

Santosh

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION NO. 793 OF 2017
WITH
NOTICE OF MOTION NO. 725 OF 2018
IN
ARBITRATION PETITION NO. 793 OF 2017

Mahanagar Telephone Nigam Ltd.	...Petitioner
<i>Versus</i>	
Jay Constructions Prop. Sanjay J. Karandikar	...Respondent

Mr. Niranjan Shimpi, a/w Mr. Sanjay Gunjkar, for the
Petitioner.
Ms. Shilpa Kapil, a/w Mr. Sandip Sarode, for the
Respondent.

CORAM: G. S. KULKARNI, J.
DATED: 27th November, 2018.

PC:-

1. Heard the learned Counsel for the parties.
2. By this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('the Arbitration Act', for short), the petitioner - Mahanagar Telephone Nigam Ltd challenges the arbitral award dated 13th July, 2017 passed by the learned Sole Arbitrator. The dispute between the parties arose under a contract for civil works. By the impugned award, the learned Arbitrator has awarded Claims no.1 to 4, 6 to 8, 12, 15 and 16 as raised by the respondent - claimant in the statement of claim.

3. Facts:-

Under a tender invited by the Petitioner, the Respondent was awarded a term contract “for maintenance and miscellaneous civil work for the year 2010 - 2011 of the Petitioner's TE Building at Belapur”. The estimated cost of the tender work was Rs.27,53,500/- as notified, and the stipulated period for completion of work was of 12 months. The respondent was awarded the contract being the lowest bidder having quoted an amount of Rs.24,01,052/-.

4. The case of the Petitioner is that complete item-wise work under the contract was not awarded and only part of the contract work was performed by the respondent. Disputes have arisen as per the specific claims as made in the statement of claim.

5. The learned Arbitrator considering the rival pleadings and the evidence on record has awarded a total claim of Rs.9,65,581/- in favour of the respondent. The heads of the claims which are allowed and the amounts so awarded are as under:-

Claim no.	Heads of the Claim	Amount awarded
1	Work executed under J.O.No.5 providing railing at 3 rd and 4 th floor at Belapur TE Bldg.	Rs.1,59,194.99/-
2	Work executed under J.O.No.6, covering of sub-station trench at Belapur TE Bldg.	Rs.1,09,630.29
3	Work executed under J.O.No.7, storm water drains at back side of Belapur TE Bldg.	Rs.1,41,363.46

4	Interest on additional security deposit of amount of Rs.4,50,000/-	Interest at 9% p.a.on Rs.3,52,448/- from 5/4/2012 to 26/6/2012
6	Management services	Rs.90,000/- subject to quoted % recoverable taxes, charges as per contract agreement.
7	Job Order No.1 (work completed but payment not made)	Rs.2,15,063.23 subject to quoted % taxes, charges as per contract agreement.
8	Balance EMD and interest on same.	Rs.55,070/ (Balance EMD Rs.30,037/- and adjusted security deposit of Rs.25,033/- recovered from bills) alongwith interest @ 9% p.a. from 5.10.2012 till the award is made.
12	Loss of profits	Rs.1,43,547/-
15	Interest	Simple interest @ 9% p.a. from 4.2.2014 to the date of the Award on claim nos.1,2,3,6 and 7.
16	Cost	Rs.50,000.00

Claim Nos. 5, 9, 10, 11, 13 and 14 as made by the respondent were rejected by the learned Arbitrator.

6. It is not in dispute that the parties were granted an opportunity of adducing their evidence and a complete opportunity of a hearing by the arbitral Tribunal.

7. The only contention as urged by Mr. Shimpi, learned Counsel for the Petitioner is that qua the claims as awarded there was no evidence on record of issuance of job orders as required by the contractual conditions. It is submitted that the Respondent could not have commenced the work under the contract in regard to the different items of the work and it was only on proper instructions and concurrence of the Petitioner by issuance of job orders, the item-wise work was required to be undertaken by the

respondent. It is submitted that for any work undertaken without issuing of the job orders by the respondent no claim was maintainable. Mr.Shimpi then submitted that as regards the grievance on the findings of the learned arbitrator on the management services, the grievance is that Claim no.6 of Rs.90,000/- ought not to have been awarded as it is against the terms and conditions of the contract between the parties. It is stated that the respondent was never called upon to undertake the management services.

8. The next grievance on the award as urged on behalf of the petitioner is in regard to Claim no.12 of loss of profits. The original claim as made by the claimant was Rs.2,25,072/-. However, the learned Arbitrator has awarded an amount of Rs.1,43,547/-. The learned Counsel for the petitioner submits that there is no application of mind in awarding this claim inasmuch as the works which were undertaken were without issuance of job orders as also there was no fault whatsoever on the part of the petitioner so that a claim of this nature can be made by the petitioner. The award thus deserves to be set aside being in conflict with the fundamental policy of Indian law. Mr. Shimpi has placed reliance on the decision in **Pimpri Chinchwad New township**

Development Authority vs. Vishnudev Co-operative Housing Society and ors¹.

