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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 10th July, 2018

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O.M.P. 532/2007

M/S TELECOMMUNICATIONS CONSULTANTS
INDIA LTD.

..... Petitioner

Through: Mr. P. K. Bansal, Advocate.
(M:9810925670)

versus

M/S NAVNEET BUILDERS LTD.

..... Respondent

Through: None.

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. None has appeared for the Respondent in this matter after 13th April, 2009. The matter has been adjourned for the last six to seven hearings.
2. The Respondent is, thus, proceeded ex-parte.
3. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 seeks setting aside of the award dated 27th June, 2007 passed by the sole arbitrator in the matter M/s. Navneet Builders Ltd. (“Navneet”) v. M/s. Telecommunications Consultants India Ltd. (“TCIL”).
4. By the impugned arbitral award, the claims of Navneet have been allowed and the counterclaims of TCIL have been dismissed.
5. The brief facts are that a contract was awarded vide the agreement dated 2nd June, 2004 by the Madhya Pradesh Rural Road Development Authority (“MPRRDA”) for construction and upgradation of the rural roads under the Pradhan Mantri Gram Sadak Yojana Package 1815, Jabalpur,

Madhya Pradesh. TCIL invited tenders for execution of some of the works under the aforesaid contract. The said tender No. TCIL/RR/MP/04/2004, inter alia, had the following terms and conditions:

“TERMS AND CONDITIONS

All materials and workmanship mentioned in the tender shall be as per prescribed terms and conditions, specifications in general & specified items in particular as forming part of agreement between TCIL and MPRRDA/CGRRDA (PMGSY authorities) unless otherwise stated herein under. The clauses herein below will have overriding effect in case of any conflict with provisions mentioned in the agreement between TCIL and MPRRD/CGRRDA (i.e. PMGSY authorities). The tenderer shall read and is deemed to have read the said entire terms conditions and specifications between TCIL and MPRRDA/CGRRDA and it shall be understood that works will have to be executed as per the CONDITIONS AND SPECIFICATIONS OF MPRRDA/CGRRDA.

A person signing the tender form or any other documents forming part of the contract on behalf of the tenderer shall be deemed to warranty that he has authority to bind the tenderer and if subsequently comes to light that the person so signed had no authority to do so, TCIL may without prejudice to any other civil and criminal remedies cancel the contract or the tender and hold the tenderer liable for all costs, charges and damages.

The tenderer shall not sublet, transfer or assign the contract or any part thereof without the written permission of TCIL/PMGSY authorities.

Nothing extra shall be paid on account of any discrepancy in nomenclature of item. The tenderer shall see the site of work & seek clarifications if any before submitting the tender.

Any cutting, overwriting etc. in tender must be signed by the tenderer.

TCIL reserves the right to distribute the work to more than one

agency and increase or decrease the quantity without assigning any reason.”

6. Thus the General Conditions and specifications as prescribed by MPRDA were accordingly made applicable. Pursuant to this tender, Navneet applied for execution of the works and an agreement was entered into between Navneet and TCIL on 4th November, 2004. The said agreement under Clause 2 clearly contemplated that all the documents attached with the NIT would form part and parcel of the agreement. Clause 2 is extracted herein below:

“The following standard documents in addition to the documents attached with NIT shall be deemed to form and be read and construed as part of this agreement viz..

- a) From of Proposal.*
- b) Special Condition of Contract of Rural Road.*
- c) General Condition of Contract of Rural Road.*
- d) Technical Specifications.”*

7. Thus, according to TCIL, all the special conditions and general conditions of the Contract of Rural Road, which were part of the agreement between MPRRDA and TCIL, formed an integral part of the agreement between TCIL and Navneet.

