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

Date of decision: 01.05.2018

+ **FAO(OS) (COMM) 59/2018**

BRAHMAPUTRA CRACKER & POLYMER LTD..... Appellant

Through: Mr. N.L.Ganpathi, Advocate.

versus

RVR PROJECTS PVT LTD

..... Respondent

Through: Mr. Sridhar Potaraju,
Ms.Ankita Sharma and Mr.Prabhat
Kumar, Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A.K. CHAWLA

A.K.CHAWLA (ORAL)

Caveat No. 290/2018

Since the counsel for the caveator has put in appearance the caveat stands discharged.

CM APPL. 13620/2018 *(for exemption)*

Allowed, subject to all just exceptions.

FAO(OS) (COMM) 59/2018 & CM APPL. 13621/2018 *(for stay)*

1. This appeal under Section 13 of the Commercial Courts, Commercial Division, Commercial Appellate division of High Courts Act, 2015 read with Section 37 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') challenges the judgment of the learned

Single Judge dismissing the appellant's objections questioning an arbitral Award dated 15.11.2017 in part.

2. Concisely, the dispute amongst the parties is the outcome of a contract for civil and structural works of Linear Low Density Polyethylene and High Density Polyethylene (LLDPE/HDPE) Unit at Lepetkata, Assam, awarded to the respondent (hereafter 'claimant') against its successful bid. Under the contract, Engineers India Limited was the Engineer-in-Charge of the subject project/contract. For the purposes of the subject matter of the appeal, it would suffice to say, the contract was not an "item rate tender" but was a "percentage rate tender". Estimated contract value as per the work order was ₹61,66,31,061.81/- and the time for completion undertaken by the claimant was 18 months from the date of acceptance/commencement of the contract i.e. 17.12.2009. In terms thereof, the intended date of completion was 16.06.2011. Work was actually completed on 30.10.2013 and the completion certificate issued on 11.12.2014 alongwith the other connected works. Disputes arose amongst the parties, when at the time of release of the final bill, the appellant made deductions against its paid RA bills (RA 4 & RA 5) towards escalation against structural steel and reinforcement bars amounting to ₹1,70,84,519/- and ₹74,03,223/- on 21.10.2014 and 03.11.2014 respectively, in all amounting to ₹2,44,87,742/-, already paid during the execution of the work. The claimant represented against the amounts. The appellant released payments of ₹1,33,99,611/- and ₹68,97,736/- on 11.08.2015 but held back ₹41,90,393/-. For the said

amount and other claims, the claimant invoked the arbitration clause and filed its claims.

3. The claim was contested to by the appellant. The arbitral tribunal rendered the award favouring the respondent on three counts; (i) ₹41,90,393/-; (ii) interest @2% higher than the current rate of interest (as defined under the Interest Act, 1978) prevalent on the date of the award from 11.08.2015 till the date of payment/realization on the foregoing amount; and, (iii) the claimant was to arrange for joint measurement of the bill towards work done but missed in the final bill being subject matter of Claim No.2, which related to construction of RCC Pavement. Aggrieved, the appellant filed objections under Section 34 of the Act. By the impugned judgment the learned Single Judge allowed the objections partly and set aside the impugned award as regards the award of Claim No.2, upholding the other claims awarded by the learned Arbitrator. Further aggrieved, the appellant has now preferred the appeal under Section 37 of the Act.

4. Before the Arbitrator, the claimant had made the following claims:-

(1) Rs.41,90,393/- towards amount retained against Escalation Bill;

(2) Rs.6,47,066/- towards work-done, missed to measure in Final Bill;

(3) Rs.26,94,202/- towards interest @ 18% on Hold amount from 28.03.2015 to 31.12.2016 towards claim against Escalation Bill (RA4 & RA5);

- (4) Rs.14,96,566/- towards extra BG charges paid for extension of BG's against PG, PRS and increased value of amount;*
- (5) Rs.2,45,379/- towards extra charges for CAR Policy for extended period of stay;*
- (6) Rs.1,35,921/- towards extra payments towards Workmen Compensation Policy for overstay period;*
- (7) Rs.2,90,61,338/- towards Head Office overheads for overstay period;*
- (8) Rs.2,32,49,070/- towards increase in labour wages during over stay period;*
- (9) Interest @ 18% p.a from the respective due dates under Section 3 of Interest Act, 1978 & Arbitration & Conciliation Act, 1996, as amended;*
- (10) Rs.10,00,000/- towards cost of arbitration.*