9. On the other hand, the learned Counsel for the Respondent has drawn my attention to the evidence/documents as placed on record which show that the work was executed. My attention is also drawn to the communication dated 2nd September, 2014 as issued by the Senior Manager (Civil), NM-II, of the Petitioner whereby the Petitioner had agreed for a joint measurement and accordingly the measurement was undertaken. It is appropriate to reproduce the findings of the joint measurement as given in the said letter, which reads thus:

Sr No.	Job order No.	Name of work	Claimed amount	Amount as per the measurements submitted by the claimant	Amount arrived after the joint measurements	Remarks
1	1	Misc Civil works day to day mtc. At Belapur TE	1,45,314.00	2,32,470.03	2,15,603.23	
2	5	Providing railing at 3 rd & 4 th floor of Belapur TE	1,63,810.00	1,59,616.83	1,59,194.99	
3	6	Covering of substation trench at Belapur TE	1,68,355.00	1,15,465.28	1,09,630.29	
4	7	Storm water drain at back side of Belapur TE	1,87,002.00	1,39,560.12	1,41,363.46	

¹Supreme Court Civil Appeal No.7649/2018. Order dt.3.8.2018

10. The learned Counsel for the Respondent also referring to the special conditions of contract and more particularly condition (i) submits that there was no requirement for prior issuance of a job order for the Respondent to undertake the different works. The said condition reads thus:

“(i) The issue of job-order(s) in writing to the contractor may take some time for completing procedural formalities. It is agreed condition of the contract that the contractor shall not refuse to commence the job within the period as required and directed by the E-in-C even before issue of job order for commencement of such work by E-in-C.”

11. Learned Counsel for the Respondent submits that the findings as arrived by the arbitral Tribunal are based on evidence and thus it would not be proper for the Petitioner to contend that the findings are without evidence. In supporting the claim of the respondent on loss of profits, reliance is placed on the decision of the Division Bench of this Court in **Mahanagar Gas Ltd. vs. Babulal Uttamchand and Co., Mumbai²**.

12. I have heard the learned Counsel for the parties as also I have perused the record.

13. On perusal of the award and the materials as placed on record, I am not inclined to accept the plea as urged by the Petitioner. Each claim has been considered by the learned Arbitrator on the evidence as placed on record. There is clear contractual condition which entitled the Respondent to undertake

²2013(2) Mh.L.J. 94.

the job work without issuance of job orders as noted above. Further, it is also not in dispute that the work was executed. There is no material placed on record to indicate that at any point of time the Respondent was prohibited from undertaking the specific works of maintenance, which formed the part of the contract. From a perusal of the material on record, it appears that the Respondent is right in contending that the technical plea of non-issuance of job order was raised as a hollow defence in the arbitral claims as made by the Respondent, and the stark reality was different.

14. It is also quite clear that the Respondent had mobilised resources on an assumption that a contract which was awarded was for total amount of Rs.24,01,052/-. Considering the well settled principles of law as clearly reflected in the decision of the Division Bench of this Court in **Mahanagar Gas Ltd.** (supra), it is seen that the award of the claim for Rs.2,25,072/- on the loss of profits is a reasonable award of claim. It cannot be said that it is not supported on evidence on record.

15. Further in regard to the claim on account of management services, the learned Arbitrator has rightly considered the very terms and conditions of the contract and the fixed rates as agreed between the parties, which were forming part of the contract. It is not in dispute that at no point of time the Petitioner was

prevented from executing any of the claims and the work of the management services as obliged to be undertaken by the Respondent under the contract. It is also not the case that the performance of the said condition was at any time mutually varied so that the said work need not be performed. In any case, there are fixed rates which are set out in the schedule (page No.48). Thus the award of the Respondents on the management of services is completely within terms and conditions of the contract and based on the evidence/material placed on record of the arbitral proceedings.

16. As regards the claim for legal fees of Rs.2,20,000/- as made by the respondent an amount of Rs.50,000/- has been awarded. It cannot be considered to be unreasonable by any standard. It is thus clear that the petitioner has failed to make out any ground under which the Court can interfere in its limited jurisdiction under Section 34 of the Act. It is accordingly rejected.

17. Considering the commercial interest of the Respondent it is, however, rejected with cost of Rs.50,000/-, to be paid within two weeks from today.

[G. S. KULKARNI, J.]