8. Navneet, on 21st March, 2005, informed TCIL that it was facing financial problems due to withholding of 25% of the payable amounts and, therefore, would not be able to execute the work of both the roads at Jabalpur. Extract of the said letter is set out below:

“

Date: 21. 03. 2005

*To,
The General Manager (RR),
TCIL, Jabalpur (M.P).*

*Sub: Construction/Up-gradation of SH-12 to Kuda
Kala Road in Jabalpur District*

Respected Sir,

*I had been awarded the road work of SH-12 to Basedi
and SH-12 to Kuda Kala under your kind control. We
are facing some financial problem to accelerate the
work due to my 25% withheld amount of Earth Work
done by me in the previous period.*

*In view of above I would not be able to execute the
work of both the roads at Jabalpur.*

*The amount received from TCIL so far is my full and
final payment except for 25% earth work withheld
amount, 5% S.D., P.B.G. of Rs 2.00 lacs and LD
amount. I have no further claim on TCIL what so ever.*

Thanking you,

Yours faithfully

For NAVNEET BUILDERS

(Sd/-)”

9. In view of the letter of Navneet dated 21st March, 2005, TCIL terminated and withdrew the works from Navneet. Extract of the said letter is set out below:

*“No. TCIL/PMGSY/1815/JBL/03/2004-05 Dated
21.03.2005*

*To,
M/s. Navneet Builders,
1282, North Kasba,
Bank of Maharashtra Building,*

Solapur.

Sub: Construction/Up-gradation of SH-12 to Basedi and SH-12 to Kuda Kala Road under PMGSY of Package No. MP-1815 in Jabalpur District

Ref.: Our letter Nos.

- 1. TCLI/PMGSY/MP/1815/JBL/03/2004-05 dt. 11.02.2005*
- 2. TCIL/PMGSY/MP/1815/JBL/03/2004-05 dt.18.03.3005*

Dear Sir,

With reference to above and your letter dt. 21.03.2005 vide which you have expressed your unwillingness to execute subject works, works of both these roads are hereby withdrawn from you and balance works in these two roads shall be got executed through other industries at your risk and cost.

Further TCIL reserves the right to offset any additional cost against your other works of TCIL.

Thanking you,

Yours faithfully,

*For TELECOMMUNICATIONS CONSULTANTS
INDIA LTD.*

Sd/-

(A.K. Ganjoo)

*General Manager (RR),
Madhya Pradesh”*

10. Navneet then referred the matter to the sole arbitrator. Before the arbitrator, the claims of the Navneet included the payment of the security deposit and other amounts. TCIL filed counter claims.

11. The sole arbitrator vide award dated 27th June, 2007, allowed the claim of Navneet and rejected the counter claims of TCIL.

12. The main basis of the arbitrator for rejecting the claims of TCIL and allowing the claim of Navneet was that the general conditions of the contract between TCIL and MPRRDA were not applicable. The arbitrator held that the terms of the said agreement were not applicable to the transaction between TCIL and Navneet on a back-to-back basis. The arbitrator further held that the condition in the agreement between TCIL and Navneet, that the work would have to be executed as per the conditions and specifications of the MPRRDA, was vague. It was further held that the drawings were to be supplied by TCIL as Clause 18 of the general conditions of contract did not apply and hence the delay cannot be attributable to Navneet. The relevant portion of the award is extracted herein below:

“4) The agreement was made on 04.11.2004 between the Claimant & the Respondent for execution of above referred road works. This agreement comprised of documents attached with NIT, Form of Proposal, Special & General Conditions of Contract of Rural Road and Technical Specifications.

5).....

6) The Respondent has argued that all clauses mentioned in General & Special Conditions in the Contract between TCIL and MPRRDA including those explicitly mentioned in the tender, are applicable on the Claimant whereas the Claimant contested that only material and workmanship of work shall be as per conditions and specifications prescribed in the agreement between TCIL and MPRRDA. The conditions incorporated in the

agreement between TCIL & MPRRDA are not applicable to the Claimant on back to back basis.

