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IN THE HIGH COURT OF DELHI AT NEW DELHI

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**Reserved on: 09th March, 2018
Pronounced on: 23rd March, 2018**

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O.M.P. (COMM) 132/2017

BSES RAJDHANI POWER LIMITED Petitioner

Through : Mr.Sudhir Nandrajog, Sr Advocate
with Mr.Manish Srivastava and
Mr.Harsh Prakash, Advocates.

versus

A K BUILDERS & ANR Respondents

Through : Mr.Sanjay Bansal, Advocate.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. The petitioner filed these objections under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred as 'the Act') against an arbitral award dated 16.01.2012.

2. The petitioner is a Limited Company duly constituted under the provisions of the Indian Companies Act, 1956 on the unbundling of the erstwhile *Delhi Vidyut Board* on 01.07.2002. Resultantly, independent companies namely Delhi Power Corporation Limited (the Holding Company); Delhi Transco (The Permission Company); Indraprastha Power Generation Company; and three distribution Companies (DISCOMS), namely the BSES RPL, BSES YPL & NDPL respectively, responsible for

distribution came into existence. The petitioner BSES RPL is assailing the impugned award dated 16.1.2012 passed by the learned arbitrator, who has awarded an amount of ₹ 42,53,215/- against it, failing which the petitioner has to pay an interest @ 12% per annum on the awarded amount with effect from 15.03.2012.

3. The factual matrix of the case leading to the filing of this petition are as follows:-

(i) The predecessor of the petitioner i.e. erstwhile DVB and respondent i.e. A.K. Builder entered into an agreement dated 20.07.2000 for construction of a control room building for 66KV Grid Station West of JNU, New Delhi. The awarded value of the work was ₹ 43,12,757.15. The estimated cost put to tender was ₹ 45,55,293.41. The stipulated date of start was 26.7.2000, whereas as the actual date on which the work started was 19.9.2000 and the date for completion was 25.1.2001. The period for completion of the aforesaid work was, therefore, 6 months;

(ii) After award of the work, all the related drawing, ie, structural and architectural were handed over to the contractor/ respondent with the request to make arrangements to draw the steel and cement from the store. Accordingly the cement priority list was issued and contractor was requested to start the work. The work of excavation of foundation on the building and earth work remained in progress till 05.10.2000. Approximately 2½ months was wasted by the contractor only on excavation of 50% area of

the proposed building. The contractor delayed the execution of work on flimsy grounds solely attributable to it;

(iii) The work remained suspended from 30.8.2001 to April, 2002 due to the intervention of Ministry of Urban Affairs which was beyond the control of the petitioner and due to force majeure which was intimated to the respondent/contractor vide letter dated 30.08.2001. The construction of the building was asked to start on 06.06.2002 after the withdrawal of order of stoppage of work by the concerned Ministry;

(iv) With the unbundling of Delhi Vidyut Board with effect from 01.07.2002 and existence of six different companies, as noted above, the area where the proposed Control Room building was to be erected, fell under the jurisdiction of the petitioner and it succeeded the aforesaid agreement;

(v) The awarded work was never completed. The respondent/contractor vide letter dated 10.8.2004 asked for the closure of the contract and requested for the release of payments pertaining to losses and damages and various other claims were raised. The claimant/respondent moved an application under Section 11 (6) of the Arbitration and Conciliation Act, 1996 and accordingly the Chief Executive of the petitioner company appointed Sh.B.B.Das as a sole arbitrator in this case vide letter dated 13.06.2006. Pursuant to his appointment, the learned arbitrator entered into the reference on 19.8.2006;

(vi) The respondent/claimant submitted its claims on 28.08.2007. The petitioner also filed reply and raise various counter claims before the learned arbitrator;

(vii) On 26.03.2008 the respondent moved an application before the learned arbitrator for refund of security deposits to the tune of ₹ 3,33,353/- as an interim measure. The said application was contested by the petitioner stating the security deposit is to be released on expiry of guaranteed period and after completion of work and as the work was not completed in terms of the contract no cause of action arose for refund of the security deposit. It was further submitted in many cases the security deposits, which was deducted by the erstwhile DVB have been released by the Holding Company, ie, DPCL. The learned arbitrator passed an interim award dated 11.10.2010 holding that the part security deposit to the tune of ₹ 1,66,062/- deducted prior to unbundling of the erstwhile DVB shall be paid by the DPCL in terms of Rule 2(j) and (k) of the Transfer Scheme. The remaining security deposit was held to be paid by the petitioner. The DPCL has challenged the said interim award in FAO No.74/2011 and the same is pending before this Court;

(viii) In the meantime, an application dated 28.09.2007 was moved by the petitioner to implead DPCL as a necessary party in the light of DPCL's letter dated 17.03.2003 to the effect that in cases where amount involved is more than ₹ 10.00Lac, consultation with DPCL, the holding company on restructuring of DVB will continue. Accordingly a notice was sent to DPCL, who

admitted that part security deposit is lying with them. However, the learned arbitrator declined to implead the DPCL as a party in the ongoing proceedings;

(ix) During arbitral proceedings, the evidence by way of affidavits was filed and witnesses were cross-examined, whereafter the impugned award dated 16.1.2012 has been passed by the learned sole arbitrator.

