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

+ **O.M.P. (COMM) 430/2017**

Date of decision: 1st December, 2017

VED PRAKASH MITHAL & SONS Petitioner
Through Mr. Peeyoosh Kalra, Ms. Sona
Babbar and Mr. Deepesh, Advs.

versus

DELHI DEVELOPMENT AUTHORITY & ANR.
..... Respondents
Through Mr. Pawan Mathur, Adv.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

IA No.14226/2017 (Exemption)

Allowed, subject to all just exceptions.

O.M.P. (COMM) 430/2017

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Arbitral Award dated 02.08.2017 passed by the Sole Arbitrator.

2. The disputes between the parties had arisen out of an agreement No.20/EE/RPD-6/2012-13/A/DDA for Development of 153.55 Hectare of land in Sector-36 (Part.) Phase-V, Rohini with sub head i.e. construction of 30 M ROW roads with cement concrete rigid pavement in Sec-36 (Part), Phase-V. The petitioner claims that though the site was handed over to the petitioner on 07.12.2012, due to the hindrances and protest by the local villagers sometime in February, 2013 the work came to standstill. The petitioner further claims that other hindrance of natural causes had earlier also caused delay. It is further submitted that Supreme Court, by an interim order dated 10.05.2013, directed the maintenance of status quo with respect to the land on which the work was to be executed to be maintained. This order of status quo was modified only on 30.07.2013. Thereafter, the petitioner made a request to the respondent to accept fresh rates for the execution of the work, as well enter into a supplementary agreement in this regard. As the respondent was not agreeable to the same, the petitioner vide its letter dated 05.03.2014 requested the respondent to either execute supplementary agreement with fresh rate or “close the contract” and pay the pending dues. The respondent claims that on this request, the Work Advisory Board in its meeting dated 12.05.2013 decided to foreclose the work.

3. In view of the above, the petitioner raised the following claims before the Sole Arbitrator:

“Claim No. 1 for a sum of Rs 13,08,078/- on account of release of earnest money.

Claim No.2 for a sum of Rs.41 ,45,351/- on account of release of performance guarantee.

Claim No.3 for a sum of Rs.30,00,000/- on account of work done and material brought/consumed.

Claim . No.4 for a sum of Rs.1 ,24,36,000/- on account of loss/damages on account of diminished work/delay/losses due to idle staff/machinery/watch & ward and other incidental and principal.

damages/expenses:

Cost of Rs.1 ,00,000/- has separately been claimed by the claimants.”

4. The present petition has been filed by the petitioner being aggrieved inter-alia by the denial of Claim No.4 by the Arbitrator. The Arbitrator while denying the said claim has, inter-alia, relied upon Clause 13 of the Agreement/Tender executed between the parties. The same is reproduced herein below:

“CLAUSE 13

Foreclosure of Contract due to Abandonment or Reduction in Scope of work

If at any time after acceptance of the tender, DDA shall decide to abandon or reduce the scope of the works for any reason whatsoever and hence not require the whole or any part of the works to be carried out, the Engineer-in-Charge shall give notice in writing to that effect to the Contractor and the contractor shall act accordingly in the matter. The contractor shall have no claim to any payment of compensation or otherwise whatsoever, on account of any profit or advantage which he might have derived from the execution of the works in full but which he did not derive in consequence of the foreclosure of the whole or part of the works.

The contractor shall be paid at contract rates full amount for works executed at site and, in addition, a reasonable amount as certified by the Engineer-in-Charge for the items hereunder mentioned which could not be utilized on the work to the full extent in view of the foreclosure:

- i) Any expenditure incurred on preliminary site work, e.g. temporary access roads, temporary labour huts, staff quarters and site office; storage accommodation and water storage tanks.*
- ii) DDA shall have to option to take over contractor's materials or any part thereof either brought to site or of which the contractor is legally bound to accept delivery from suppliers (for incorporation in or incidental to the work) provided, however, DDA shall be bound to take over the materials or such portions thereof as the contractor does not desire to retain. For materials taken over or to be taken over by DDA, cost of such materials as detailed by Engineer-in-Charge shall be paid. The cost shall, however, take into account purchase price, cost of transportation and deterioration or damage which may have been caused to materials whilst in the custody of the contractor.*
- iii) If any materials supplied by DDA are rendered surplus, the same except normal wastage shall be returned by the contractor to DDA at rates not exceeding those at which these were originally issued less allowance for any deterioration or damage which may have been caused whilst the materials were in the custody of the contractor. In addition, cost of transporting such materials from site to DDA stores, if so required by DDA, shall be paid.*
- iv) Reasonable compensation for transfer of T & P from site to contractor's permanent stores or to his other works, whichever is less. If T & P are not transported to either of the said places, no cost of transportation shall be payable.*
- v) Reasonable compensation for repatriation of contractor's site staff and imported labour to the extent necessary.*

The contractor shall, if required by the Engineer-in-Charge furnish to him books of account, wage books time sheets and other relevant documents and evidence as may be necessary to enable him to certify the reasonable amount payable under this condition. The reasonable amount of items on (i), (iv) and (v) above shall not be in excess of 2% of the cost of the work remaining incomplete on the date of closure, i.e. total stipulated cost of the work as per accepted tender less the cost of work actually executed under the contract and less the cost of contractor's materials at site taken over by the DDA as per item (ii) above. Provided always that against any payments due to the contractor on this account or otherwise, the Engineer-in-Charge shall be entitled to recover or be credited with any outstanding balances due from the contractor for advance paid in respect of any tool, plants and materials and any other sums which at the date of termination were recoverable by the DDA from the contractor under the terms of the contract.”

