

\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

%

Decided on: 24th January, 2018

+

O.M.P. (COMM) 32/2018

SUMTECH ENGINEERS PRIVATE LIMITED Petitioner

Through : Mr.Vikas Upadhyay, Mr.Vidit
Monga and Mr.Bhanwarjit Singh,
Advs.

versus

GURU GOBIND SINGH TRICENTENARY
MEDICAL COLLEGE HOSPITAL AND
RESEARCH INSTITUTE & ANR.

..... Respondents

Through : Mr.Samrat Nigam and
Mr.Vijayender Kumar, Advs.

CORAM:
HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

CAV 58/2018

1. Counsel as above appears for the respondent/caveator.
2. The caveat is discharged.

IA No.1128/2018

3. Exemption allowed, subject to all just exceptions.
4. The application stands disposed of.

OMP (COMM) No.32/2018

5. Issue notice. The learned counsel accepts notice.
6. With the consent of the learned counsels for parties petition is taken up for hearing.
7. This is a petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred as 'the Act') against the impugned award dated 17.10.2017.
8. The brief facts of the case are as follows :
 - (a) on 05.12.2009 a letter of intent was issued by the respondent no.1 after getting approval from respondent no.2 for assigning the work of construction of 3 BHK apartments for respondent No.1;
 - (b) on 10.12.2009 a formal contract was entered between the parties. It is in relation to the payment due with regard to the work done under the said contract for which the claim had initially been filed before the arbitration tribunal and from which the present petition arises;
 - (c) on 15.04.2010 the 1st phase of the work assigned was completed by the petitioner and accordingly the same was mentioned in all the RA bills starting from 8th RA bill onwards;
 - (d) on 30.01.2011 the respondents stopped entry of petitioner in the construction site and also barred him from taking away his material left at the site;
 - (e) on 18.02.2011 the petitioner submitted final bill with the net amount due against the work done to the tune of Rs.72,37,321/-

The fact about submission of the said bail has also been mentioned in the notice sent by the petitioner;

(f) on 14.03.2011 a legal notice has been sent by the petitioner to the respondent wherein the entire breakup of his claim was provided in para-5 of the said notice, including the value of material left at the site. This is pertinent to mention here that this is an admitted document;

(g) on 16.04.2011 the respondent replied to the legal notice dated 14.03.2011 sent by the petitioner, however it was an evasive reply and no specific response was submitted with regard to the claim made by the present petitioner and also with regard to the material left at the site;

(h) in 2012 Arbitration Petition No.488/2012 was filed by the petitioner before this Court seeking appointment of an arbitrator to resolve the dispute;

(i) on 30.04.2014 the High Court asked the petitioner as well as respondent to appear before the architect and try 'to resolve their issues amicably, however the arbitration petition was kept pending to look into the outcome of the said effort;

(j) on 04.08.2014 the architect directs the respondents to make a payment of Rs.6,50,000/- to the petitioner. Later in the arbitration proceedings the architect has explained this amount as half of the value of construction material found by him at the site, the ownership of which could not be proved by the respondents and thus as the value of such material was Rs.13 lakhs so he directed for the payment of Rs.6.5 lakhs to the petitioner by the respondent;

(k) on 28.08.2014 the respondent made an offer to the petitioner to accept Rs.6.5 lakhs however the offer was rejected by the petitioners as its claim was of much higher amount and therefore the High Court disposed of arbitration petition after appointing an arbitrator in the case. The petitioner submitted its claim of approximately Rs.1.43 Crore before the arbitration tribunal and in response to the same the respondents submitted a counter claim of Rs.2 Crores against the petitioner;

(l) in July 2016 final arguments in the arbitration proceedings commenced and the same continued for 4 months i.e. till November 2016, thereafter the judgment was reserved by the arbitration tribunal;

(m) on 17.10.2017 the arbitration tribunal pronounced its award and rejected both the claim as well as counterclaim submitted in the matter, hence this petition.

9. The petitioner primarily had raised dispute viz qua two bills 12th running account bill and 14th running account bill. It is the case of the petitioner he gave a legal notice dated 14.3.2011 in which the petitioner made a reference of various amount due to it to the tune of Rs.2,29,44,586.19 and out of which payments against 11th RA were received and the remaining amount approximately of Rs.72 lakh was pending for which he prepared 12th RA bill. The payments of such 11th RA bills were allegedly cleared by 30th September, 2010. In October, 2010 12th RA bill was allegedly sent by the petitioner herein to the respondent. The

learned counsel for the petitioner however refers to its statement of claim filed before the tribunal wherein following was stated i.e. *as agreed bill were prepared as per partly work done and as per bills payments were released by the respondents till 12th RA bill of the claimant*, which relevance as per the petitioner was wrongly relied upon by the arbitral tribunal.

