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

Date of Decision: 30th October, 2018

+ **OMP 564/2010**

IILM WORLD SCHOOL

..... Petitioner

Through: Mr. Samrat Nigam, Mr. Sandeep Mittal and Ms. Rekha, Advocates.
(M:9560952425)

versus

S. S. MANN & ANR.

..... Respondents

Through: Mr. Sandeep Sharma and Mr. Aman Dhyani, Advocates. (M:9717464364)

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 has been filed challenging the award dated 21st May, 2010 passed by the learned Sole Arbitrator. The Respondent – Contractor (*hereinafter ‘Contractor’*) was awarded a construction contract on 1st April, 2005 for building the IILM campus at Gurgaon. The total value of the contract comprising civil/structural work was Rs.4,82,37,613/-. The contract had an arbitration clause, which reads as under:

“14. ARBITRATION

In the event of any dispute arising out of or in relation to this agreement between the parties hereto the same shall first be sought to be settled by arbitration governed by the Arbitration & Conciliation Act, 1996 and the rules framed there under, whose decision shall be final and binding upon the parties Jurisdiction shall be at Delhi for all cases.”

2. Subsequent to the main contract awarding the work, a supplementary contract/work order was awarded on 1st December, 2005 and thereafter, a third work order was awarded on 7th December, 2005. The second work order dated 1st December, 2005 is not subject matter of the present petition.

3. The Contractor carried out a substantial portion of the work but thereafter, disputes arose between the parties. The Contractor filed a Section 11 petition before this Court. Vide order dated 2nd February, 2007, this Court appointed a Sole Arbitrator to adjudicate upon the disputes between the parties. The learned Arbitrator passed award dated 21st May, 2010 awarding various claims of the Contractor.

4. The Petitioner raised the following three objections in respect of the impugned award.

i) That the claims in respect of work order dated 7th December, 2005 could not be adjudicated by the learned Arbitrator as there was no arbitration clause in the said work order.

ii) That the Engineer-in-Charge had, made a noting on the final bill, that a sum of Rs.17 Lakhs (Rs.11 Lakhs as security deposit + Rs.6 Lakhs above sum) was to be retained, until the Contractor cleared the defects in the construction. Out of the said amount, the learned Arbitrator has wrongly awarded to the Contractor a sum of Rs.13 Lakhs (Rs.11 Lakhs + Rs.2 Lakhs).

iii) That there is a calculation error of Rs.3 Lakhs in the final award.

Each of the above objections shall be dealt with hereinafter.

i) That the claims in respect of work order dated 7th December, 2005 could not be adjudicated by the learned Arbitrator as there was no

arbitration clause in the said work order.

5. It is submitted by learned counsel for the Petitioner that the work order dated 7th December, 2005 does not provide that the arbitration clause in the original contract namely dated 1st April, 2005 would apply qua this work order. He specifically relies upon clause 5 of the supplementary work order dated 7th December, 2005 to argue that the arbitration clause is conspicuous by its omission. It is, further, submitted that the learned Arbitrator has, despite relying upon the judgements of the Supreme Court in *Alimenta S A v. National Agricultural Cooperative Market Federation of India Ltd. (NAFED) 1987(1) SCC 615* and *Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya (2003) 5 SCC 531* arrived at an incorrect legal conclusion that the disputes qua the supplementary work order were arbitrable.

6. On the other hand, learned counsel for the Respondents submits that the original work order was itself for a sum of Rs.4.82 Crores and the supplementary work order dated 7th December, 2005 was for a sum of Rs.64.93 Lakhs. Since the original work order itself was above the total amount of the final bill i.e. Rs.4.42 Crores, which was raised by the Contractor, there was no issue in respect of disputes being non-arbitrable.

7. A perusal of the supplementary order dated 7th December, 2005, clearly shows that the same is in continuation of the original work order dated 1st April, 2005. The campus, where the construction is to take place is the same, the project is the same and the work order is described as “supplementary work order for extra items and quantities”. The supplementary work order itself refers to the main contract, which is awarded to the Contractor.

8. Moreover, in the Section 11 petition, which was filed by the Contractor, paragraph 12 reads as under:

“12. That vide Award letters dated 1.12.2005 and 7.12.2005, the supplementary works were also awarded for construction of Underground Water Tank and other extra items and quantities in the contract for the work awarded to the Petitioners vide Award letter dated 1.4.2004. (A copy of each of the letters dated 1.12.2005 and 7.12.2005 are annexed herewith as Annexure B Colly.)

As per the letter dated 1.12.2005, the work of Underground Water Tank was tentatively valued at Rs.16,19,836/- and the work of other extra items and quantities i.e. Supplementary Work, as per award letter dated 7.12.2005 was valued at Rs.64,93,933/-. However, actual amount payable was to be based on actual quantities on site measurement on the basis of rates quoted in the Bill of Quantities attached to the letters dated 1.12.2005 and 7.12.2005 respectively.”

The prayer, however, in the said petition mentioned only the work order dated 1st April, 2005, while seeking reference of disputes to arbitration.

