not covered by SSR-1996, they will submit rate analysis based on market prices to enable release of payment. The respondents however denied the payment vide their letter dated 23.12.2004 (Ex.C1/4)

7.1.2 The respondents have stated the claim is not payable as the contractor should give 7 days' notice before need for execution of any item, not covered by approved BOQ arises. The respondents have further stated that the SSR -91 Part 1 Specifications Para 3.3.4, 3.6 & 3.10 cover site clearance, etc and therefore no extra payment becomes due.

7.1.3 During the hearing on 8th and 9th December 2011, instructions were given to the Petitioner to elaborate and explain the work of jungle clearance etc duly marked on site plans of different areas where the dwelling units were constructed. The claimant submitted the same vide letter No. A SPBLTD/MAP/ARB/4963 Dated 30.01.2012. The area where jungle clearance was done is detailed in drawings & summarised CH-9/1. Area is 66129.90 sqm.

7.1.4 The respondents on 23.04.2012 submitted as under:-

(i) surface excavation not exceeding 30cm & averaging 15 cm. depth:-

S1-76 13287.81sqm @ Rs. 4.55/sqm =Rs. 60,459.54.

(ii) Surface Dressing not exceeding 15cms.

S1-86 52213.23sqm@Rs.2.30/Sqm =Rs1,20,090.43

(iii) Excavation over Areas:-

S1-79 9222.17sqm@Rs.22.16/sqm =Rs.2,04,363.29

Total amount paid (i+ii+iii) plus 37% tender appreciation
=5,27,331.00

The respondent also submitted that in addition to the above, the claimant was paid Rs. 2.04 Lakhs towards excavation over areas for roads plus Rs. 27,12,288.00 for disposal of earth.

- 7.1.5** The Claimant submitted replies/ clarifications vide letter dated 27.05.2013. The respondent has not disputed that the work of jungle clearance was done by the Claimant.

7.1.6 Appreciation of evidence:-

Respondents have not disputed jungle clearance by the claimant. In fact they admit that the work has been done but payment for the same is covered in item 1 & 2 of BOQ/76/81 of SSR 1996. Item 76 covers surface excavation and item 81 covers excavation in trenches etc. Therefore none of these items cover jungle clearance. After hearing both parties, and examination of documents, I find that the details of work done has been elaborated and established. It is also clear that jungle clearing over an area of 66129.90sqm has been done by the claimant. The respondent has not made payment for this work. The revised details of the said work are:-

- (i) Clearing jungle including uprooting:- 66129.90 Sqm @ Rs 1.53=Rs1,01,17874
- (ii) Removing jungle plus uprooting- 7935.50cum@Rs.47.66/cum=Rs.3,78,205.93
- Add Tender Percentage@37% = Rs.1,77,372.32
- Total = Rs. 6,18,683.00
- The claim is substantiated.
- AWARD.....Rs. 6,18,673.00”**

12. Counsel for the appellant submits that the claim no. 1 should have been rejected for the respondent-contractor had not given 7 days' notice before execution or clearing the site to get rid of jungle and vegetation. This assertion was also made before the Arbitrator and has been rejected for the reason that the respondent-contractor had written letter dated 21st December, 2004, stating that clearing of jungle was not covered by SSR-1996 and they would be submitting rate analysis based on market price. This claim was disputed and denied by the appellant.

13. In these circumstances, we do not think that the argument of the appellant carries any weight. The submission of the appellant is rather technical for it is submitted that the respondent-contractor had not written any letter within 7 days of award of work on 5th November, 2004. The letter dated 5th November, 2004, by the appellant had directed the respondent-contractor to ensure that the site layout of all the sites in New Cantonment forming part of the contract should be completed by 28th December, 2004. We do not think that the said contention carries any weight and warrants interference with the Award.

14. The next contention of the appellant pertains to payment of difference in price of TMT bars used instead of HYSD bars. BOQ had provided HYSD bars, whereas the respondent-contractor had used TMT bars. The appellant accepts that the respondent-contractor has to be paid for the TMT bars as per clause 20 with reference to the current market price. TMT bars were not included in the BOQ and the rate was not available in MES SSR-1966.