5. The Arbitrator has further held that the petitioner was unable to show any proof of employment of labour or machinery at the site during the period of claim; on the other hand, presumption would be that the claimant/petitioner would have shifted its labour or staff to some other site.

6. Arbitrator has also placed reliance on Clause 3-A of the Agreement/Tender for rejection of this claim. Same is reproduced herein below:

“CLAUSE 3A

In case, the work cannot be started due to reasons not within the control of the contractor within 1/8th of the

stipulated time for completion of work, either party may close the contract. In such eventuality, the Earnest Money Deposit and the Performance Guarantee of the contractor shall be refunded, but no payment on account of interest, loss of profit or damages etc. shall be payable at all.”

7. Learned counsel for the petitioner submits that Clause 13 reproduced above would have no application to the facts of the present case. It is submitted that in the present case, the respondent did not abandon or reduce the scope of the work but the work could not be carried out due to agitation of the villagers and later due to the order passed by the Supreme Court. He further placed reliance on judgment of Supreme Court in ***K.N. Sathyapalan (Dead) by LR's v. State of Kerala and Anr.***, 2006(4) Arb.LR 275 (SC) to contend that in that case also, Supreme Court had allowed the claim of the contractor for compensation for the loss suffered by it due to delay caused in execution of the work due to interruption of work by anti social elements.

8. I am unable to accept the said submission of learned counsel for the petitioner. Clause 13 of the Agreement/Tender states that where DDA decides to abandon or reduce the scope of the work “for any reason whatsoever”, the contractor shall have no claim for payment of any claim of compensation or payment whatsoever on account of any profit or advantage which he might have derived from the execution of the work in full, which he did not derive in consequences of the foreclosure on the whole or any part of the work. In the present case, it is admitted between the parties that due to the reason which were

not attributable to either of them, the work could not be executed and later the petitioner demanded the revision in the rate of the Agreement/Tender which was not acceptable to the respondent. It was in these circumstances that the petitioner requested for closure of the Agreement and respondent accepted the same. This would clearly amount to abandonment of the work in terms of the Clause 13 of the Agreement/Tender. In terms of Clause 13, therefore, Claim No.4 of the petition was rightly rejected by the Sole Arbitrator. The judgment in *K.N. Sathyapalan (supra)* would not be applicable to the facts of the present case due to presence of Clause 13 and also because in the said judgment. Claim was one for compensation in the extended period of work, while in the present case both parties had mutually decided to rescind the work.

9. As far as the Clause 3A is concerned, learned counsel for the petitioner, in my opinion, rightly contends that the same would not be applicable to the facts of the present case. The said Clause would apply only where the work is yet to start, however, in the present case, admittedly, work has started and therefore, this Clause has no application. However, this itself would not be sufficient for me to set aside the Award challenged before me.

10. As stated above, Arbitrator has also refused the claim on the ground that the petitioner was unable to prove the deployment of labour and machinery at the site during the relevant period. I may here quote from the Award:

“In view of the aforesaid judgment, Claimants have to actually prove the loss of profit and unless that is done,

it cannot be held entitled for the same. However, Claimants have not filed any documentary evidence to prove that it had actually deployed labour, machinery or T&P throughout the period of 9 months. In Para 14 of Preliminary Objections, the Respondents have taken an Objection stating that as per Clause 190 of the agreement Claimants was required submit to the Engineer-in-Charge a true statement of the number of labours employed, their working hours, wages paid to them for the preceding month, but It had not done the same, which shows that Claimants had not hired any such labour etc. In Rejoinder, the Claimants have simply denied the contents of para 14 of Preliminary Objection but has not shown any proof of submitting any such report. Claimants have not filed any other document to prove its claim for idle labour and it has not sought permission to lead oral evidence. Therefore, its claim towards idle labour and machinery etc. is not made out. Also, Claimants is an experienced Class-I working Contractor and it could easily have shifted its labour and staff to its any other work/site. Rather, the presumption can only be that if the environment was not conducive because of which the work could not be started, than the Claimants would definitely have shifted its labour and staff to some other site. Therefore, no amount for loss on that account can be granted to the Claimants.

Claimants have not been able to prove that throughout the period it could not take-up or execute any other work. It has also not been able to prove that under all possibilities it would have earned 15% profits as claimed by it. There are possibilities that because of inflammation increase in cost-index, prices etc. the Claimants would not have earned any profits at all or that it would have earned only some minor profits. This Tribunal notes that the Claimants have not provided any grounds to prove that it had suffered any losses because of work being held-up and prolonged.”

