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

% *Date of Decision: 01.02.2018*

+ O.M.P. (COMM) 43/2018

**BRAHMAPUTRA CRACKER AND POLYMER LIMITED**

..... Petitioner

Through Mr.N.L.Ganpathi and Mr.Shaleen  
Srivastava, Advs.

versus

**RVR PROJECTS PRIVATE LIMITED**

..... Respondent

Through Mr.Sridhar Potaraju, Mr.Prabhat and  
Ms.Ankita Sharma, Advs

**CORAM:**

**HON'BLE MR. JUSTICE JAYANT NATH**

**JAYANT NATH, J. (ORAL)**

1. This order is passed in continuation with the order dated 31.1.2018. I have heard learned counsel for the respondent. The contents of the order dated 31.1.2018 are somewhat repeated herein for the sake of continuity of the order.
2. This petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) seeking to set aside a part of the Award dated 15.11.2017 passed by the learned Arbitrator.
3. The brief facts which come out from the petition are that the petitioner is a Central Public Sector Enterprise for the Government of India. It had invited bids for the Civil and Structural Works of Linear Low Density Polyethylene and High Density Polyethylene Unit of the petitioner's petrochemical complex in Dibrugarh, Assam. The respondent emerged as L1

bidder and its bid was accepted. Letter of acceptance dated 08.02.2010 was issued by the petitioner to the respondent. Engineers India Ltd. was the Engineer-in-Charge for the contract. It is pleaded that the date of commencement of the contract was 17.12.2009 and the time for completion was 18 months. The contract completion date was 16.06.2011. 75% of the original time schedule of the contract applicable for claiming price variation/escalation for Structural Steel and Reinforcement Bar as provided in Clause 44 of the Special Conditions of the Contract was said to be 30.01.2011. The actual date of completion of the contract was 30.10.2013.

4. By the consent of the parties, Mr. S.M. Chopra, Former ADSJ was appointed as a sole Arbitrator. The learned Arbitrator has now given his Award dated 15.11.2017.

5. As per the Award two of the claims of the claimant/respondent have been accepted, namely, claim No.1 for Rs.41,90,393/- and claim No.2 whereby the parties have been directed to carry out a joint measurement for the subject matter of the bill in question failing which the bill submitted by the respondent for a sum of Rs.6,47,066/- was to be accepted.

6. I have heard learned counsel for the parties.

7. Learned counsel for the petitioner has made two submissions. Firstly, he submits that the Award of Rs.41,90,393/- under claim No. 1 is totally contrary to Clause 44 of the Special Conditions of the Contract. As per Clause 44, escalation could be claimed for structural Steel and Reinforcement Bar only if the purchase order was made within 75 % of the time schedule and the material is delivered before the expiry date of the Contract. He pleads that under the Contract, the petitioner had to give drawings for the said Structural Steel and Reinforcement Bar. Where the

drawings have been given after 30.01.2011 (being the relevant 75 % time schedule), the petitioner has accepted the escalation bill of the respondent. However, where the drawings were given prior to 30.01.2011, the bills for escalation have been disallowed. He submits that in all the cases, the purchase orders were placed after 30.01.2011. Hence, he pleads that the award of Claim No. 1 is totally erroneous and against the provisions of the contract and is hit by Section 28 of the Act.

8. He further submits that as far as claim No. 2 is concerned, this is related to construction of RCC pavement. He points out that the consultant i.e. Engineers India Ltd.(EIL) had on 22.07.2011 informed the respondent that the RCC pavement is not required any further. He also submits that after the final bill was submitted, the respondent have woken up to submit a bill for this work which EIL had already requested them to not to carry out. As the bill was belated and after the final bill had already been processed, EIL vide its communication dated 02.04.2015 refused to process the bill inasmuch as the final measurement of the contract had been completed and recommendations had been sent to the petitioner for closure of the contract.

9. Learned counsel for the respondent submits that as far as claim No.2 is concerned the work was done by the respondent in December 2011. He submits that the RCC Pavement had been prepared and the pavement continues to exist at site and hence it cannot be pleaded by the petitioner that the measurements are not possible.

