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IN THE HIGH COURT OF DELHI AT NEW DELHI

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**Reserved on: 16th January, 2018
Pronounced on: 09th February, 2018**

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O.M.P. 1588/2014 & IA No.13751/2017

M/S PRESTRESS WIRE INDUSTRIES

..... Petitioner

Through : Mr.Ankit Anandraj Shah Mr.Vivek
R Mohanty, and Ms.Priyadarshini
Patnaik, Advocates.

versus

M/S UPPAL BUILDERS PVT LTD

..... Respondent

Through : Mr.L.B,Rai and Mr.Syed Kamran
Ali, Advocates.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. This petition is under section 34 of the Arbitration and Conciliation Act 1996 (hereinafter referred as 'the Act') challenging the award dated 17.04.2017 passed by the sole arbitrator.

2. Vide an agreement dated 24.01.2009 M/s Prestress Wire Industries (the petitioner herein) had awarded the work of construction of factory building at Bajpur vide agreement dated 24.01.2009 amounting to ₹2,28,00,000/- to the contractor/the respondent herein who reduced its bid by 6.7% discount. Certain disputes arose between the parties and an arbitrator was appointed. The statement of claim was filed on 09.08.2012 and the statement of defense was filed on 04.12.2012. The claimant

submitted its rejoinder on 26.02.2013 and evidence was recorded and thereafter an impugned award was given.

3. The stipulated date of commencement of work was 21.01.2009 and the stipulated time for completion was 180 days plus 15 days for additional mobilization.

4. The layout drawings of the work were issued on 14.03.2009, the foundation details on 19.03.2009 and hence the date of start of the work was 03.02.2009. Further tiles were asked to be provided in foundation as an additional item of work. There was a shortage of cement and steel which was later arranged and the shortage of labour and other resources on the part of the claimant.

5. Qua allowing of claim No.1 of the respondent the petitioner has urged the details of the final bill given in annexure C-6 are not admitted as were never received by them and was not signed by the Architect of the respondent. Rather relying upon the details of the final bills given in the letter of the Architect dated 12.10.2012 annexure R-23 it is stated no other payment was due to the claimant and that over payments have been made. It is urged by the learned counsel for the petitioner the tender of the claimant was not the lowest, but was accepted after the claimant had agreed to reduce the tender amount by allowing rebate of 6.7%. The respondent urges the rebate was conditional to execution of both the works by the claimant viz this work and a similar work for the sister concern of the respondent - M/s.Sidhi Ferrous, but such rebate was never agreed to and accordingly no such condition is stipulated in the

agreement. However, the learned arbitrator has decided this claim as under:-

“.....Admittedly all the running bills were paid after deducting the rebate, which were all along accepted by the claimant. It is added that as late as on 05.05.2010 (exh.R/21), the claimant confirmed/admitted the account statement of the 5th Running bill accounting for the rebate. Further, since there is no stipulation in the contact agreement as to the rebate being conditional to the execution of both the works by the claimant, the rebate can't be denied in this work to which this arbitration relates.

As per the admission/denial of the documents, the respondent has denied receipt of the final bill submitted by the claimant at Annex. C-6, and the claimant has denied the cover page of the final bill at Annex. R/23 while the rest of the details as on pg 60 to 69 of Annex. R-23 are accepted, which incidentally are practically the same as at Exh C/6. It is seen that the cover page of Annex. R-23 is the letter from the Architect addressed to the respondent, giving summary of the final bill. The letter is signed by the Architect.

Admittedly, amount of .the total work done comes to Rs. 3,42,59,951/-(Rs.3,02,67,908/- on account of work as per tender items plus Rs.39,92,043/- for extra items), and after adding 33% of 10.3% service tax (payable to the claimant as per terms of the contract) on the total amount of Rs.3,42,59,951/-, gross amount of the work comes to Rs.3,54,24,447/- . Recovery on account of steel and cement stands at Rs. 1,12,35,051/- and a total

payment of Rs.2,15,80,666/- has earlier been received by the claimant.

