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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 13th August, 2018

Date of Decision: 4th September, 2018

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O.M.P. 435/2011

**HINDUSTAN STEELWORKS CONSTRUCTION
LIMITED**

..... Petitioner

Through: Ms. Shipra Ghose, Advocate.

versus

UNION OF INDIA

..... Respondent

Through: Mr. N. Prashant Kumar Nain,
Advocate. (M-9811558972).

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. The Respondent, Union of India represented through the Deputy Chief Engineer Construction, Northern Railways issued a Notice Inviting Tenders for earth work in filling for embankment with contractor's own earth and cutting to required profile, including compaction by vibratory roller, construction/extension of retaining wall, platforms, station buildings, S & T room, gate huts, and other allied work between Garhmuktesar Pul (excluding) and Kuchesar Road (excluding) stations (Chainage 10050 to 24700) in connection with Hapur, Kankather doubling (Zone - II) (hereinafter referred to as "*the said works*")

2. The Petitioner, Hindustan Steelworks Construction Limited, a Government of India owned company, submitted its bid in response to the tender notice and the same was duly accepted vide letter of intent dated 18th

August, 2004. Though the initial value of the contract was Rs.682.63 lakhs, as per the site availability, the scope of work was later restricted to Rs.340 lakhs.

3. Contract dated 11th November, 2004 was entered into between the parties. The date of commencement was from the letter of intent i.e. 18th August, 2004 and the date of completion was 17th April, 2006, which was subsequently extended to 15th July, 2006. According to the Petitioner, it faced various difficulties in the execution of the work as the Respondent was not performing its obligations. The scope of work having been reduced, it is the case of the Petitioner that it could not mobilize adequate resources on the ground. On the other hand, it was the Respondent's contention that there was insufficient mobilization by the Petitioner, and in fact, the work was progressing very slowly. After various meetings and correspondence between the parties, the scope of work was revised and the value of the contract was further reduced. The Respondent then issued a letter dated 9th May, 2006, by which it called upon the Petitioner to make immediate arrangements to improve the progress of the work, failing which, action would be liable to be initiated under clause 62 of the General Conditions of Contract. This notice was given under clause 26 of the General Conditions. Thereafter, on 7th July, 2006, the Railways rescinded the work.

4. This notice to rescind was replied to by the Petitioner on 12th July, 2006. No response was received to the said letter and the Petitioner invoked arbitration vide its letter dated 14th April, 2007. The matter being between Governmental Authorities was referred to the Committee on Disputes, Cabinet Secretariat which resolved as under:

“The Committee heard both parties to the dispute and

perused documents produced. The representative of the Railways stated that notices for recovery of LD and award of the balance work to Ashoka Construction Company were served on HSWCL by post. The contract contained an arbitration clause for arbitration by an arbitrator to be appointed by General Manager, Railways. However, HSWCL was required to file a statement of claims before the arbitrator. The representative of HSWCL requested that the company should not be debarred by the Railways from undertaking other packages/contracts. The Committee directed that:-

i) The Railways should immediately appoint an arbitrator for arbitration of the dispute without waiting for receipt of the statement of claim from HSWCL and complete arbitration in six months time.

ii) HSWCL should withdraw the case filed by it before the High Court.

iii) The Railways should sympathetically consider the request of HSWCL not to debar it from undertaking other packages/contracts bids.”

5. The dispute was thereafter referred to a three-member Arbitral Tribunal. Claim statements were filed by the Petitioner, and the Respondent filed its defence and counter claim. The claims of the Petitioner were to the tune of Rs.22,53,642/- and the counter claim by the Railways was to the tune of Rs.1,79,40,546/-. The impugned award dated 22nd December, 2010 was passed. As per the award, the Petitioner was awarded a sum of Rs.32,999/-, which has not been challenged by the Railways. On the other hand, the claim of the Railways for liquidated damages was allowed to the extent of Rs.1,79,40,546/-. The reasoning given by the Arbitral Tribunal for awarding this claim of the Railways is set out herein below:

“Contract for the work was awarded to the Claimants in August, 2004 at a cost of Rs.6.82 Crores with

stipulated completion period of 20 months. Despite many warning letters by the Respondents, the Claimants progress of work was very slow. Even after 7 days notice was issued, the Claimants never made adequate progress as compared to the programme submitted by them. The Claimants failed persistently in bringing about any significant improvement in progress. For most of the period, the level of resources deployed by the Claimants was much below the required level. Under the circumstances the work was rescinded in terms of Clause-62 of General Conditions of Contract (GCC) – 1999 in July, 2006 by the Respondents and Risk & Cost Tender was invited. The Risk & Cost Contract was awarded to another firm M/s Ashoka Construction Co. Obra. The amount is payable by the Claimants towards the cost of liquidated damages as per Clause 62 of GCC-1999,

During the Arbitration proceedings, the Claimants could not substantiate their contention that the action taken by the Respondents (Railways), in rescinding the contract & the Respondent's Claim for liquidated damages, was irregular. In view of above, the claim of the Respondents is justified.”

