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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ O.M.P. (COMM) 14/2017

GOVERNMENT OF NCT OF DELHI
PUBLIC WORKS DEPARTMENT ..... Petitioner

Through: Ms Nandita Rao, ASC with Mr Sanjay Dewanand Ms Palak Rohmetra, Advocates.

versus

M/S N N BUILDCON PVT LTD ..... Respondent

Through: Mr V. K. Jhanji, Senior Advocate with Mr Vineet Jhanji, Ms Jyoti Mendiretta, Mr Imran Moulaey and Ms Deeksha Ladi Kakkar, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

O R D E R

% **16.01.2017**

VIBHU BAKHRU, J

IA No.516/2017

1. For the reasons stated in the application, the delay in re-filing the petition is condoned.

2. The application stands disposed of.

IA No.515/2017

3. Allowed, subject to all just exceptions.

4. The application is disposed of.

CAV.40/2017

5. The learned counsel for the caveator/respondent has entered

appearance. The caveat stands discharged.

O.M.P. (COMM) 14/2017 & IA No.514/2017

6. The Government of NCT of Delhi (hereafter 'GNCTD') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') for setting aside the arbitral award dated 31.08.2016 (hereafter 'the impugned award') passed by the sole arbitrator, Sh S.K. Singhal.

7. The impugned award was made in the context of disputes between GNCTD and the respondent (hereafter 'NNBPL') in connection with the execution of the works relating to the main building, principal's residence, auditorium, girls hostel and staff quarters, including water supply, sanitary installation, drainage and internal electrical works of Shaheed Rajguru College of Applied Sciences for Women at Vasundhara Enclave, Delhi.

8. The contract for execution of the aforesaid works was awarded by GNCTD to NNBPL by its letter dated 13.03.2009. The estimated cost of the works was ₹21,37,89,580/- and NNBPL had tendered to execute the same for a sum of ₹27,70,17,042/-. The stipulated date for commencement of the works was 04.04.2009 and the works were to be completed within a period of 20 months, that is, on or before 03.12.2010. The execution of the works extended beyond the period of 20 months and the works were finally completed on 04.03.2011. The final bill dated 29.09.2012 for ₹31,76,28,140/- was raised by NNBPL, however, certain claims made by NNBPL were not accepted. This led NNBPL to invoke the arbitration clause and the sole arbitrator was appointed to adjudicate the disputes between the

parties.

9. The arbitrator considered the rival contentions and made the impugned award in favour of NNBPL. The claims awarded included claim on account of escalation to the extent of ₹38,28,686/- against NNBPL's claim of ₹1,54,79,043/- (Claim No.3); ₹7,82,700/- on account of escalation pertaining to electrical works (included as a part of Claim No. 7); and claim for bonus in the sum of ₹1,38,50,852/- (Claim No.5).

10. Ms Nandita Rao, appearing on behalf of GNCTD advanced contentions on two fronts. First, that the award of escalation under Clause 10CC of General Conditions of Contract (GCC) was perverse and contrary to the plain language of the said clause. She submitted that the said clause was amended by a circular dated 21.08.2013 in respect of Notice Inviting Tenders issued after 21.08.2013, but the arbitrator had erroneously applied the amended clause to the contract in question. She contended that the escalation was only limited to the prices/wages prevailing at the time of stipulated date of completion, that is, 03.12.2010, and the arbitrator could not have adjusted the said date by taking into consideration the time for extra items of work.

11. Second, that award of bonus - Claim No. 5 - is contrary to the express terms of Clause 2A of GCC. She submitted that in terms of the said clause, bonus was payable to a contractor at the rate of 1% of the tendered value per month (subject to the maximum limit of 5% of the tendered value) for completion of the contract ahead of the scheduled completion time. She stated that this was an incentive to the contractor for a timely completion of