10. Clause 44 of the Special Conditions of the Contract read as follows:-

**“44.0 PRICE VARIATION FOR STRUCTURAL  
STEEL & REINFORCEMENT BAR**

The price variation shall be applicable on supply price of

bulk steel material for site fabrication/construction for permanent incorporation in work i.e. for structural steel and Reinforcement Bar only:

$$V_m = (IR \times Q) \times \frac{M - M_o}{M_o}$$

Where

$V_m$  = Variation in supply of structural steel & Reinforcement Bar

$IR$  = Rate of steel items (**structural steel & Reinforcement Bar**) declared by SAIL on the due date of submission of bid.

$Q$  = Qty. of Structural steel & Reinforcement Bar executed by Contractor & certified by Engineer-in-Charge.

$M_o$  = All India Wholesale Price Index for Iron & Steel Commodity released by Office of Economic Advisor to Govt. of India, Ministry of Commerce and Industry (as published by RBI) on the last date of submission of bid (including extension in the date if any).

$M$  = All India Wholesale Price Index for Iron & Steel Commodity released by Office of Economic Advisor to Govt. of India, Ministry of Commerce and Industry (as published by RBI) on the date of placement of Purchase Order to Material supplier.

The above price variations shall be applicable only for structural steel & Reinforcement Bar (excluding chequered plate & gratings); for which purchase orders are placed within 75% of original time schedule of the contract: reckoned from the date of issue of notification of award and brought to site within original time schedule of the contract. For the materials which are brought at site beyond the above time period, price variation clause shall not be applicable even if the purchase orders are placed within 75 % of original time schedule of the contract.

The purchase orders for all items, for which price variation is applied, as mentioned above, shall be sent to Engineer-in-Charge immediately after placement of purchase order to the vendor; but not later than 7 days after placement of such purchase order.”

11. From a reading of the above clause, it is pleaded that the price variation is available only for such purchase orders which are placed within 75% of the original time schedule of the contract and the material is brought to site within the original time schedule of the contract. It is the case of the petitioner that 75% of the time schedule of the contract was 30.01.2011. The contract completion date was 16.6.2011. Certain drawings had to be admittedly given by the petitioner to the respondent before the respondent could place the purchase orders. It is an admitted fact that for price variation clause a total bill of Rs.2.44 crores was raised. As most of the drawings had been given to the respondent after the said 75% of the original time schedule had expired, namely, 30.01.2011, all the bills pertaining to such contracts were drawings were given after the said date have been paid by the petitioner. Hence, out of escalation bills of Rs.2.44 crores and Rs.2.02 crores have been released to the petitioner. The bills stopped by the petitioner are those bills for which drawings were given to the respondent prior to 30.1.2011 and purchase orders were not placed by the respondent before expiry of the said date, namely, 30.1.2011.

12. A perusal of the Award would show that the learned Arbitrator has noted that the original escalation bills i.e. RA4 and RA5 were paid on 21.10.2014 and 03.11.2014. It is only when the payments were being made towards the final bill, the amount which had been so paid was deducted from the amount of the final bill. Later, on the representation of the respondent the petitioner released a portion of this amount as noted above by carving out a distinction based on the benchmark of 30.01.2011 regarding drawings, as already elaborated above. The learned Arbitrator concludes that the

provisions of the contract on which the petitioner relies upon, namely, clause 44 does not give indulgence to the petitioner to deal with the bills in the said manner. The learned Arbitrator construes the conduct of the petitioner as an admission on its part that the contractual provisions admitted to dilution based on the facts and circumstances that were existing.

13. The circumstances here are quite glaring. Bulk of the drawings had not been supplied by the petitioner before the cut-off benchmark date 30.01.2011. Some limited drawings appear to have been submitted before 30.01.2011 on account of which the petitioner has withheld parts of the bills which are subject matter of claim No.1. On the factual matrix the learned Arbitrator held that the claimant is not entitled to withhold the amount and accordingly allowed claim No.1.

14. In my opinion, the conduct of the petitioners leads to this claim being allowed. They have initially paid the escalation bill i.e. RA4 and RA5 in the year 2014, Subsequently, when the final bill was sent for payment they have reduced the payments already made from the final bill presumably on the basis of clause 44 of the Special Conditions of the Contract. Thereafter on a representation they have released substantial part of the bills in view of the fact that the drawings had been supplied by the petitioners themselves after the stated period, namely, 30.01.2011. It is quite clear that when substantial drawings were delivered after 30.01.2011, the respondent could not have been expected to place limited purchase order by 30.01.2011 for some of the drawings. Merely because some drawings were given prior to the date cannot give an excuse to the petitioner to try and deduct the bills now at the later stage. The view taken by the learned Arbitrator is a plausible view. Interpretation of the terms of the contract is within the powers of the learned

Arbitrator.

