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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 14th March, 2018

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O.M.P. (COMM) 119/2018

N N BUILDCON PVT. LTD.

..... Petitioner

Through: Mr.Imran Moulaey, Ms.Jyoti Mendiratta,
Mr.Vineet Jhanji, Mr.Aastik Dhingra, Advs.

versus

UNION OF INDIA

..... Respondent

Through: Mr.R.Mishra, Mr.M.K.Tiwari,
Mr.Abhishek Rana, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

IA 3570/2018

Exemption allowed subject to all just exceptions.

OMP (Comm.) 119/2018

1. This 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 25th December, 2017 (corrected vide communication dated 5th January, 2018) passed by the Sole Arbitrator adjudicating the disputes between the parties.

2. The bone of contention between the parties is the foreclosure of the contract awarded in favour of the petitioner by the respondent vide notice dated 16th August, 2013.
3. The respondent had issued a tender for “Construction of Security Police Line Campus at Bapu Dham, Chanakyapuri, New Delhi including water supply, sanitary installation, and internal electrical works, fire alarm and fire fighting system” vide NIT No. 06/CE/NDZ-III/2012-2013.
4. The petitioner submitted its bid in the tender, which was accepted by the respondent vide its Letter of Acceptance dated 12th February, 2013. The estimated cost of the work was Rs.68,68,02,291/-. The stipulated date for commencement of work was 6th March, 2013 and the stipulated date of completion was 5th March, 2015.
5. The respondent vide its letter dated 23rd March, 2013 informed the petitioner that they had received a communication from the Delhi Police informing them that the work should not be started and no financial liability be incurred till financial approvals for the project are received from the Ministry of Home Affairs. By a further communication dated 26th March, 2013, the respondent reiterated its instructions to the petitioner to stop the work till further orders.
6. The respondent by its communication dated 10th June, 2013 rejected the claim of the petitioner of having suffered losses due to the stoppage of work *inter alia* taking the following stand:

“Refer this letter of even No. 15-E dated 23.03.2013, which was addressed to you and it was clearly

written/intimated that Delhi Police has written to this office “that work at the site of Police Security Line at Bapu Dham may not be started and not to incur any financial liability till EFC approves this project under head plan and A/A & E/S is received from MHA”. It was also clearly written by the undersigned that the above work may not be started till further order and you are requested to remove your T&P machinery and staff from the site and not incur any expenditure on the work, but in your letter para 2 and 3 you have written giving the reference of letter No.15-E dated 23.03.2013 that the work was stopped on some "flimsy ground" and the seems to some other hidden agenda of the department. Either your “authorize signatory” is unable to understand the content of the letter or trying to mould the subject, otherwise he should not have used such language. The above mentioned letter written to you is very much clear and each and every aspect of the department has been written to you.”

7. By a subsequent letter dated 14th June, 2013, the respondent called upon the petitioner to remove all its machinery from the site and hand over the vacant site to the DCP/Security without further delay. This was reiterated in a subsequent letter dated 6th July, 2013.
8. Vide letter dated 16th August, 2013, the respondent invoked clause 13 of the agreement and informed the petitioner that the agreement shall stand foreclosed and the petitioner would be paid at contract rates, the full amount for work executed at the site and in addition, a reasonable amount as certified by the Engineer-in-Charge for the items mentioned in the said letter. As noted above, this became the reason of dispute between the parties.
9. The petitioner claiming that the respondent had arbitrarily

invoked clause 13 of the agreement and was, therefore, liable to pay damages to the petitioner for premature foreclosure of the work for six months, filed claims before the Arbitral Tribunal. The Arbitral Tribunal vide its Impugned Award has held that the foreclosure of the agreement by the respondent was justified and proper and in view thereof, the petitioner is not entitled to claim any damages for loss of profit or otherwise from the respondent. The Arbitral Tribunal has further granted in favour of the petitioner, only the cost of works that were proved by the petitioner before the Arbitral Tribunal.

10. Learned counsel for the petitioner submits that the impugned award is liable to be set aside inasmuch as the arbitrator has completely misinterpreted the provisions of clause 13 of the agreement. He submits that clause 13 of the agreement has application only in situations where the work is restricted and the same is not to be carried out at all at a later date through another agency. For this proposition, he relies upon the judgments of this Court in *Madhok Construction Co. (P) Ltd. vs. Union of India* 1998 (1) RAJ 239 (Delhi) and *Ms. Shanti Devi & Ors. vs. Delhi Development Authority & Ors.* 2007 (2) R.A.J. 195 (Del). He submits that in the present case admittedly the work in question had been awarded in favour of another agency by the respondent on 17th October, 2016. Therefore, there was no abandonment of work as contemplated in clause 13 of the agreement and consequently, the petitioner was entitled to its claim for damages for the premature foreclosure of the work.