6. The present objection petition under Section 34 of the Arbitration and Conciliation Act, 1996 (*hereinafter 'the Act'*) has been filed challenging the award of liquidated damages in favour of the Railways. The preliminary ground which has been alleged by Ms. Ghose is that the award is completely unreasoned and no reasoning has been given by the Arbitral Tribunal to justify the grant of liquidated damages. She relies upon the judgments of the Supreme Court in **Anand Brothers v. Union of India (2014) 9 SCC 212** and **State of Kerala v. Som Dutt Builders 2009 (10) SCC 259**. It is further submitted by Ms. Ghose, that the finding of the Tribunal that no

documentation was submitted by the Petitioner is incorrect. Ms. Ghose further alleges that the Tribunal failed to appreciate that the delay in the execution of the work was due to the negligence and inaction of the Respondent.

7. On the other hand, Counsel for the Respondent submits that the scope of interference under Section 34 of the Act is very limited. According to the Respondent, the Tribunal had fully examined the various claims and counter claims. Insofar as claim no.1 was concerned, since the Petitioner never showed up for the final measurement after the termination, the Tribunal went by the measurement recorded in the measurement book.

8. In respect of claim no.2, for “vacuum de-watering flooring”, the Respondent had established that the payment was duly made.

9. For claim nos. 3 and 4, since the Petitioner could not produce any documentary evidence to show the extent of work which was carried out the same was rightly rejected.

10. Insofar as claim no.5 was concerned, the Claimant could not produce any documents to support the expenditure.

11. In respect of the counter claim, it was submitted by the Respondent that the Claimant, right from the beginning, had not carried out any mobilization on the ground but kept alleging that the Respondent was in breach. The Respondent further submitted that after termination, the Railways had to engage one M/s Ashoka Construction Co. The tender to M/s Ashoka Construction Co. for the same work was awarded at the cost of Rs.5,55,46,615.73/-, which was higher than the cost for which the Petitioner was to execute the work. Hence, according to the Respondent, it was entitled to terminate the contract and claim liquidated damages i.e. the balance

amount of Rs.1,79,40,546/-. The calculation was filed on the record of the Tribunal, but was also communicated to the Petitioner even prior to the arbitration being invoked.

12. A perusal of the award under challenge shows that the Tribunal has succinctly justified the grant of the counter claim in favour of the Respondent. The Tribunal has taken note of the various warning letters sent by the Respondent. The Tribunal has also considered the seven days' notice that was issued under clause 26 and the fact that the Petitioner failed to bring about any improvement on the ground even thereafter. The Tribunal has also considered that the rescission was as per clause 62 of the General Conditions of Contract, which permitted the Respondent to re-tender the work at the risk and cost of the Petitioner. The Tribunal has also noticed the award of the tender in favour of the third party. The final finding of the Tribunal, that the Petitioner could not justify that the rescission was unlawful, shows that the Tribunal has applied its mind to all the relevant facts and circumstances.

13. A perusal of all the letters, which are placed on record also shows that the Railways repeatedly cautioned the Petitioner vide letters dated 4th October, 2004, 4th January, 2005, 28th January, 2005, 20th October, 2005, 7th December, 2005, 29th December, 2005, 30th May, 2006 and 30th June, 2006. Despite this being the position, the Petitioner, in none of its letters could justify or prove that it had adequately mobilized its resources on the site. In fact, the Petitioner kept making allegations, which were general in nature. Further, the Railways, vide notice dated 8th June, 2005 also notified the Petitioner that competent operators/drivers were not being employed. The primary grievance of the Petitioner continued to be that because the value of the work was reduced, mobilization could not take place. The Petitioner also

agreed, in the reply to the termination letter, that the slow progress of the work was for reasons “beyond our control”. Thus, in effect, the Petitioner admitted in its letter that there was slow progress of work. In the said reply to the termination letter dated 12th July, 2006 Petitioner also states as under:

“We had indicated during various meetings & correspondences that we were facing difficulty in execution of earthwork due to Royalty problem & had requested the department to help us in this regard but we regret that no proper assistance was extended to us resulting in considerable hindrances on this account.”

14. All these facts go to show that the Railways had no option but to terminate the contract and hand over the work to a third party. As per clause 62(2):

“(2) Right of Railway after rescission of contract owing to default of Contractor – In the event of any or several of the courses, referred to in sub-clause (1) of the clause, being adopted:-

(a) the Contractor shall have no claim to compensation for any loss sustained him by reason of his having purchased or procured any material or entered into any commitments or made any advances on account of or with a view to the execution of the works or the performance of the contract and Contractor shall not be entitled to recover or be paid any sum for any work thereto for actually performed under the contract unless and until the Engineer shall have certified the performance of such work and the value payable in respect thereof and the Contractor shall only be entitled to be paid the value so certified.