15. During the course of hearing, learned counsel for the appellant had submitted that the actual market price of the TMT bars as per purchase invoice produced by the respondent-contractor was paid. The assertion was that the Award in fact directs payment over and above the invoice price paid. We had asked the learned counsel for the appellant to point out the relevant paragraphs of the petition under Section 34 of the A & C Act raising the aforesaid contention and objection. Reference was made to paragraph 5.8 (CC). We find that this objection was not specifically raised. This being the position, this contention has to be rejected. In sub-paragraph DD the appellant had

submitted that the contractor had claimed Rs. 50 lakhs, but the Arbitrator had awarded an amount of Rs.1.23 crores. We find that the submission is wrong for the simple reason that even in the letter dated 9th June, 2006, the respondent-claimant had made a claim of Rs.1.41 crores.

16. The third objection raised by the appellant relates to enhanced rates on account of statutory increase in wages and excise duty. The aforesaid claim was examined by the Arbitrator, who has referred to the specific notifications and thereafter, amount awarded has been computed. Counsel for the appellant has submitted that the respondent-contractor in the claims statement had used the word 'adjustment' and, therefore, the claim should have been rejected because 'adjustment' is not permissible under clause 18 of SCC. The said contention has to be rejected for the reason that the word 'adjustment', if used in the claim statement, would not justify rejection of the claim if there was increase in labour rates or wages pursuant to statutory increases and prices of goods procured had increased on account of increase in excise duty. Factually, the statutory increases are not disputed.

17. During the course of hearing, learned counsel for the appellant submitted that payment was made on account of increase in excise duty on TMT bars, whereas separate payment had been made on account of TMT bars under claim No.2. We had asked the counsel for the appellant to point out whether any such objection was raised before the Arbitrator or in the petition under Section 34 of the A & C Act. It is fairly stated that no such objection was raised before the Arbitrator or in the petition. We find that this argument was not raised

earlier and we do not know whether this is factually correct and are unable to comment on the said argument. In given circumstances, we would not allow the appellant to raise the said argument for the first time in this appeal.

18. The last submission of the appellant relates to claim for idle plant and machinery. Reference is made to certain clauses of the contract to submit that the claim should not have been entertained. This aspect has been examined in the impugned Award and dealt with in the following manner:-

“b.Loss due to Idle Machinery & Plants:- Amount
Rs.1,72,3,924/-

The petitioner has claimed Rs.1,72,53,924.00 on this account. Calculations are in Annexure-VI (b) giving the various machines at site as well as the period for which each machine and equipment remained idle. The work got delayed by more than 29 months on account of respondents and therefore the equipment and machinery must not have been utilized to the fullest. The respondent has termed the claim as illegal and not sustainable. They have stated that the claimant failed to complete the work in the allotted time due to his own failures. This is not correct as delay occurred due to the respondents as brought out in para-7.6.3 & 7.6.4 above. Besides the respondent granted extension to date of completion without imposing any penalty on the petitioner thereby accepting that delay did not occur on account of petitioner. It is a fact that when work gets delayed the plant and equipment mobilized by the contractor at site remains idle and therefore the loss. The Respondents did not state anything about the calculations of losses submitted by the Petitioner except stating that the claim is not sustainable, being a fixed rate contract. Price adjustment is not applicable in this contract as rates shall remain fixed. It is pertinent to point out that the claimant is not claiming increase in rates of BOQ but compensation for loss due to idling of plant and machinery.

I have gone through the calculations submitted by the petitioner Annexure VI (b). The rates used are from CPWD

DSR-2007 & therefore one cannot find any fault there. The number of machines is on the higher side. Half the number would easily be required for work of this type. Number of days for which machines remained idle during the course of contract would be 5 Months and not 6.5 months as claimed by the claimant. Therefore loss on this account would be Rs. $(17253924/2) \times 5/6.5 = \text{Rs.} 6636124.00$, which should be paid to the petitioner.

Award

Rs.66,36,124.00”

19. Immediately before, the Arbitrator had also dealt with the claim for loss of overhead and profit amounting to Rs.6,10,70,579/- and had rejected the same as the contract had stipulated and barred compensation for the delay and price escalation. Albeit, the claim on account of idle plant and machinery was treated as valid and maintainable for there was delay in completion of work and the respondent-contractor had suffered as the plant and machinery had remained idle. The Arbitrator has recorded that the work got delayed by more than 29 months and this was on account of the failure of the appellant. We do not see any reason to interfere with the findings recorded by the single Judge on the said claim.

20. In view of the aforesaid, we do not find any merit in the present appeal and the same is dismissed without any order as to costs.

SANJIV KHANNA, J.

NAVIN CHAWLA, J.

SEPTEMBER 01, 2017

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