With deduction of 6.7% rebate on the work done based on the tender rates given in the BOQ net amount of the payment of payment due, is worked out as given below

<i>Work done as per tender rates</i>	<i>Rs. 3,02,67,908</i>
<i>Deduct 6.7% rebate</i>	<i>(-) Rs. 20,27,950</i>
	<i>Rs.2,82,39,958</i>
<i>Add for extra items</i>	<i>Rs. 39,92,043</i>
<i>Total amount of the work</i>	<i>Rs 3,22,32,001</i>
<i>Add for the service tax @33% of 10.3%</i>	<i>Rs 10,95,888</i>
	<i>Rs 3,33,27,889</i>
<i>Less recovery for materials</i>	<i>(-) Rs 1,12,35,051</i>
	<i>Rs 2,20,92,838</i>
<i>Less already paid</i>	<i>(-) Rs 2,15,80,666</i>
<i>Net payment due</i>	<i>Rs 5,12,172/-</i>

Accordingly, it is held that the claimant is entitled to receive Rs.5,12,172/- from the respondent.”

6. Though it was argued by the petitioner rebate of 6.7% ought to have been allowed on the extra work, but since this work was never included in the scope of the agreement hence there was no illegality in not allowing rebate on such extra items. The extra work was done at the instance of the petitioner and the amount was based on actual, as certified by the architect of the respondent, hence learned arbitrator not erred in allowing claim No.1.

7. Qua claim No.2 the learned counsel for the petitioner urges and refer to an admission by the respondent it would remove the labour

hutment and store sheds etc at the end of the completion of the construction project, but later on rescinded the decision and left the structures at the site and that ₹1.00 Lac was wrongly awarded by the learned arbitrator as damages against the admission of the respondent.

8. It is urged by the petitioner that initially the respondent agreed to take over hutment but rescinded from his promise but yet compensation was awarded to the respondent. The learned arbitrator dealt with the issues raised as follows :-

“Claim no.2: Rs.4,63,550/- on account of miscellaneous work.

Claimant submitted that as per respondent's own admission in letter dated 02.07.2010 {exh. Annex C-14}, the respondent earlier promised to take over labour hutments and store sheds at the end of construction of the project. The respondent all of a sudden rescinded its decision which was rebutted by e-mail {Annex. C-15}, indicating that since it was too late to use the bricks initially contemplated to be used for construction of drains etc., the respondent was bound to take over the structures and pay for the same. There was no rebuttal to the same and the structures are claimed to have been left at site on completion of the project. The claimant submitted that as per statement of final payment prepared by the Architect, a payment of Rs.2,50,000/- was recommended for payment.

The claimant further submitted that the Architect recommended a payment of Rs.15,000 on account of soil testing which the respondent has since admitted.

Admittedly, as per terms of the agreement, the respondent was required to provide free electricity to the claimant wef 21 March 2009. In this connection it is contended by the claimant that as the electricity supply was extremely erratic, the claimant had to hire DG sets and purchase diesel for running the same for which the Architect approved an amount of Rs.1,98,550/- in the final bill. A total of Rs.4,63,550/- is claimed on these counts.

Regarding taking over of the labour huts and store sheds, the respondent admitted that instructions for not dismantling were initially given to the claimant but shortly thereafter decision not to take' over the same was conveyed. It is contended that the old bricks smeared with mortar as obtainable from the temporary structures were not suitable for construction of drains.

Claim of Rs 15,000/- on account of soil testing is admitted by the respondent. regarding electricity, the respondent argued that there was no complaint till 21.01.2010 when the claimant asked for power connection from our DG set installed for the factory (pg 86 of Annex. C-12 colly). It is argued that whenever power cut was imposed, the claimed stopped the work and continued with other activities not requiring power. Also, there is no evidence of payment of any hire charges and purchase of diesel and no log book is produced.

