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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **O.M.P. (COMM) 152/2018 & IA No.4875/2018 & IA No.**
4876/2018

PUNJ LLOYD LIMITED

..... Petitioner

Through: Mr Anil Sapra, Sr. Advocate
with Mr Shambhu Sharan, Ms
Divya Krishnan and Mr Sarthak
Katyial, Advocates.

versus

MINISTRY OF HEALTH & FAMILY WELFARE,
GOVT. OF INDIA

..... Respondent

Through:

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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12.04.2018

VIBHU BAKHRU, J

1. The petitioner (hereafter 'PLL') has filed the present petition under Section 34 of the Arbitration and Conciliation Act (hereafter 'the Act') challenging an arbitral award dated 07.12.2017 (hereafter 'the impugned award') delivered by an arbitral tribunal constituted by a sole arbitrator (hereafter 'the Arbitral Tribunal').

2. By the impugned award, the Arbitral Tribunal has rejected the claim preferred by PLL on account of escalation under Clause 10 CC of the General Conditions of Contract (GCC). Although the Arbitral Tribunal accepted some of the claims made by PLL, it rejected the

claim relating to escalation on account of prolongation of work. The counter claims raised by the respondent were also rejected.

3. The principal controversy involved in the present case relates to the rejection of PLL's claim of ₹21,26,33,622/- raised on account of escalation. The Arbitral Tribunal rejected the said claim on the ground that Clause 10 CC of the GCC was inapplicable to the contract in question. PLL does not dispute the same, however, claims that even though Clause 10 CC of GCC is not applicable, PLL would nonetheless be entitled to claim escalation. And, the Arbitral Tribunal has grossly erred in proceeding on the basis that no escalation is payable if Clause 10 CC of GCC is not applicable.

Brief Facts

4. The respondent had invited tenders for a project of setting up All India Institute of Medical Sciences (AIIMS) at six locations, namely, Bhopal, Bhubaneswar, Jodhpur, Patna, Raipur and Rishikesh. Pursuant to the said invitation, PLL submitted its bid for construction of the AIIMS at Raipur, which was accepted. Thereafter on 21.05.2010, the parties entered into an agreement (hereafter 'the Agreement'). In terms of the Agreement, the petitioner was to commence the project by 30.05.2010 and complete the same by 29.08.2011. The contract price for the said project was agreed at ₹1,15,20,95,011/-.

5. Admittedly, there have been delays in execution of the project and PLL claims that the same was for reasons attributable to the

respondent including on account of delay in finalization of the building layout; delay in handing over the site; delay in cutting and removal of the trees by the Forest Department; delay on account of frequent revisions of the drawings; delay in finalization of the building layout; discrepancies in the drawings relating to auditorium building; delay in approval of samples of various materials; delay in approval of rates of items like fire rated door and award of additional works. In addition, it is claimed that project was delayed due to unprecedented rains and non-availability of steel and non-availability of skilled/semi-skilled workers due to elections.

6. PLL sought extension of time for completion of the project repeatedly and the same were granted by the respondent from time to time. In the statement of claims filed by PLL before the Arbitral Tribunal it is stated that the extension of time was granted for the 15th time by a letter dated 30.12.2015 whereby the time for completion of the project was extended till 31.12.2016. The extensions of time granted by the respondent have been termed as provisional and the respondent has also reserved its right to levy liquidated damages. PLL claims that the same is wrongful and it has filed objections against the same.

7. PLL claims that it submitted several letters raising claims, inter alia, on account of losses suffered by it as well as on account of escalation. Under the cover of the letter dated 13.10.2015, PLL submitted an escalation bill (termed as escalation bill no.1) for an aggregate value of ₹18,68,28,493/-. The said amount comprised of

delays pertaining to material escalation in the sum of ₹9,48,32,053.08; labour escalation amounting to ₹ 2,84,30,710,60; fuel escalation in the sum of ₹92,62,263.84; escalation relating to steel in the sum of ₹44,65,56,259.99; and escalation in cement for a sum of ₹77,47,205.36. However, the respondent did not accept the said bill. Thereafter, PLL sent a letter dated 14.01.2016 calling upon the Superintending Engineer of the respondent to resolve all matters within a week. This was followed by another letter dated 03.03.2016 addressed to the Joint Secretary of the respondent seeking resolution of the disputes.

8. Since, the disputes were not resolved, PLL sent a letter dated 04.04.2016 addressed to the Superintending Engineer to decide the pending issues including the escalation claims raised by PLL.

9. Thereafter, by a letter dated 28.04.2016, PLL invoked the arbitration clause and called upon the Joint Secretary of the respondent to appoint an arbitrator.

10. The respondent by a letter dated 31.08.2016 appointed the sole arbitrator to adjudicate the disputes and in terms of the said letter the scope of reference was limited to adjudication of “*Claim nos. 5, 7 & 8 amounting to Rs.18,68,00,000/-, Rs.23,14,000/- and Rs.21,71,596/- respectively*” .