10. The petitioner filed claim No.1 for outstanding dues of Rs.58,30,937/- for the work done. The petitioner has given this table for bills raised, payments made and receivables and says payments qua bills No.12th to 14th were never received.

R/A BILLS	GENERATION DATE	NET PAYABLE AMOUNT	TOTAL AMOUNT (IN RS.) [RECEIVED]	DIFFERENCE
1ST	4-01-2010	9,83,783	897,313	86,470
2ND	19-01-2010	14,47,713	12,10,230	2,37,483
3RD	03-02-2010	16,39,475	11,15,449	524026
4TH	28-02-2010	25,23,648	14,29,923	1093725
5TH	28-02-2010	22,98,156	20,31,693	266463
6TH	14-03-2010	25,75,221	23,58,343	216878
7TH	29-03-2010	67,73,539	24,59,915	4313624
8TH	17-05-2010	53,60,968	13,15,383	4045585
9TH	19-07-2010	32,87,337	11,08,525	2178812
10TH	28-08-2010	36,19,133	490,000	3129133
11TH	30-09-2010	31,71,661	113,962	3057699

12TH	16-10-2010	14,47,999	NIL	1447999
13TH	23-11-2010	28,40,356	NIL	2840356
14TH	25-02-2011	72,37,621	NIL	7237621

11. The statement of claim of the petitioner herein notes the only claim for outstanding bill account as raised by the petitioner is to the extent of Rs.58,30,937/-, whatever is the bill 12th or 14th etc. Now, the 8th RA bill of the petitioner reflects an amount of Rs.1,14,59,915/- for the 7th and 8th RA bill, per corrections made/see page 118. *The 12th RA bill given at page 130 show various corrections made by the respondent and the amount thereof has been corrected as Rs.1,13,945/- which stood paid, as noted on the said Bill.* Thus, considering the admission of the respondent in its statement of claim the amount being paid till 12th RA Bill; the copy of the 12th RA Bill with corrections and payment made being on record, the learned arbitral tribunal was right in its conclusion. The learned tribunal has dealt with 12th RA Bill along with 14th RA Bill as under:

12. The tribunal has held as under:-

“After the submission of the 12th RA Bill on 16-10-2010 as above, the respondent cleared the same and payments were released till the 12th RA Bill. This is admitted generally even by the claimant in para.5 of the SoC. In the last three lines of para.5 of the SoC, the claimant admitted thus: "As agreed bills were prepared as per partly work done and as per bill payment were released by the respondents till 12th running bill of the claimant". The

argument of the claimant is that these lines should not be read in isolation and should be read with pages 70 and 124 of the documents filed with the SoC and page 38 of the documents filed with the claimant's rejoinder. I have done so. Page 70 is part of the legal notice dated 14-3-2011, starting from page 67 (Ann.C/ 4) in which several claims have been made against the respondent; it cannot be a substitute for evidence. It is only an assertion or claim made by the claimant with the help of a columnar table where payments received upto the 11th RA Bill are shown. Page 124 of the claimant's documents filed with the SoC is being dealt with below separately. Page 38 of the documents submitted by the claimant with the rejoinder under the head "Table No.2" is again only an assertion that no payment was received in respect of the 12th RA Bill. This seems to be also an after-thought and contradicts the admission made in para.5 of the SoC. Thus there is nothing to show that the claimant submitted any other RA Bill to the respondent, though the argument of its learned counsel was that the 13th RA Bill was submitted on 23-11-2010 and the 14th RA Bill was submitted, firstly on 27.1.2011 and again on 25.2.2011. This argument seems untenable as there is no evidence to support it.

From the four different 14th RA Bills filed by the claimant in the documents, this tribunal is unable to ascertain which 14th RA Bill was submitted on which date or whether any 14th RA Bill was submitted at all by the claimant on the dates claimed, i.e., on 27-1-2011 or 18/25-2-2011. There is also force in the contention of the respondent that there are discrepancies between the quantum and area of work as per the 14th RA Bill at pages 124-125 of the claimant's documents and those in the 14th RA Bill at pages 53-54 of the