11. Learned counsel for the petitioner drawing reference to the table given in paragraph 3(xv) of the petition submits that complete details of the loss had been submitted before the Arbitrator. The petitioner was claiming 15% of the loss of profit and this right has been admitted in various judgments of this Court and by the Supreme Court. He further submits that the staff and machinery for which the claim had been made was mandatory to be kept at the site under the terms of the agreement. Therefore, he submits that no further proof was required to be given before the Arbitrator as a justification of this claim.

12. I am unable to agree with the said submission of the learned counsel for the petitioner. Where a claim of loss is made, proof of the same has also to be submitted before the Arbitrator. It is true that in certain cases, in absence of proof, the Court may presume a loss and Award the same. However, in the facts of the present case, where the work had come to a standstill due to firstly an agitation by the villagers and thereafter an order of status quo granted by the Supreme Court, it could not be presumed that the petitioner would have continued to maintain the staff and the machinery at the site during this period. In terms of Clause 13 of the Agreement quoted above also, the petitioner was supposed to have produced its books of accounts etc. before the Engineer-in-Charge in support of such a claim. Having not produced any evidence in support of this claim, the petitioner cannot be heard in complaint to denial of the claim.

13. I may further note that from the chart, it appears that the total claim by the petitioner during this period would have been

Rs.3,25,02,360/-, however, claim for a sum of only Rs.1,24,36,000/- had been made before the Arbitrator. The reason for such reduction should have been adequately explained before the Arbitrator, as this gives a justifiable doubt as to whether the staff and machinery was at all present at the site during the entire period in question. Learned counsel for the petitioner submits that the claim had been restricted to Rs.1,24,36,000/- as this was the claim that was raised at the initial stage of the dispute. I do not find such explanation to be of any assistance to the case of the petitioner.

14. In any case this Court, in exercise of its power under Section 34 of the Act cannot sit in appeal over the Arbitral Award. The Arbitrator is sole and final judge of the evidence led before him and until and unless it is shown that the Award is so perverse so as to shock the conscience of the Court, the court cannot intervene in the same.

15. The other challenge made by the learned counsel for the petitioner is to the denial of claim of Rs.8,13,835/- towards the balance payment for providing Granule Sub Base (GSB). It is submitted that the respondent had paid towards 90% of the value for providing GSB and the balance 10% had to be funded by the petitioner. The petitioner was therefore entitled to refund of this 10% amount once the Arbitrator has allowed all the material to be taken away and kept by the respondent. This issue has been discussed by the Arbitrator as under:

“The Claimants have also claimed Rs.8, 13,855/- towards balance payment for providing and lying GSB

(The net sum of .the said sum of Rs.8, 13,855/- and aforesaid sum of Rs.23,52,812/- comes to Rs.31,66,667/-). However, the Claimants have restricted its claim to Rs.30,00,000/- without stating any reason for the sum of Rs.1,66,667/- The Claimants have not even submitted any documentary evidence to substantiate the said claim of Rs.8,13,855/- rather, it is an admitted fact that the laying of GSB was made from the material brought by the Claimants from the material for which the secured advance already paid to the claimants by the Respondents. As such, no claim is admissible for laying GSB as stated by the claimants.”

16. Even before me, barring referring the document dated 30.01.2013, (Page 337), no explanation or proof for making such claim has been provided. I am, therefore, unable to accept the objection against this portion of the Award as well.

17. The last ground of challenge to the Arbitral Award is the denial of Award of Interest to the petitioner on the amounts awarded under different claims. The Arbitrator has declined to award interest holding as under:

“Claim for interest:-

Since, the work was rescinded in view of clause 3A and clause 13 of the agreement which clearly bars the claimants for payment of any interest I therefore, reject the claim of the interest filed by the claimants in their statement of facts, whereas, no such claim was raised by the claimants at the time of making the request for appointment of arbitrator on dated 9-2-2015.”

18. Admittedly, there is no clause in the Agreement prohibiting payment of interest.

19. Learned counsel for the respondent submits that claim of interest has been rightly denied to the petitioner as no such claim was raised before reference of disputes to the Arbitrator. In my opinion, this can be a relevant factor for denying the interest pre-reference in favour of the petitioner, however, could not have been relevant for denying even the pendentalite and future interest to the petitioner. The petitioner had made specific prayer in this regard before the Arbitrator claiming pre-reference, pendentalite and future interest. In term of Section 31(7)(a) of the Act, unless otherwise agreed by the parties, where the award is for payment of money, the Arbitral Tribunal may include in the sum for which Award is made, interest on the same at such rate as it may deem reasonable. Under Section 31(3) of the Act, Arbitrator is obliged to give reasons for the Award. In my opinion, no reason having been given by the Arbitrator for denial of the interest *pendentalite* and future interest in favour of the petitioner, same cannot be sustained. I therefore award interest @9% p.a. in favour of the petitioner *pendentalite* and till the date of payment of the awarded sum under the impugned Award.

20. In view of the above, the present petition is allowed to the limited extent as noted above with no order as to cost.

NAVIN CHAWLA, J

DECEMBER 01, 2017/vp