11. Before the Arbitral Tribunal, PLL filed its statement of claim, *inter alia*, claiming : (i) ₹21,26,33,622 on account of escalation (claim no.1); (ii) ₹23,14,000 on account of wrongful imposition of penalty

for violation of claims 36 of GCC read with schedule F (Claim No.2); (iii) ₹21,71,576 on account of interest on delay in release of RA Bills (Claim No.3); (iv) Costs (Claim No.4); and interest @ 18% till the date of payment (Claim No.5).

12. The respondent filed the Statement of Defence countering the assertions made by the petitioner and also raising counter claims on account of loss of rent due to non-occupancy of the hostels in the sum of ₹17,54,00,000 and transport expenditure amounting to ₹62,56,000/. The arbitral proceedings culminated into the impugned award whereby the claims preferred by the petitioner were allowed and whereby claim no.2 of the petitioner was allowed in its entirety. The Arbitral Tribunal also allowed the claim no.3 to the extent of ₹12,06,442 and further awarded simple interest at the rate of 8% per annum on the aggregate claim of ₹35,20,442/- with a further provision that if the payment of the awarded amount was delayed beyond a period of three months respondent would also be liable to pay simple interest at the rate of 10% per annum. However, Claim no.1 – claim on account of escalation – was rejected in entirety.

13. Since there was an apparent error in computing of the amount awarded against claim no.2, the petitioner preferred an application under Section 33 of the Act, which was allowed by an order dated 07.12.2017. By the said order, the amount awarded against Claim No.2 was increased from ₹12,06,442 to ₹21,71,596/-.

14. Insofar as the claim for escalation is concerned, the Arbitral

Tribunal rejected the same on the ground that Clause 10 CC of the GCC – which provides for escalation for price variation on account of escalation – was not applicable. This was so because it was expressly provided that the said clause would be applicable only in respect of contracts where the stipulated period of completion exceeded 24 months. Since the present case, the stipulated period for completion of the project was 15 months, the said clause was held to be inapplicable.

Submissions

15. Mr Anil Sapra, learned Senior Counsel appearing for PLL contended that the Arbitral Tribunal had fallen in error in rejecting PLL's claim for escalation on the ground that Clause 10 CC was inapplicable. He submitted that even though PLL's claim may not fall within Clause 10 CC, nonetheless, PLL would be entitled to escalation. He contended that even in cases where the contract does not include a escalation clause, a contractor would be entitled to escalation if the contract is prolonged. He relied on the decision of the Supreme Court in *Assam State Electricity Board and Ors. v. Buildworth Pvt. Ltd.: (2017) 8 SCC 146* and submitted that the Arbitral Tribunal had erred in not considering the same.

Reasons and Conclusions

16. At the outset, it is relevant to state that the escalation bill raised by PLL was in terms of the formula specified under Clause 10 CC of GCC. The Escalation Bill No.1 dated 13.10.2015, which has been

produced on record also indicates that PLL had merely claimed variation in price in terms of Clause 10 CC of GCC and not independent of it.

17. It is also apparent that the said escalation claim (as raised by way of Escalation Bill no.1) in the sum of ₹18,68,00,000/- was referred to arbitration. This is apparent from the letter dated 04.04.2016 whereby PLL had indicated the pending claims. The escalation claim was referred at Point No.5 and the relevant extract of the said letter is set out below:-

“Your kind attention that the escalation of prices of INR 18.68 crore due to the extended construction period of the project has been brought to your kind notice from time to time from our side. We would like to highlight that even after the reminders there has not been any response from your side which has affected the planned progress and delayed the completion of the works.”

18. The scope of reference before the Arbitral Tribunal was restricted to Claim Nos. 5, 7 & 8 indicated in the letter dated 04.04.2016 as is apparent from Clause 1 of the letter dated 31.08.2016 issued by the respondent appointing the sole arbitrator. Clause 1 of the said letter indicating the scope of reference is set out below:-

“(i) The scope of reference of Arbitration shall be to adjudicate on Claims No. 5,7 and 8 amounting to Rs. 18,68,00,000/-, Rs.23,14,000/- and Rs.21,71,596/- respectively, raised by the Claimant in his letter dated 04.04.2016 (copy enclosed for reference).”

19. Thus, the limited scope of reference before the Arbitral Tribunal was whether PLL was entitled to escalation as per its Escalation Bill no.1 in the sum of ₹18.68 crores. It is not disputed that the said bill was also raised in terms of Section 10 CC of GCC.

20. It is also relevant to note that on a pointed query raised by the Arbitral Tribunal, the learned counsel for PLL had confirmed that it was claiming escalation as per Clause 10 CC of GCC. This is apparent from the following observation made in the impugned award:-

“On a specific query from AT, the learned counsel for claimant submitted that it was claiming escalation as per clause 10 CC as other claims of claimant including claim for damages had not been referred by appointing authority to the Sole Arbitrator.”

21. Since, PLL had founded its claim for escalation only on Clause 10 CC of GCC and since it is not disputed that the said Clause is inapplicable, PLL’s claim was rejected by the Arbitral Tribunal. This Court finds no infirmity with the aforesaid view.