claimant's document which was the only 14th RA Bill received by the respondent, that too on 23-5-2014. The tribunal has compared both the bills and found the contention to be correct. While the 14th RA Bill received by it on 23-5-2014 (pages 53-54 of claimant's documents) shows the "net payable amount" to be Rs-4,76,337, the 14th RA Bill (at pages 124-125 of the claimant's documents) shows the 'net payable amount' at Rs. 58,30,937 (at page 125) and after making further additions for material at site, labour etc. the amount claimed is Rs.1,42,59,262.17 Ps. This includes interest of Rs.56,21,642. It is incomprehensible how such huge amount of interest (which is also claimed in the present proceedings in the SoC) could have been claimed even on 27-1-2011 or 25-2-2011 when the 14th RA Bill is claimed to have been submitted to the respondent. The argument put forward on behalf of the claimant that the legal notice dated 14-3-2011 which referred to a claim made in the 14th RA Bill or the 14th RA Bill sent vide speed-post receipt dated 23-5-2014 should be taken as the submission of the said bill to the respondent is wholly unacceptable. In paragraph 2 of the legal notice (page 67 of the claimant's documents) there is reference to "a 14th running bill was submitted by my client vide letter dated 27.1.2011 of Rs.2,16,54,291.00 (gross amount). The net work done in the 14th running bill was of Rs.58,34,424.00". In paragraph 3 of the same notice, to which pointed attention was drawn by Mr. Uphadhyaya in the course of his arguments on 3-10-2016, the claimant has stated thus: "My client also submitted a final bill vide letter dated 18.2.2011 of gross amount of Rs.2,29,44,586.49 and the net amount of the work done is of Rs.72,37,321.00". But neither of these two RA Bills has been produced by the claimant in the course of

the arbitral proceedings by way of evidence. What has been filed at pages 124-125 of the claimant's documents as the 14th RA Bill does not even bear the signature of the claimant; further, it includes claims which could not have been made if it had been actually submitted to the respondent on 27-1-2011 or 18/25-2-2011. No covering letter thereto could be produced by the claimant. It cannot therefore be taken as a "running account" bill. In response to the legal notice, the respondent replied, vide reply dated 16-4-2011 (page 74, Ann. C/5 of claimant's documents), denying the receipt of any 14th RA Bills referred to in the claimant's notice. The respondent also stated that the claimant was not permitted to commence the work of Phase 2 since its work in Phase 1 was far from satisfactory. It also stated that even the Phase 1 work was left incomplete by the claimant and therefore the respondent had to complete it by engaging a third party. At no point of time did the claimant produce proof to show that it had sent any RA Bill after the submission of the 12th RA Bill. The burden was on the claimant. to prove it, which it did not discharge.

I will now refer to the oral evidence on this aspect, viz., whether the claimant had sent any RA Bill to the respondent after the 12th RA bill. Mr.Parashar Gautam, CW-1, has admitted to the last question asked on 14-10-2015 that there is no acknowledgment of the final bill (which is the 14th RA bill) and also stated that he has stated so in the legal notice dated 14-3-2011. In answer to the previous question, he had accepted the suggestion that the respondent used to give acknowledgement after receiving the RA Bills. He has confirmed his answers during the cross examination on 2-11-2015 - see the first two questions and answers thereto, in which he has first answered that the

respondent refused to take the final bill, but then answered to the next question that the bill was not even sent to the respondent by post or e-mail (which a person would normally do in case of refusal). To a specific question whether he can show the 13th RA Bill from the records, he answered in the negative but added that he had submitted it on 23-11-2010 and has an acknowledgement for it. But the acknowledgement was not produced before the tribunal. The claim that the claimant sent its 13th and 14th RA Bills in November, 2010 and January /February, 2011 thus does not stand proved by the testimony of CW-1.

RW-1, Mr. Rajesh Gupta has testified during the cross-examination that the RA Bills submitted by the claimant are placed at pages 38 to 41 and 43 to 46 of the documents accompanying the counter-claim. These are the same documents which have been referred to by me earlier, where the 12th RA Bill submitted on 16-10-2010 has referred to the net payable amount at Rs.14,47,998.94 Ps. No question was put to him by the claimant during the cross-examination about the other four 14th RA Bills said to have been sent by the claimant, copies of which are placed at pages 53, 103, 119 & 124 of the documents filed by the claimant.”

13. The above shows the 14th RA Bill did not have acknowledgement of respondent; even it did not bear signature of claimant; no covering letter could be produced; even the work of phase 1 was got completed by some other contractor what to say of Phase 2. Even in cross-examination of CW1 it has come out there was no acknowledgement of final bill (14th Bill). He could neither show 13th RA Bill on record nor acknowledgement, further RW1

was never asked any question on 14th RA Bill. The arbitral tribunal rightly reflected claim for 12th and 14th RA Bill.

14. There is no reason for me to take a different view from the learned arbitrator. The arbitrator has dealt with the contentions of the petitioner elaborately in its award and had even discussed oral and documentary evidence. No flaw can be seen in its finding. The role of the Court being limited in these cases, there is no reason why the petition should not be dismissed.

15. Hence the petition is dismissed.

16. No order as to costs.

YOGESH KHANNA, J

JANUARY 24, 2018
VLD