15. The Supreme Court in the case of *McDermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181 held as follows:-

“112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. (See *Pure Helium India (P) Ltd. v. ONGC* [(2003) 8 SCC 593] and *D.D. Sharma v. Union of India* [(2004) 5 SCC 325] .)”

16. I see no merit in the challenge to claim No.1.

17. As far as claim no.2 is concerned, a direction has been passed by the learned Arbitrator stating that the petitioner will arrange for joint measurement of the bill being subject matter in question through its own Engineer, with prior intimation to the respondent. Thereafter the necessary payments would be released to the respondent based on the measurements. If the joint inspection is not carried out the bill of the respondent shall be paid as such. This bill is for Rs.6,47,066/-.

18. Learned counsel for the petitioner has pointed out that this work was never done by the respondent. Reliance is placed on a communication dated 22.7.2011 sent by EIL, where EIL has requested the respondent that the RCC Pavement is not required. Relevant portion of the said communication

reads as follows:-

“Please note that RCC Pavement in the future expansion area for Chromium is not required to be constructed at this stage. However, the area may be filled up by approved earth and proper compaction to be done up to the adjoining Pavement level. Kindly ensure that proper slopes are provided for storm water towards the storm water drains to avoid water logging.

The same shall be updated in the RCC Pavement drawing and the revised drawing shall be sent shortly.”

19. Learned counsel for the petitioner has also pleaded that after the work was stopped, the payment has been completed by a third contractor and hence even if a joint inspection is carried out it would not be possible to measure the work allegedly completed by the respondent. It has been pleaded that no work has been done by the respondent and no evidence to this effect was led before the learned Arbitrator.

20. I may note that this work which is subject matter of the bill was possibly completed prior to 22.07.2011 as claimed by the respondent. The respondent submitted the final bill sometimes in 2013. It is only thereafter that they have woken up and have sent the disputed bill for the work which forms part of claim No.2. The bill is belated. Even before the learned Arbitrator no evidence was led that this work was really done by the respondent. The only ground for allowing this bill by the award was that the consultant EIL had declined to scrutinise the bill and carry out joint measurement as the final bill had already been scrutinised and finalised. The learned Arbitrator concludes that there can be no hindrance in EIL, the consultant, from scrutinising the bill, at this stage, even after the final bill

had been scrutinised. The award notes that the contract does not expressly prohibit submission and scrutiny of bills prior to actual payment of the final bills. The scrutiny of bills should not have been refused on the aforesaid pretext. Based on the above, learned Arbitrator has further noted that as joint measurements had not been carried out, the learned Arbitrator is handicapped in the face of peculiar facts and circumstances and it passed above-noted directions.

21. It is quite clear that the learned Arbitrator has been swayed by the fact that EIL had not scrutinised the bill. The learned Arbitrator did not look into the evidence led by the respondent to show that the work was indeed completed. It was admitted before this court that no such evidence was led by the respondent. This fact that was not refuted by the learned counsel for the respondent. The learned Arbitrator also ignored the plea of the petitioner that given the present condition of the pavement a joint inspection will not reveal whether any work was actually done by the respondent as another contractor was later awarded the said work. The onus to prove that the work which is the subject matter of claim No.2 was done by the respondent was on the respondent. As there is no evidence on record to the said effect, it is obvious that the claim should not have been allowed. Allowing a claim without evidence to support, it would be contrary to the fundamental policy of Indian law. The Supreme Court in the case of *Associate Builders v. DDA (2015) 3 SCC 49* held as follows:

“31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

(i) a finding is based on no evidence, or

(ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or  
(iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.”

Hence, in my opinion, claim No.2 has been allowed based on no evidence and the decision has to necessarily be set aside to that extent.

22. The award to the extent it grants claim No.2 is wholly illegal and also against the public policy of India. It has been passed without any evidence whatsoever on record. Accordingly, I disallow claim No.2.

23. Present petition stands disposed of, as above. All pending applications, if any, also stand disposed of accordingly.

**FEBRUARY 01, 2018**

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**JAYANT NATH, J**

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