5. Claim No.1 with interest was upheld by the learned Single Judge. By the present appeal, the appellant now seeks the setting aside of the award to that extent. The primary challenge is founded on the premise that the delay in execution of the work was attributable solely to the respondent and therefore, the appellant had rightly deducted the amounts from the two escalation bills (RA4 & RA5) for a total amount of ₹2,44,87,742/-, which were earlier paid to the respondent provisionally as contemplated by Clause 90.1 of GCC and that it was only as a special indulgence, a sum of ₹2,02,97,347/- was released to the extent it related to drawings issued to the respondent after 75% of the original time schedule of the contract i.e after 30.01.2011; and further that the amount of ₹41,90,395/- related to the drawings issued

to the respondent before 75% of the original time schedule of the contract i.e. 30.01.2011 and was not liable to be released.

6. The learned arbitrator dealt the appellant's plea as follows:

"9. Coming to the merits of the claims, as regards Claim No.1 for Rs.41,90,393/- towards the amount retained against escalation bill from the final bill, it is admitted case of the parties that the amount towards escalation on account of revision in prices of structural steel & reinforcement bars which was subject matter of Escalation Bill RA1 and RA5 were paid on 21.10.2014 and 03.11.2014 and, thereafter, at the time of payment towards final bill, the amount which had been so paid was deducted from the amount of the final bill. Later, on representation from the claimant, the respondent released a portion of the amount so retained from the final bill by carving out a distinction by the benchmark of a cut off date viz.30.01.2011, namely to the extent of allowing the escalation(said to be an act of indulgence on the part of the respondent) to the extent where drawings have been provided after 30.01.2011 and disallow the escalation to the extent where the drawings have been provided by 30.01.2011 being the date of 75% of the original CCD. While the Ld.Counsel for the claimant contended that there was no provision in the contract to make such a distinction, the Ld. Counsel for the respondent contended that there was no bar to the same and the said distinction benefited the claimant and such a view was taken on the representations of the claimant. In my considered view, while the contract did envisage payment of RA Bills to be on account and could be taken into consideration at the stage of payment of final bill, yet the provisions of the contract on which the respondent banks upon in support of its justification to initially deduct the amount from the final bill, and thereafter to extend a limited indulgence, in the manner stated here-in-

before, did not allow carving out an exception by reference to the date of issuance of drawings, be it before or after 30.01.2011. On the other hand, the aforesaid plea of the respondent has to be construed as an admission on its part that the contractual provisions admitted of suitable dilution/exclusion(s), if considered appropriate, in the given scenario. There appears to be no justification whatsoever for the act of the respondent to show a limited 'indulgence' in the manner it sought to bestow by making a distinction with reference to the cut off date of 30.01.2011. In the given factual matrix, the claimant is held to be entitled to the amount of claim no.1 being the amount which was admittedly not released while releasing the rest of the amount deducted from the final bill. Thus, claim no.1 is allowed."

7. Objections to the foregoing conclusions arrived at by the learned Arbitrator were rejected by the learned Single Judge with the observations as follows:

"11. From a reading of the above clause, it is pleaded that the price variation is available 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 was those bills for which drawings were given to the respondent prior to 30.01.2011 and purchase orders were not placed by the respondent before expiry of the said date, namely, 30.01.2011.

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."