the works notwithstanding any hindrances that may be faced by the contractor. She submitted that the scheduled completion time was specified under the contract as 20 months from 04.04.2009. But, the arbitrator had also considered the delays on account of hindrances as well as further time for completion of additional work in computing the scheduled time for completion for the purposes of awarding bonus and thus, in effect, had re-written the contract. She also drew the attention of this Court to the notification dated 02.05.2013 whereby the said clause (Clause 2A of GCC) was amended prospectively. She earnestly contended that the arbitrator had relied upon the amended clause to award bonus to the contractor and the same was unsustainable. She further contended that the aforesaid issue had been considered by two Division Benches of this Court and had expressed differing views. She submitted that in case of ***Navyuga Engineering Company P. Ltd v. Public Works Department and Anr.*****: FAO(OS) 264/2014 decided on 15.03.2016**, a Division Bench of this Court had upheld the decision of a Single Judge setting aside the award of such claim. She submitted that in a later decision in ***Union of India v. M/s N.N. Buildcon Pvt. Ltd.*****: FAO(OS) 438/2015 decided on 01.09.2015**, a Division Bench of this Court had taken a contrary view without considering the earlier decision in ***Navyuga Engineering Company Ltd*** (*supra*) and therefore, the said decision was *per incuriam.*

12. I have heard the learned counsel for GNCTD at length.

13. At the outset, it is necessary to refer to Clause 10CC of GCC as applicable to the contract in question and as amended by the circular dated 21.08.2013. The relevant extract of the said clause - both pre-amendment

and post-amendment - are set out below:-

CLAUSE 10 CC (*pre-amendment*)	CLAUSE 10 CC (*post amendment*)
Payment due to increase/decrease in Prices/Wages (excluding materials covered under clause 10 (CA) after receipt of Tender for Works (Page 27) If the prices of materials ....provisions of clause 5 of the contract without any action under clause 2. However, for the work done during the justified period extended as above, the compensation as detailed below will be limited to prices/wages prevailing at the time of stipulated date of completion or as prevailing for the period under consideration, whichever is less. No such compensation shall be payable for a work for which the stipulated period of completion is equal to or less than the time as specified in |Schedule F.	**Payment due to increase/decrease in Prices/Wages (excluding materials covered under clause 10 (CA) after receipt of Tender for Works (Page 27)** If the prices of materials ....provisions of clause 5 of the contract without any action under clause 2. However, for the work done during the justified period extended as above, the compensation as detailed below will be limited to prices/wages prevailing at the time of updated stipulated date of completion considering the effect of extra work (to be calculated on pro-rata basis as cost of extra work x stipulated period/tendered cost). No such compensation shall be payable for a work for which the stipulated period of completion is equal to or less than the time as specified in Schedule F.

14. A plain reading of Clause 10CC as applicable to the contract indicates that the contractor would be entitled to compensation for prices and wages prevailing at the time of the stipulated date of completion or as prevailing

for the period under consideration, whichever is less. The arbitrator had considered that in the present case, the period of execution of the works was extended on account of additional items as well as on account of hindrances. GNCTD had also accordingly extended the time for completion of the contract without levy of any liquidated damages.

15. The arbitrator found that the extension of time on account of award of additional work as per provisions of Clause 12.2 of the GCC was accepted as 168 days by GNCTD and the civil component of the works was completed on 04.03.2011, that is, after 91 days of the earlier contemplated date of completion - 03.12.2010. He, accordingly, held that even without considering the extension of time on account of hindrances, the extra period of 91 days, as required by NNBPL, was clearly justified due to additional work. He, accordingly, held that NNBPL was entitled to escalation till the actual date of completion of the works as the actual date of completion - which was 91 days ahead of 03.12.2010 but was less than 168 days - was within the contractual period for completion of works if the time for completion of additional work was included. The arbitrator held that the extended period for completion of the works on account of award of additional items would also have to be included as a part of the stipulated period of the contract. He relied on the decision of the Rajasthan High Court in ***Heera Singh v. State of Rajasthan and Ors.***: **2007 (4) ArbLR417 (Raj)** in support of his view.

16. Although, the arbitrator referred to the circular dated 21.08.2013 by which Clause 10CC was amended, however, the arbitrator did not base his decision only on the amended clause. It is seen that he relied upon the

amended clause only in support of the rationale articulated by him. This is clear from the fact that he expressly noted that the circular was not applicable to the case in hand. However, the arbitrator proceeded on the basis that the amendment introduced in Clause 10CC clearly indicated the rationale - which he described as the "thought process" - for explicitly amending the clause.

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.

18. The arbitrator also on similar principle awarded claim for the electrical component which was included in Claim No.7. No interference with the said claim is also warranted for the reasons stated above.