(x) It is the case of the petitioner the learned arbitrator has gravely erred in passing the impugned award against the provisions of the terms of the contract

4. Certain dates are relevant. The date of start of work was 26.7.2000 whereas it actually started on 19.09.2000. The date for completion was 25.1.2001 but the work went on till 10.08.2004 when the respondent sought closure of the work and certain disputes arose. The matter was then referred to the learned arbitrator who entered reference on 19.8.2006 and rendered the impugned award on 16.01.2012 for a sum of ₹ 42,56,215/- against the petitioner.

5. The petitioner has challenged the impugned award on the ground viz. the learned arbitrator having noted *a)* both the claimant and the respondent being responsible for the delay in execution of the job; and *b)* as due to the act of the respondent part of the job remained unexecuted; the claims of the Respondent ought not to have been allowed against the petitioner herein and due

apportionment ought to have been made for the delay caused by the respondent herein.

6. I may here note when the learned arbitrator had talked about the delay on the part of the both the parties, he has stated about the claimant / respondent being responsible for the delay of only for 1½ months in start of the work against the actual date of start- viz. 26.07.2000 and in the same breath had noted the petitioner herein was mainly responsible for the major part of job remain unexecuted as there was delay in issuance of cement, steel and mainly due to non-shifting of the EHT lines. As per the claimant they were never informed if the lines were not shifted. In fact the claimant urged the work ought not to have been awarded to the claimant or to anyone else without first getting such lines shifted. Admittedly there was an abnormal delay in shifting of the lines and further delays were caused due to reasons stated in brief facts above, hence the arbitrator rightly held the delay was primarily on account of the petitioner herein.

7. Another contention raised by the learned senior counsel for the petitioner is the learned arbitrator travelled beyond the terms of the contract which he ought not to have done. Regarding claim No.1 viz *the payment for extra work to the tune of ₹ 3,51,391/-*, the claimant submitted the analyses of rates for extra items based on the market rates as applicable vide its letter annexed to the statement of facts. The learned arbitrator notes the petitioner herein have approved the rates for some of the extra items, but did not pay

for the remaining items despite several letters issued by the respondent. The claimant / respondent rather relied upon the Measurement Book in which bills were prepared by the petitioner. The learned arbitrator called for a copy of Measurement Book and examined it in detail. The claimant hence claimed for the extra work done, though the petitioner denied it saying no details of such extra work was ever furnished. The Measurement Book record the payment having been made in most of the work at some reduced rates than that in the agreement; but for item No.8 viz *filling of available earth/malba rate which was allegedly not in the agreement*, but since the analysis of rates were admitted by the then Assistant Engineer (Civil) of the respondent on 05.10.2009; as indicated in document C-50 of the claimant, the entry was made in the measurement book No.852 showing the payments verified and made for excavation of earth to the extent of 6,357 cum. The measurement book though does not show the payments to be made for filling of the earth/*malba* but admission of the rates by the department indicate such work was also to be done. Since the quantity of earth refilling was same as of quantity excavated, so the learned arbitrator rightly awarded a sum of ₹ 2,89,370/- for 6357 cum at an approved rate of ₹ 45.52.

8. Though the learned senior counsel for the petitioner alleged there was no provision in the agreement qua payment for refilling of earth and to such an extent the award was beyond the scope of agreement. However the petitioner did not deny such work was

not done and hence there is no material to disagree with the finding of the learned arbitrator. Since the earth was excavated, the contractor was to fill it with available earth/ *malba* and hence while quoting the rate of 45.52 for filling, the department indicated such rate would be applicable for refiling such quantity of earth and hence the learned arbitrator was justified in awarding the same.

9. The learned senior counsel for the petitioner then disputed claim No.2(b) i.e. *the interest on delayed payment of ₹ 45,442/- as claimed on the ground that there was no agreement for the same.* However, the award reveals the payments qua the 4th and 5th RA bills were delayed considerably. As per the General Conditions of Contract, 75% of the payment was to be released in 15 days and balance 25% in next 15 days. The 4th RA bill was though submitted on 31.10.2002 but the payment was released on 13.02.2003 and the 5th RA bill was submitted on 28.01.2003 and payment was released on 24.04.2003. So the interest was, of course, payable for such delayed payments even on equity basis. The letter dated 15.01.2003 of the Executive Engineer (Civil) (South-II) is clearly evident for the delay on the part of the petitioner and there is a delay of about 75 days in processing of 4th bill, and certainly the respondent was deprived of its due money for 75 days, hence interest @ 10% was granted only to meet the ends of justice and hence only an amount of ₹ 13,017/- was given as interest, which I feel is fair and reasonable.