9. The submission of the learned counsel for the Respondents cannot be accepted, that this issue is no longer in dispute, in view of the reference order dated 7th December, 2005. The order appointing the sole arbitrator does not go into the issue as to whether the supplementary work order is included in the reference or not.

10. It is, however, clear that the supplementary work order was in continuation of the main work order, which was awarded to the Contractor. The said supplementary work order has no independent existence. The wording used in the supplementary work order also reveals the intention of

the parties i.e. in clause 5. The said clause provides as under:

“5. Other Terms & Conditions

All other terms & conditions of this supplementary work like arrangement of water & electricity, payment terms, recovery of Income Tax (TDS) & Works Contract Tax, retention money, insurance, statutory obligation, notices, fees and charges etc would remain same as mentioned in our Work Order dated 01.04.2005 issued & accepted by you.”

The above clause is broad enough to hold that the intention of the parties was to treat the supplementary work order, in continuation of, in addition to and in furtherance of the main contract awarded to the contractor. All other terms and conditions of the supplementary work order, except the ones specified in the main contract were to remain the same as in the main work order dated 1st April, 2005.

11. Learned Arbitrator cannot be faulted with for having considered the two work orders as being integral to each other. The findings of the learned Arbitrator are set out herein below:

“

I have carefully considered the respective contentions of the parties on the question as to whether the arbitration agreement as contained in the first agreement dated 1st April, 2005 will also form part of the agreement dated 7th December, 2005. While it is true that the arbitration agreement has not been specifically mentioned in the second agreement, however, one has to look to the intention of the parties as can be gathered from various documents including the agreements on record. The parties, in my opinion, had considered the works awarded both by the work order dated 1st April, 2005 as well as work order

dated 7th December, 2005 as one contract. Separate bills were never prepared in respect of the work executed under the second agreement. Running bills as well as the final bill were prepared as if the work executed under the two agreements was one. There is no reference anywhere in any of the correspondence exchanged between the parties that the work carried out under the second work order was under a separate contract or that the single bill cannot be prepared in respect of both the contracts. It is for the first time before the Arbitral Tribunal that the plea about there being two agreements in existence has been taken. I am, therefore, of the considered opinion that the arbitration agreement as contained in work order dated 1st April, 2005 also by incorporation forms part of the work order dated 7th December, 2005 and the disputes under the second agreement will be covered by the arbitration clause as contained in the first agreement. The judgments cited by Mr. Chawla, in my opinion, are on their own facts and are not applicable to the present proceedings.”

12. The above findings of the learned Arbitrator, on facts, are not disputed i.e. no separate bills were prepared and the running bills and final bill were treated as one. Parties themselves treated both the work orders as being part of one contract. It is also agreed by Ld. Counsel for the Petitioner, that the Petitioner raised a counter claim in respect of the supplementary work order before the Ld. Arbitrator.

13. Moreover, in a recent judgment of the Supreme Court in ***Ameet Lalchand Shah and Ors. v. Rishabh Enterprises and Ors., A.I.R. 2018 SC 3041*** the Supreme Court has held that when there are multiple work

orders/agreements entered into in respect of a single commercial project, all the disputes ought to be resolved through arbitral proceedings. Paragraph 21 of the said judgment is set out herein below:

“21. In a case like the present one, though there are different agreements involving several parties, as discussed above, it is a single commercial project namely operating a 2 MWp Photovoltaic Solar Plant at Dongri, Raksa, District Jhansi, Uttar Pradesh. Commissioning of the Solar Plant, which is the commercial understanding between the parties and it has been effected through several agreements. The agreement – Equipment Lease Agreement (14.03.2012) for commissioning of the Solar Plant is the principal/main agreement. The two agreements of Rishabh with Juwi India: (i) Equipment and Material Supply Contract (01.02.2012); and (ii) Engineering, Installation and Commissioning Contract (01.02.2012) and the Rishabh’s Sale and Purchase Agreement with Astonfield (05.03.2012) are ancillary agreements which led to the main purpose of commissioning the Photovoltaic Solar Plant at Dongri, Raksa, District Jhansi, Uttar Pradesh by Dante Energy (Lessee). Even though, the Sale and Purchase Agreement (05.03.2012) between Rishabh and Astonfield does not contain arbitration clause, it is integrally connected with the commissioning of the Solar Plant at Dongri, Raksa, District Jhansi, U.P. by Dante Energy. Juwi India, even though, not a party to the suit and even though, Astonfield and appellant No.1 – Ameet Lalchand Shah are not signatories to the main agreement viz. Equipment Lease Agreement (14.03.2012), it is a commercial transaction integrally connected with commissioning of Photovoltaic Solar Plant at Dongri, Raksa, District Jhansi, U.P. Be it noted, as per clause(v)

of Article 4, parties have agreed that the entire risk, cost of the delivery and installation shall be at the cost of the Rishabh (Lessor). Here again, we may recapitulate that engineering and installation is to be done by Juwi India. What is evident from the facts and intention of the parties is to facilitate procurement of equipments, sale and purchase of equipments, installation and leasing out the equipments to Dante Energy. The dispute between the parties to various agreements could be resolved only by referring all the four agreements and the parties thereon to arbitration.”