As regards the claim on account of handing over of labour huts and store sheds, there is no evidence of rebuttal to the assertion of the claimant that the respondent was obliged to take over the same. Further,

the Architect has also recommended for payment of compensation of Rs.1,00,000/- even as per the final bill produced by the respondent at exh. R-23. In these circumstances the claimant is allowed compensation of Rs.1,00,000/- as per assessment of the Architect.

Rs.15,000/- on account of soil testing stands admitted by the respondent. As regards the claim for hire charges of DG set and purchase of diesel, I am in full agreement with the respondent and hold that the claim remains unsubstantiated,

As a result of the above findings, claim no.2 is held to be justified for an extent of Rs.1,15,000/-."

The arbitrator said there was no evidence of rebuttal to the assertion of the claimant that the respondent was obliged to take over the same and such opinion is justified on facts.

9. Now, I come to the claim No.5 which was on account of the compensation towards the increase in the price during the construction period. This claim was *duly certified by the architect* of the respondent. Though it is argued by the learned counsel for the petitioner the time was an essence of the contract but admittedly the work of construction prolonged beyond 180 days and was never objected to by the respondent and rather they allowed the petitioner to complete the project. The claimant alleges that there was a delay in issue of layout drawing of the project and it was decided to provide piles in foundation instead of ordinary foundation for which reinforcement details were provided on 19.03.2009. because of the additional work the total quantum of work was increased by over 50% of the contract value and also there were

occasional interruptions on account of irregular supply of cement and heavy down pour every now and then. It increased the cost of labour and material. However, petitioner rely on clause 25 of the agreement which says no enhancement of the rates would be entertained. It runs as under:

“25. Escalation No enhancement of rates would be entertained in case of escalation in price of raw-material, transportation, labour etc. "No escalation.”

10. The learned arbitrator has dealt with the claim No.5 as follows:-

“Claim no.5: Rs.14,00,000/- on account of compensation towards increase in the price during the extended period of construction.

Case of the claimant is that as against the stipulated period of completion of 180 days, execution of the work got prolonged by about 12 months on account of delays on the part of the respondent. It is argued that although the claimant was ready with labour and materials, to start the work, but there was delay of 6 weeks in issuing the layout drawing of the factory and subsequently it was decided to provide piles in foundations instead of ordinary foundations for which reinforcement details were provided on 19 March 2009 only(letter at Annex. C-5}. Because of additional work, the total quantum increased by over 50% of the contract value. Also there were occasional interruptions on account of irregular supply of cement by the respondent, besides heavy down pour every now and then. It is contended that because of prolongation of the work, there was increase in the cost of labour and materials for the work done in

the extended period and is claimed from the respondent.

The respondent contended that as per clause 25 of the agreement, no such enhancement is admissible. It is contended that the respondent provided all possible help in execution of the work and there were no delays on the part of the respondent. The respondent further contended that as the time was essence of contract, it was mandatory on the claimant to serve notice at the time of expiry of contract period, of its intention to claim damages as per clause 55 of the Contract Act, and thus there could be no claim for damages.

As discussed in para 1.1 above, it is observed that there was initial delay of about six weeks in providing details of foundations, layout drawings etc, besides minor hold ups on account of rains, short supply of cement etc. Admittedly quantum of the work increased by more than 50% of the contract amount. As regards contention of the respondent regarding applicability of clause 25 of the agreement prohibiting Escalation in Prices, I am of firm view that the contract provision would justifiably be applicable upto the stipulated period of completion and not for any indefinite period. As regards the contention that time is stipulated as Essence of Contract, I am of the view that since the work continued to run even after the stipulated date of completion and it was no further made as essence of contract, time was set at large and ceased to be essence of contract, and the requirement of notice at the time expiry of the contract period did not remain applicable.

