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

+ **O.M.P. 691/2012**

Date of Decision : 5th December, 2018

PANKAJ MITTAL

..... Petitioner

Through: Mr.Bhupesh Narula, Ms.Rinku
Narula, Advs.

versus

UNION OF INDIA

..... Respondent

Through: None

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

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 22.03.2012 passed by the Sole Arbitrator adjudicating the disputes that have arisen between the parties in relation to the Acceptance Letter dated 12.12.2007 issued by the respondent in favour of the petitioner for the work of Provision of heavy duty height gauge at Lxings and RUBs in the section of DEN/DLI.

2. Some of the salient features of the Letter of Acceptance mentioned by the petitioner in its petition are reproduced hereinunder:

- a) *Contract value:* Rs.45,80,145/-
- b) *Stipulated date of start:* 06/12/2007
- c) *The stipulated date of completion:* 05/04/2008
(4 months)
- d) *Actual date of completion of the work:* work
not completed.
- e) *Date of rescission of contract:* 23/04/2009

3. The Arbitrator by his Impugned Award, while rejecting the claim of the petitioner for the refund of Earnest Money Deposit, has allowed the counter claim of the respondent towards damages/penalty.

4. Counsel for the petitioner submits that the Arbitrator has completely ignored the various letters written by the petitioner, including the letters dated 17.04.2008, 08/14.07.2008, 21.09.2008, 23.10.2008 and 17.11.2008 by which the petitioner had requested the respondent to forward the drawings and provide the site of work as also asked the respondent for increase in price of the work due to delays attributable to the respondent in non-supply of such drawings. He submits that the drawings were forwarded by the respondent to the petitioner only under cover of its letters dated 25.11.2008 and 28.11.2008, however, without any intimation on the increase in price. The respondent, thereafter, unilaterally and without any justified

cause terminated the contract vide its communication dated 23.04.2009 primarily on the ground that the petitioner had failed to seek extension of time for completion of the work. He submits that time being not the essence of contract and the default being attributable to the respondent, the termination of the contract was illegal.

5. I have considered the submissions made by the counsel for the petitioner, however, I find no merit in the same. As noticed by the Arbitrator, upon issuance of the Letter of Acceptance in favour of the petitioner and in terms of paragraph 5.2(a) and (b) of the Special Tender Conditions and instructions to tenderers, it was the obligation of the petitioner to submit a Performance Guarantee within 15 days of the issue of Letter of Acceptance in the form of an irrevocable Bank Guarantee amounting to 5% of the Contract value. On submission of such Bank Guarantee, a formal contract was to be executed between the parties for the work in question. In spite of repeated requests by the respondent vide letters dated 14.01.2008, 19.03.2008 and 09.04.2008, the petitioner failed to submit the Performance Guarantee.

6. The letters now sought to be relied upon by the petitioner are all dated after the stipulated date of completion of work which, even as per the petitioner was 05.04.2008. There is absolutely no justification given by the petitioner for non-

submission of the Performance Guarantee in terms of the Tender Conditions.

7. The respondent in its reply has rightly stated that the petitioner never wanted to undertake the work and having secured the work, first waited for the stipulated date of completion of work to expire and thereafter started demanding enhancement of rates. This in my opinion, was a clear case of blackmailing and the petitioner cannot claim any equity in its favour.

8. Counsel for the petitioner has further submitted that the Arbitrator has erred in allowing the counter claim of the respondent towards penalty. He submits that in terms of Clause 17B of the General Conditions of Contract (GCC), the maximum liquidated damages for a contract of a value of more than Rs.2 lacs is 10% of the first Rs.2 lacs and 5% of the balance amount. The Arbitrator, however, has awarded a penalty of 10% on the total contract value thereby acting in ignorance of the contractual condition.

9. He further submits that the respondent had not issued any notice before claiming damages from the petitioner. Relying upon the judgment of the Punjab and Haryana High Court in ***Bodh Raj Daulat Ram & Ors. v. Food Corporation of India & Anr.*** 2003(2) Arb LR 677 (P&H), he submits that no damages can be claimed by the respondent without issuance of a show cause notice to the petitioner in that regard. Further, relying

upon the judgment in *Kailash Nath Associates vs. DDA & Anr.* (2015) 4 SCC 136, he submits that in any event, no evidence was led by the respondent to show any loss being suffered by it due to any reason attributable to the petitioner. In absence of such evidence, the claim of damages could not be sustained.

10. I have considered the submissions made by the counsel for the petitioner, however, find no merit in the same.

11. In my view, Clause 17B of the GCC is not relevant to the claim of damages raised by the respondent. Admittedly, the contract was not entered into between the parties due to a default of the petitioner in submission of the Performance Guarantee in terms of the Tender Conditions. Clause 17B of the GCC would become applicable in case of delay in execution of the work by the petitioner and not in case of total abandonment of the work by the petitioner. In the present case, the question is not of delay but of total abandonment of the work by the petitioner.

12. As far as the plea of the petitioner that no damages can be claimed without a show cause notice being issued, the same cannot be accepted. In case of a breach of contract, once the disputes are referred to arbitration, the party not in breach can always claim damages from the party in breach of the contract. No further notice is required for the said purpose.

13. As far as the plea of the petitioner that the respondent had failed to lead any evidence of loss suffered by it due to non-performance of the work by the petitioner, I may only note that the work in question is of a public importance and therefore, once it is accepted that there was a total abandonment of work by the petitioner after having become successful in a tender process, the damages awarded by the Arbitrator cannot be said to be unreasonable or perverse in any manner so as to warrant any interference of this Court in exercise of its powers under Section 34 of the Act. Such damage or loss can be inferred from the very fact that the respondent would have to re-tender for the work and have to incur additional costs due to escalation etc. In any case, the matter of quantification of damages by the Arbitrator cannot be interfered with unless the same is found to be totally perverse or unreasonable. In the present case, the damages awarded are reasonable and, therefore, deserve no interference from this Court.

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

NAVIN CHAWLA, J

DECEMBER 05, 2018
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