19. In so far as the award of bonus is concerned (Claim No. 5), the same is stipulated in Clause 2A of the GCC. The relevant clause, both pre and post amendment are set out below:-

CLAUSE 2A (*pre amendment*)	**CLAUSE 2A (*post amendment*)**
In case, the contractor completes the work ahead of scheduled completion time, a bonus @ 1% (one per cent) of the tendered value per month computed on per day basis, shall be payable to the contractor, subject to a maximum limit of 5% (five per cent) of the tendered value. The amount of bonus, if payable, shall be paid along with final bill after completion of work. Provided always that provision of the Clause 2A shall be applicable only when so provided in 'Schedule F'"	In case the contractor completes the work ahead of updated stipulated date of completion considering the effect of extra work (to be calculated on pro-rata basis as cost of extra work x stipulated period/tendered cost), a bonus @ 1% (one per cent) of the tendered value per month computed on per day basis, shall be payable to the contractor, subject to a maximum limit of 5% (five per cent) of the tendered value. The amount of bonus, if payable, shall be paid along with final bill after completion of work. Provided always that provision of the Clause 2A shall be applicable only when so provided in 'Schedule F'

20. As is apparent from the express language of Clause 2A of GCC, the same contemplates award of bonus to the contractor for completing the

works ahead of the schedule. The arbitrator had interpreted the expression 'scheduled completion time' to also include additional time for additional works as well as extension of time on account of hindrances that occurred during the course of execution of work that justified extension of time. The arbitrator had noted that in terms of the contract, extra time was permissible and the time for completion was agreed to be extended in given circumstances. The arbitrator referred to Clause 12.1 of the GCC and held that the provisions of the contract recognized extension of time on account of deviations resulting in additional costs over the tendered value.

21. The arbitrator had further found that on account of hindrances, the time for completion of the contract as extended by a period of 177 days was justified and accepted by GNCTD. The arbitrator found that the hindrances on account of which extension of time was granted had cropped up because of GNCTD '*not fulfilling fundamental obligation on their* part'. The arbitrator held that GNCTD was in breach of its fundamental obligations.

22. In the given facts, the arbitrator held that the delay on account of hindrances would also have to be included while computing the stipulated period of time. This is clearly in conformity with the rationale of awarding bonus as an incentive to a contractor to complete the works ahead of the schedule. The delay on account of GNCTD, which prevented the contractor from executing the works, would clearly have to be excluded from computing the time available to a contractor to complete the works. Looked upon from another angle, an employer cannot be heard to state that it is absolved from its liability to pay bonus - which is a part of consideration of the contract - because of its own failure to perform its obligations. GNCTD

by its actions cannot frustrate the incentive granted to the contractor. Plainly, an employer by creating hindrances and delaying the execution of the works cannot deprive the contractor of the incentive for completing the works within the time provided to it. This would clearly be unreasonable and render Clause 2A unworkable.

23. A Division Bench of this Court in ***Union of India v. M/s N.N. Buildcon Pvt Ltd.*** (*supra*), had considered a similar controversy in the context of Clause 2A of GCC and held as under:-

> "In the present case, the period of completion available to the contractor was 14 months. Because of additional work awarded to the contractor, the contractor would be entitled to additional time of four months i.e. the total time available to the contractor to complete the originally stipulated work and the additional work was 18 months. In addition, the contractor would be entitled to the benefit of the time during which delay occurred on account hindrances caused by the employer."

24. The decision in ***Navyuga Engineering Company P. Ltd v. Public Works Department*** (*supra*) may not be applicable in this case since in that case there is no finding that the delays on account of hindrances were solely on account of the employer. Clearly, any hindrances which arise in the normal course of execution, which are not caused by the employer and/or are not attributable to the employer, cannot be taken into account while computing the period for completion of the works for the purposes of awarding bonus. As stated earlier, the bonus is provided as an incentive to the contractor to adhere to the agreed timelines and to complete the works

within the stipulated period.

25. As observed earlier, an arbitral award can be interfered with only on the grounds as indicated in section 34(2) of the Act. In the given circumstances, no interference is called for with the impugned award as the award was made neither without jurisdiction nor it is in conflict with the public policy of India.

26. The petition is, accordingly, dismissed. Pending application is also disposed of.

VIBHU BAKHRU, J

JANUARY 16, 2017
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