In the circumstances, it is felt that for the work beyond the contract period, the claimant was entitled to suitable compensation for escalation in price of the work executed as per tender items. The work executed as Extra items was already based on the market rates and did not call for any further escalation. As per the 2nd running bill dated 31.07.2009 certified by the Architect {Pg 43 of Annex C-I0Colly}, work done as per tender items was Rs.1,26,37,188/-, which could be taken as the work done in the stipulated period of contract. Further as per the final bill (Annex. R-23), work done as per tender items came to Rs 3,02,67,908/- and thus the work done in the extended period amounts to Rs.1,76,30,720/-, which after applying 6.7% rebate works out as Rs.1,64,49,461/-.

Further, no escalation would be applicable to the cost of cement and steel issued by the respondent at fixed price, which could reasonably be taken as 35%. After adjusting for the same, the net amount subject to escalation comes to as Rs.1,06,92,149/-. As per the wholesale price index given at Annex. C-35, it appears that there was escalation of 9.3% over the extended period compared to the price index prevailing at the beginning of the work. Allowing the same, the escalation payable works out as Rs 9,94,370/.

Accordingly, the claim is held to be justified to the extent of Rs.9,94,370/-."

11. Clause 25 though say the escalation of price would not be entertained but the learned arbitrator rightly held such escalation of course was limited to the period of contract and not beyond it. Since the work

extended over beyond the period of contract the claimant was certainly entitle for escalation of price of the work executed as per the tender items. The work executed as extra was already based on market rates and did call for escalation. Such details, as submitted, were *duly certified by the architect* and per whole sale price index the amount of escalation was worked to ₹9,94,370/-. The learned arbitrator rightly held the time though was an essence but as the contract was spilled over to further 12 months, the essence part lost its importance. The bills of the work were duly certified by the architect of the petitioner taking into consideration the wholesale price index.

12. Lastly, the learned counsel for the petitioner argued qua claim No.6 to say interest @ 18% pa was wrongly awarded. To support his contention, the learned counsel for the petitioner relied upon decision in *Ashutosh vs. State of Rajasthan and others* (2005) 7 SCC 308 where the court held as under:-

Though the interest is claimed at 18% p.a. by the State, we cannot also shut our eyes at the prevailing bank rate for fixed deposits and for lending which is not more than 6-7%."

13. In *P.Radhakrishna Murthy vs. National Building Construction Corporation Limited* (2013) 3 SCC 747 the court held as under:

The same cannot be found fault with by this Court for the reason that the High Court taking relevant aspects into consideration has rightly reduced the rate of interest to 12% per annum from 16.5% per annum after holding that exercise of discretionary power by the Arbitrator Under Section 34 of Code of Civil Procedure is a discretionary power and the same cannot be interfered with by the High Court."

14. The learned counsel for the respondent though referred to *State of Haryana and Others vs S.L. Arora and Company* (2010) 3 SCC 690 wherein 18% pa post award interest was awarded. Further in *Bhag Kathuria Engineers (P) Ltd vs. Delhi Development Authority and Another* 1997 (Suppl) Arb. LR 157, yet again 18% pa simple interest was found to be reasonable. Further, in *Aditya Mass Communications (P) Ltd vs APSRTC* (2003) 11 SCC 17 where the High Court had reduced the interest from 12% to 9%, the Supreme Court said it was not correct.

15. Thus, in view of above submissions, there is nothing to interfere with the impugned award. As per settled law a court would not sit in appeal over the award of an arbitral tribunal by re-assessing or re-appreciating the evidence. An award can be challenged only on the grounds mentioned in section 34(2) of the Act. In the absence of such grounds under section 34(2) of the Act, it is not possible to re-examine the facts to find if a different conclusion can be arrived at.

16. The arbitral award being a reasoned one based upon the agreements, the plea of the petitioner seeing afterthought, there is no valid cause for setting aside the reasoned award, hence the petition stands dismissed.

17. The pending application (IA No.13751/2017) is also disposed of and petitioner to pay the entire costs within four weeks from today.

YOGESH KHANNA, J

February 09, 2018/VLD