11. I have considered the submissions made by the counsel for the

petitioner, however, I am unable to agree with the same. I would first quote clause 13 of the agreement between the parties:

"CLAUSE 13: If at any time after acceptance of the tender, Engineer-in-charge 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) Government shall have the 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 Government 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 Government, 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 Government are rendered surplus, the same except normal wastage shall be returned by the contractor to Government 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 Government stores, if so required by Government, 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 then cost of work actually executed under the contract and less the cost of contractor's materials at site taken over by the Government 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 Government from the contractor under the terms of the contract.”

12. A reading of the above clause would show that where the Engineer-in-Charge decides to abandon or reduce the scope of work ‘for any reason whatsoever’, he shall give a notice to that effect to the contractor and in such case the contractor shall not be entitled to claim payment of compensation or otherwise whatsoever, on account of any profit or advantage which he might have derived from the execution of the work in full but which he could not derive in consequence of the foreclosure of the whole or part of the works. The question in the present case would, therefore, be whether the foreclosure of the work by the respondent vide its letter dated 16th August, 2013 was due to abandonment of work or otherwise.

13. The Arbitrator has considered the above issue in detail. He has taken note of the fact that the work was awarded by the respondent based on an administrative approval and expenditure sanction accorded by the Government of NCT of Delhi in its favour on 22nd December, 2010. The Delhi Police had also given clearance to the respondent for the award of the work, however, shortly after the work was awarded in favour of the petitioner, the Delhi Police asked the respondent to stop the work. Due to such instructions received by the respondent from the Delhi Police, the respondent, in turn, called upon the petitioner to stop all work under the agreement. The Arbitrator

further takes note of the letter from the Commissioner, Delhi Police dated 10th June, 2013 which makes reference to the decision of the Government of India that the funds allotted in the 12th Plan period for the Delhi Police Building Programme Scheme (DPBP) first be utilized by giving priority to the police station buildings and secondly for the residential projects and only thereafter if some funds are left, then for the office complex. Based on this decision, the Ministry of Home Affairs had decided that further action on the project of construction of Security Police Lines at Bapu Dham be kept in abeyance as this was purely an office complex. As the scheduled date of completion of work under the agreement was 5th March, 2015 and the 12th Plan period was between 2012 and 2017, this would in fact, amount to the abandonment of work. The Arbitrator further takes note of the fact that the Government of India later decided to assign the work with a reduced scope to another agency, namely NBCC on 17th October, 2016. The Arbitrator comes to the conclusion that award of such work after such a long interval does not in any manner, take away from the fact that in August, 2013, the work was actually abandoned by the respondent for a valid cause.

14. In *Ms. Shanti Devi (supra)*, this Court, after analysing clause 13 of the agreement, had held that an Arbitrator would commit an error of jurisdiction if he awards a claim prohibited under the terms of the agreement. The Arbitrator is bound, like the parties, to act in terms of the agreement as the very reference to the Arbitrator arises from the contract. The bar contained in clause 13 would become operative only if recourse to the said clause is *bona fide*, proper and is

not arbitrary. In the present case, the Arbitrator finds that the recourse to clause 13 by the respondent is *bona fide*, proper and is not arbitrary. Therefore, clearly the respondent was entitled to rely upon clause 13 of the agreement for pre-maturely foreclosing the awarded work of the petitioner. The learned counsel for the petitioner does not contend that there was any malafide on the part of the respondent or any of its officers in ordering foreclosure of the work.

15. The plea that because the work was awarded to another agency on 17.10.2016, there was no abandonment of work, is also fallacious. As noted above, the work was foreclosed on 16.08.2013 i.e. within six months of Letter of Acceptance. In fact, within a month of Letter of Acceptance, the respondent had already directed the petitioner not to start with the work. The foreclosure of work was due to non-sanction/non-availability of funds. The work was thereafter tendered by NBCC only on 17.10.2006, that is after the scheduled date of completion provided in the agreement with the petitioner and more than three years after the foreclosure of work. Abandonment cannot mean that the work cannot be awarded ever after the foreclosure.

16. In any case, this being a finding of fact by the Arbitrator, this Court in exercise of its powers under Section 34 of the Act cannot sit as an Appellate Court to re-judge the same and to arrive at a different conclusion.

17. In *Associate Builders vs. Delhi Development Authority* (2015) 3 SCC 49, the Supreme Court has held as under:-

“33. It must clearly be understood that when a court is applying the “public policy” test to an arbitration award, it

does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts.”

18. In view of the above, I find no merit in the present petition and the same is accordingly dismissed with no order as to costs.

MARCH 14, 2018
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NAVIN CHAWLA, J