14. In view of the latest decision of the Supreme Court and in view of the facts of the present case, the objection is not sustainable and the findings of the Arbitrator do not warrant any interference. The main contract and the supplementary work order were part of a comprehensive assignment which was rightly adjudicated in the arbitration proceedings.

ii) That the Engineer-in-Charge had, made noting on the final bill, that sum of Rs.17 Lakhs (Rs.11 Lakhs as security deposit + Rs.6 Lakhs above sum) was to be retained till the Contractor cleared defects in the construction. Out of the said award, the learned Arbitrator has wrongly awarded to the Contractor a sum of Rs.13 Lakhs (Rs.11 Lakhs + Rs.2 Lakhs).

15. Coming to the second objection in respect of retaining of the amount of Rs.17 Lakhs as per the Engineer-in-Charge's noting, the said noting is extracted herein below:

“The contractor has agreed to rectify all items as defective within 15 days starting from 30th May, 2006. Till such time, Rs.6 lakh (in addition to retention money of 2.5% -- 11,06,920/-) is held and shall be paid to contractor on satisfactory rectification of defects.”

16. The fact that the Contractor accepted the said noting, is not in dispute. The Petitioner would have, therefore, been entitled to damages/compensation in respect of any defective work, which the Petitioner would have got executed at the risk and cost of the Contractor. However, unfortunately except in respect of a staircase, which was renovated and rebuilt by the Petitioner, towards which Rs.6 Lakhs was claimed by the Petitioner, there is no evidence on record to show any other work or defects having been executed by the Petitioner at the risk and cost of the Contractor.

17. Out of the claim for the sum of Rs.6 Lakhs qua construction of the staircase, the learned Arbitrator has awarded a sum of Rs.4 Lakhs. The remaining amount of security deposit and the retained amount of Rs.11 Lakhs has been refunded to the Contractor. In the absence of any evidence to show that any of the defects were got executed by the Petitioner at the risk and cost of the Contractor, the learned Arbitrator was left with no option but to adopt the course of action he adopted. This objection is also not sustainable.

iii) That there is a calculation error of Rs.3 Lakhs in the final award.

18. In respect of the calculation error, the Petitioner has filed an amended petition. Amendment is allowed and the amended petition is taken on record. In respect of any calculation error, if the same exists, the same would be liable to be rectified especially since the Ld. Arbitrator has since passed away. In the amended petition, the calculation error has been elaborated as under:

“That further there is an error apparent on the fact of the record with respect to the final amount

awarded by the Ld. Arbitrator as well. It is most respectfully submitted that as per the Award of the Hon'ble Tribunal, the following amount is payable to the Claimant.

Total amount certified by the Architect Rs.4,42,51,651/-

Less amount paid

(Rs.3,89,46,673/- + Rs.8,00,000/-) = Rs.3,97,46,673/-

Less amount awarded for demolition of staircase

Rs.6,00,000/-

Less amount Awarded for cost of construction of the Staircase

Rs.4,00,000/-

Less amount awarded on account of delay in construction

Rs.2,85,362/-

Less amount awarded towards electricity charges

Rs.72,372/-

Therefore amount payable (including Security deposit)

Rs.31,47,244/-

(Rupees Thirty one lakhs forty seven thousand and two hundred and forty four only)

That against the above amount, the Hon'ble Tribunal has directed the Respondent to pay a sum of Rs.23,26,315 + Rs.11,06,291/- = Rs.34,32,606/- (Rupees thirty four lakhs thirty two thousand six hundred and six only) thereby clearly making a mistake apparent on the face of the record. ”

19. Learned counsel for the Respondents, while opposing that there is a calculation error, is unable to satisfy the Court as in what manner the

calculations put forth by the Petitioner is inaccurate. A perusal of the award makes it clear that the learned Arbitrator has, in addition to Rs.6 Lakhs claimed by the Petitioner, deducted Rs.4 Lakhs from the final bill of the Contractor as the staircase had to be reconstructed. Relevant portion of the award reads as under:

*“..... There is no evidence to show what is the cost of the staircase claimed in the bill by the claimant. The respondent has, however, spent a sum of Rs.6 lakh for the re-construction of staircase. In the absence of any evidence, only a rough estimate can be made as to how much amount would have been claimed by the claimant for construction of the staircase in the bill. Taking the fact that the respondent had spent a sum of Rs.6 lakhs, I will presume that a sum of Rs.4 lakhs have been claimed by the claimant from the respondent for the construction of the said staircases to which amount, the claimant is not entitled as the staircases had to be demolished because of defective workmanship.
.....”*

Thus, the calculation given by the Petitioner is correct. Being something which the learned Arbitrator has overlooked, the Court is bound to correct the same. Accordingly, the amount payable is held to be Rs.31,47,244/-.

20. With these observations, the OMP is disposed of.

**PRATHIBA M. SINGH
JUDGE**

OCTOBER 30, 2018/dk