(b) the Engineer or the Engineer’s Representative shall be entitled to take possession of any materials, tools, implements, machinery and buildings on the works or on the property on which these are being or ought to have been executed, and to retain and employ the same in the further execution of the works or any part thereof

until the completion of the works without the Contractor being entitled to any compensation for the use and employment thereof or for wear and tear or destruction thereof.

(c) the Engineer shall as soon as may be practicable after removal of the Contractor fix and determine ex-parte or by or after reference to the parties or after such investigation or enquiries as he may consider fit to make or institute and shall certify what amount (if any) had at the time of rescission of the Contract been reasonably earned or would reasonably accrue to the contractor in respect of the works then actually done by him under the contract and what was the value of any unused, or partially used materials, any constructional plant and temporary works upon the site.

(d) the Railway shall not be liable to pay to the Contractor any moneys on account of the contract until the expiration of the period of maintenance and thereafter until the costs of completion and maintenance, damages for delay in completion (if any) and all other expenses incurred by the railway have been ascertained and the amount thereof certified by the engineer. The Contractor shall then be entitled to receive only such sum or sums (if any) as the Engineer may certify would have been due to him upon due completion by him after deducting the said amount, but if such amount shall exceed the sum which would have been payable to the Contractor, then the Contractor shall upon demand pay to the Railway the amount of such excess and it shall be deemed a debt due by the Contractor to the Railway and shall be recoverable accordingly."

15. The contract was rescinded, and as per the termination letter dated 7th July, 2006, the work under the contract was carried out at the risk and cost of the Petitioner. The new tender, dated 7th November, 2006 and the notice of liquidated damages dated 11th January, 2007 was also placed on record by the Respondent. The facts narrated above go to show that the findings of the

Arbitrator are absolutely justified. It is not necessary in every case that the reasons have to be verbose. The judgments of the Supreme Court only require the Arbitrator to record reasons. The dictum of the Supreme Court in ***Anand Brothers v. Union of India (supra)*** is as under:

“14. It is trite that a finding can be both; a finding of fact or a finding of law. It may even be a finding on a mixed question of law and fact. In the case of finding on a legal issue the arbitrator may on facts that are proved or admitted explore his options and lay bare the process by which he arrives at any such finding. It is only when the conclusion is supported by reasons on which it is based that one can logically describe the process as tantamount to recording a finding. It is immaterial whether the reasons given in support of the conclusion are sound or erroneous. That is because a conclusion supported by reasons would constitute a “finding” no matter the conclusion or the reasons in support of the same may themselves be erroneous on facts or in law. It may then be an erroneous finding but it would nonetheless be a finding. What is important is that a finding presupposes application of mind. Application of mind is best demonstrated by disclosure of the mind; mind in turn is best disclosed by recording reasons. That is the soul of every adjudicatory process which affects the rights of the parties. This is true also in the case of a finding of fact where too the process of reasoning must be disclosed in order that it is accepted as a finding in the sense the expression is used in Clause 70.”

Similar is the finding of the Supreme Court in ***State of Kerala v. Som Dutt Builders (supra)***:

“25. The requirement of reasons in support of the award under Section 31(3) is not an empty formality. It guarantees fair and legitimate consideration of the controversy by the Arbitral Tribunal. It is true that the Arbitral Tribunal is not expected to write a judgment

like a court nor is it expected to give elaborate and detailed reasons in support of its finding(s) but mere noticing the submissions of the parties or reference to documents is no substitute for reasons which the Arbitral Tribunal is obliged to give. Howsoever brief these may be, reasons must be indicated in the award as that would reflect the thought process leading to a particular conclusion. To satisfy the requirement of Section 31(3), the reasons, must be stated by the Arbitral Tribunal upon which the award is based; want of reasons would make such award legally flawed.”

In consonance with the judgment in **Anand Brothers**, the Arbitral Tribunal has given a finding which is based on application of mind. The findings of the Arbitral Tribunal show that despite warning letters, the progress of work was slow. There was complete application of mind by the Tribunal. The findings recorded above are factually correct and each of the findings are supported by the documents, which are on record. Thus, it cannot be said that the award is unreasoned. The award of the Tribunal has precise and succinct reasoning, which is clearly supported by the evidence which was before it. This is not a case where the Tribunal has given a mere one-line award rejecting or allowing the claims. Each of the claims have been tabulated, and reasons have been given against each of the claims, as well as where the claims have been rejected. The findings of the Arbitral Tribunal on the various claims are completely justified. No ground is made out for interference with the same.

16. OMP is dismissed. No order as to costs.

PRATHIBA M. SINGH
JUDGE

SEPTEMBER 4th, 2018/Rahul