22. The contention that PLL would be entitled to escalation even though Clause 10 CC of GCC was inapplicable is unmerited. This Court had pointedly asked whether PLL had set up any case for damages. In response, it was readily conceded by Mr Sapra that PLL had raised a separate claim of damages and the claim for escalation was not one in the nature of damages. He, however, urged that notwithstanding that PLL’s claim was not of damages, PLL would nonetheless be entitled to escalation in view of the dicta of the

Supreme Court in *Assam State Electricity Board and Ors. v. Buildworth Pvt. Ltd.* (*supra*). This contention is plainly unmerited. In that case the contract had been extended and the Arbitral Tribunal had allowed escalation on the basis of evidentiary material. The said award was made on a finding that the appellant therein (Assam State Electricity Board) was also responsible for the delay. The Arbitral Tribunal held that the clause in the contract, which provided for escalation, did not apply during the extended period of the contract and, therefore, the claimant would be entitled to make a claim for the same. This was clearly a case where the contractor's claim for damages and compensation was awarded on the basis of evidence produced. It is also relevant to note that in that case the Supreme Court had also referred to its earlier decision in *Food Corporation of India v. A.M. Ahmed & Co. and Anr.*: (2006) 13 SCC 779 and observed as under:-

“15. A similar principle find expression in another judgment of two learned Judges of this Court in *Food Corporation of India v. A.M. Ahmed & Co.* (2006) 13 SCC 729.

“32. Escalation, in our view, is normal and routine incident arising out of gap of time in this inflationary age in performing any contract of any type. In this case, the arbitrator has found that there was escalation by way of statutory wage revision and, therefore, he came to the conclusion that it was reasonable to allow escalation under the claim. Once it was found that the arbitrator had jurisdiction to find that there was delay

in execution of the contract due to the conduct of FCI, the Corporation was liable for the consequences of the delay, namely, increase in statutory wages. Therefore, the arbitrator, in our opinion, had jurisdiction to go into this question. He has gone into that question and has awarded as he did. The arbitrator by awarding wage revision has not misconducted himself. The award was, therefore, made Rule of the High Court, rightly so in our opinion.”

16. In *K.N. Sathyapalan (Dead) By L.R.s. v. state of Kerala and Anr.* : (2007) 13 SCC 43, this Court has held that :

“32. Ordinarily, the parties would be bound by the terms agreed upon in the contract, but in the event one of the parties to the contract is unable to fulfil its obligations under the contract which has a direct bearing on the work to be executed by the other party, the arbitrator is vested with the authority to compensate the second party for the extra costs incurred by him as a result of the failure of the first party to live up to its obligations. That is the distinguishing feature of cases of this nature and *Alopi Parshad* case [(1960) 2 SCR 793 : AIR 1960 SC 588] and also *Patel Engg.* case[(2004) 10 SCC 566] . As was pointed out by Mr Dave, the said principle was recognised by this Court in *P.M. Paul* [1989 Supp (1) SCC 368] where a reference was made to a retired Judge of this Court to fix responsibility for the delay in construction of the building and the repercussions of such delay. Based on the findings of the learned Judge, this Court gave its approval to the excess amount awarded by

the arbitrator on account of increase in price of materials and costs of labour and transport during the extended period of the contract, even in the absence of any escalation clause. The said principle was reiterated by this Court in *T.P. George case* [(2001) 2 SCC 758].””

23. A plain reading of the aforesaid passages clearly indicate that the arbitrator is vested with the authority to award a party for extra cost incurred by a party on the failure of the other party to perform its obligations. Such compensation would clearly be in the nature of compensatory damages.

24. As noticed above, PLL had not founded its case on damages but on the price variation Clause 10 CC of the GCC. Concededly, the petitioner had not produced any material to establish its claim in damages and thus none could be awarded by the Arbitral Tribunal.

25. In *State of Orissa v. Sudhakar Das (Dead) by Lrs.: (2000) 3 SCC 27*, the Supreme Court had set aside the award whereby escalation clause had been granted. The relevant extract of the said decision reads as under:-

“2. It is not disputed that the arbitration agreement contained no escalation clause. In the absence of any escalation clause, an Arbitrator cannot assume any jurisdiction to award any amount towards escalation. That part of the award which grants escalation charges is clearly not sustainable and suffers from a patent error. The decree, insofar, as the award of escalation charges is concerned, cannot, therefore, be sustained.”

26. It is also relevant to note that Clause 10 CC of GCC expressly stipulated that “*No such compensation shall be payable for a work for which the stipulated period of completion is equal to or less than the time as specified in Schedule F*”. Admittedly, Schedule F indicated the stipulated completion period to be 24 months. Thus, in terms of Clause 10 CC the claim as made by the petitioner was not payable.

27. It may have been open for PLL to raise the claim of damages provided that it was able to establish that the delay in execution of the project was on account of the respondent and by proving the loss or damage suffered by it during prolongation of work. However, admittedly, the petitioner had placed no such material but had premised its claim on Clause 10 CC of the GCC which is a price variation clause.

28. In view of the above, this Court finds no infirmity with the impugned award. The petition is, accordingly, dismissed. All pending applications are also disposed of.

VIBHU BAKHRU, J

APRIL 12, 2018

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