10. In *State of Haryana & Others vs M/s. S.L. Arora & Company* AIR 2010 SC 1511 noted:-

“17. The difference between clauses (a) and (b) of section 31(7) of the Act may conveniently be noted at this stage. They are:

(i) Clause (a) relates to pre-award period and clause (b) relates to post- award period. The contract binds and prevails in regard to interest during the pre-award period. The contract has no application in regard to interest during the post-award period.

(ii) Clause (a) gives discretion to the Arbitral Tribunal in regard to the rate, the period, the quantum (principal which is to be subjected to interest) when awarding interest. But such discretion is always subject to the contract between the parties. Clause (b) also gives discretion to the Arbitral Tribunal to award interest for the post-award period but that discretion is not subject to any contract; and if that discretion is not exercised by the arbitral Tribunal, then the statute steps in and mandates payment of interest, at the specified rate of 18% per annum for the post- award period.

(iii) While clause (a) gives the parties an option to contract out of interest, no such option is available in regard to the post-award period.

In a nutshell, in regard to pre-award period, interest has to be awarded as specified in the contract and in the absence of contract as per discretion of the Arbitral Tribunal. On the other hand, in regard to the post-award period, interest is payable as per the discretion of the Arbitral Tribunal and in the

absence of exercise of such discretion, at a mandatory statutory rate of 18% per annum.”

11. Regarding claim No.3, the learned senior counsel for the petitioner says as per terms of the contract *no amount was payable for the work done beyond deviation limits*. It was the case of the claimant the agreement provides for 25% to be considered as rationale increase of stipulated quantities and beyond this the payments were to be made as per the market rates. However, the quantities of work executed in the item were highly excessive and detailed break-up has been appended with the statement of facts. The petitioner alleged the claimant is not entitled to the claim as it was itself willing to execute the work beyond the deviation limit. If this contention is accepted then the petitioner admitted the work was done beyond the deviation limit and the petitioner rather sought an advice on actual market rates by their engineer. It was the respondent who provided the market rates based on Delhi Schedule of Rates 2002 (DSR) upto which time the work was done and then stopped. A bare perusal of the chart of the work done would show the DSR rates were rather on the higher side and but the market rate for the year 2001 and for the year 2002 was on the lower side, hence the petitioner ought not to have any grievance for the same. The learned arbitrator noted 75% of the work was done in the year 2001 and the remaining 25% work was done in the year 2002 and accordingly the award was given applying the reduced rates, hence no further interference is required in this regard.

12. The learned senior counsel for the petitioner challenged the *idle establishment due to non-execution of work and prolongation claim for ₹ 17,20,200/- alleging that there is no provision in the agreement* for the same, and also since both the parties were responsible for the delay.

13. I have already noted the delay attributable to the respondent was only of 1½ months in starting the work but later due to non-supply of material as also on account of shifting of high tension lines and further for reasons aforesaid, major delay was attributable to the petitioner, hence prolongation of the contract was due to the petitioner and though the respondent claimed ₹ 36,600/- per month for 47 months inclusive of ₹ 8,000/-per month for engineer, ₹ 5,000/-per month for Diploma holder engineer, ₹ 3,000/- per month per Chowkider for six Chowkidars and ₹ 5,600.00 for supervision, but the learned arbitrator noted the amount claimed for idle labour was on a higher side and deployment of one engineer and one diploma holder full time for the extended period was not at all necessary when no work was going on. The claimant rather have utilised their services and deployed them elsewhere. Only deployment of four full time chowidars was considered by the learned arbitrator to be valid with occasional supervision of a diploma holder. Hence, after examining in detail the claimant was found entitle to payment of ₹ 5,62,500/- only. No interference is thus necessary.

14. Remaining claims were not agitated by the learned senior counsel for the petitioner. The record reveal the learned arbitrator awarded the amount on the basis of measurement book, DSR and that too on a lower side, hence it cannot be said the learned arbitrator erred in awarding such sums, more specifically when the delay for a major period was occasioned by the petitioner herein. The view taken by the learned arbitrator was thus a plausible view based on documentary evidence and this Court is not expected to sit in appeal against the findings in the award dated 16.01.2012. No interference hence is called for by this Court.

15. In view of above, the petition is dismissed. No order as to costs.

YOGESH KHANNA, J

MARCH 23, 2018

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