8. Having considered the diverse factual aspects and the conclusions arrived at by the learned Arbitrator and the learned Single Judge, it appears that the appellant seeks to apply a thumb or "Foot" rule in making deductions towards price escalation for the drawings having been supplied by it to the respondent before the cut off date of 30.01.2011, without even a whisper, as to whether the work against such drawings, which are the subject matter of the subject claim, was independent of the other work(s) and the drawings, contemporaneously. In our considered view such an approach of the appellant is wholly misconceived and devoid of any merit. The work was scheduled to be completed on 16.06.2011 was actually completed on 30.10.2013 and there is nothing on record to show that such delay was solely attributable to the respondent/contractor. In the said context, it would be relevant to advert to the assertions made by the claimant in the statement of claim to the following effect:

"25. The Claimant submits that the Claimant hardly completed 45% of the total work (initial scope) within the original stipulated contract period and it could not complete balance works because of non-availability majority of the drawings and revision of drawings issued after completion of some works. Once a drawing was revised after completion for any part of the work the Claimant has to re-work as per revised drawing by mobilizing men, material, machinery and establishment at the same place. The re-working is most difficult task and needs lot of time than normal working. The Claimant vide its letter dated 16-06-2011 sought extension of time upto 31-03-2012 and also requested the Respondent to approve the revised schedule without imposing any PRS. The EIL vide its letter dated 11-07-2011 directed the

Claimant to submit the revised construction schedule to complete the job by 31-12-2011 for their review and forward the same to BCPL for extension of the contract. The Respondent vide its letter dated 25-08-2011 provisionally approved the extension of time upto 31-03-2012 without being prejudice to owner's right to levy PRS at a later date."

9. In the corresponding para from the reply, the appellant on its part stated as follows:

"25. The contents of paragraph 25 of the Statement of Claim are hereby denied and the Claimant is put to strict proof thereof. In reply, the Respondent craves specific reference to the letter dated 12.07.2011 which shows the Front availability and the actual progress made by the Claimant. It is evident on the face of the said letter that the actual progress achieved by the Claimant was 43.5% as against the Front availability of 93%. The huge backlog was due to poor mobilization of resources by the Claimant. The Claimant had sought time-extension upto 31.03.2012 but EIL did not accede as all the balance jobs were to be completed by 31.12.2011, and in this context the Respondent craves specific reference to the letter bearing No.S-6714 dated 15.07.2011."

10. What is stated to by the appellant in the reply, does not specifically dispute the factum of non-availability of majority of the drawings and the revision of drawings issued after completion of some works attracting re-work under the revised drawing by mobilizing men, material, machinery and establishment at the same place. In the given factual conspectus, the mere advertence to the drawings having been furnished by the appellant within the stipulated time without establishing on record the other attending circumstances

to justify its action of making deductions from the escalation bills on account of delays is wholly implausible and without any good justification. It requires no elaboration that interference by Court with arbitral awards is limited and circumscribed and an award is not to be interfered with unless it is patently illegal or vitiated by an apparent untenable interpretation of the terms of the contract. The court cannot sit in appeal over an Arbitration Award. More so, during a Section 37 Appeal. The observations made by this Court in *National Highways Authority of India vs. M/s.Prakash Atlanta (JV)*, FAO(OS)(COMM) 1/2017 decided on 11.04.2018 are squarely applicable to the facts and circumstances of the case in hand as well, which are as under:

"13. The Court, at the outset, recollects that it is asked to consider, from an appellate perch as it were, whether the limited oversight of an award by an arbitral tribunal can be interfered with. Even in the case of appeal from a regular civil cause in the first instance, well-defined boundaries constrain an appellate court. The latter cannot upset findings of fact or law, unless the Court of first instance omits to consider relevant and material facts or provisions of law; or renders findings that are plainly contrary to the statute or binding authorities or its findings on an appreciation of those factors are manifestly unreasonable, or it refused to exercise jurisdiction or oversteps it. If all the findings are within the bounds of law and based on relevant findings and facts, merely because the appellate court prefers an alternative view of facts or law, would be insufficient for it to substitute that view. In the present case, we remind ourselves that the court of first instance was severely constrained from rendering factual findings; its jurisdiction was limited to discerning, from the award whether it was patently erroneous, or contrary to

fundamental policy of India, or was based on patently unreasonable findings. None of these elements were made out on the merits of the case; this court finds none that were overlooked or were erroneously upheld by the learned Single Judge, who considered all submissions and grounds of challenge."

11. In view of the foregoing, we do not find any merit in the appeal and the same is dismissed. All the pending applications also stand disposed of.

A. K. CHAWLA, J

S. RAVINDRA BHAT, J

MAY 01, 2018

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