7) The term & condition "The work will have to be executed as per conditions and specifications of MPRRDA" built-in in tender for labour/services component of Road work, is vague. Since the Respondent is drafter of the contract and therefore, the meaning which goes against the drafter is to be taken, in view of doctrine of "CONTRA PROFERENTUM". Therefore, it is considered reasonable that material and workmanship of work shall be as per conditions and specifications prescribed in the agreement between TCIL and MPRRDA and other commercial conditions, shall be as per explicitly mentioned clauses in the tender .

8) It is documented from the records made available by both parties that date of start of work was 17.09.2004 and date of completion was 16.01.2005. In view of the fact that Clause-18 of General Conditions in the Contract between TCIL and MPRRDA is not applicable on the Claimant as such the responsibility of providing approved L-section of proposed road was with Respondent. The approved L-section of proposed road work was supplied by the Respondent to the Claimant on 03.11.2004. The initial delay in start of work was on the part of the Respondent.

9) It is documented from records made available by both parties that deductions on account of 25% of amount towards earth work, 5% Security Deposit, 0.05% Insurance and 4% LD were made by the Respondent from the running account bills, paid to the Claimant. In view of the fact that General & Special Conditions in the Contract between TCIL and MPRRDA are not applicable on the Claimant, it was found baseless to make these deductions in running account bills of the

Claimant.

10) In view of the fact that initial delay in work was on the part of the Respondent and. financial insecurity caused to the Claimant by making baseless deductions in running account bills by the Respondent, there was a lack of Performance on the part of Respondent during the original stipulated period under the contract. The Respondent committed breach of contract, as such the refusal to carry out further work the Claimant was found right.

.....
Claim (viii):- Interest rate @ 15% w. e. f. 31.03.2005 till 30.03.2006 and future interest @15% till payment.

Simple interest @ 9% is considered justified, and allowed to the Claimant from the date of invocation of arbitration i.e. 07.07.2005, till the date of actual payment by the Respondent to the Claimant on the awarded amount against the claims (i) to (v) i.e. Rs. 6,03,013.00.”

13. Insofar as the counter claims are concerned, all the counter claims have been dismissed on the ground that the general conditions in the contract between TCIL and MPRRDA are not applicable.

14. A perusal of the agreement between TCIL and Navneet leaves no room for doubt that all the documents attached to the NIT were part of the contract. Even the opening page of the NIT makes it clear that the clauses in the agreement between TCIL and MPRRDA shall be deemed to have been read by the tenderers and executed as per the conditions and specifications of MPRRDA. Further, the agreement between TCIL and Navneet also

makes it clear that the special conditions and general conditions of the Contract of Rural Road prescribed by the MPRRDA would be applicable. A perusal of the Special Conditions of the Contract - Clause 4.4 makes it clear that 25% of the amount would be withheld and shall be released in each running bill in proportion to the amount of work which is executed. Thus, withholding of 25% amount cannot be held to be improper. It is in compliance with Clause 4.4 of the Special Conditions of the Contract. Clause 4.4 is extracted herein below:

“4.4 Payment of Earthwork

Only 75% payment of the billed amount of Items of Chapter No. 2 of the Schedule of rates for road work issued by the Engineer in Chief, Madhya Pradesh Public Works Department, Bhopal shall be made in the running bills at the time of their execution and remaining 25% amount shall be withheld. This withheld amount will be released in each running bill of WBM working proportion to total amount payable for WBM work. In case, contractor submits bank guarantee for the equal amount, this 25% withheld amount will also be released.”

15. Insofar as the issue relating to supply of drawings is concerned, Clause 18.1 makes it clear that contractor, i.e. in this case Navneet, was to submit the specifications and drawings, showing a proposed temporary work. Thus, the finding of the arbitrator in respect of the L-section is also contrary to the General Conditions of the contract. Insofar as the remaining amount which has been awarded to the Navneet is concerned, the relevant clause is Clause 44 of the General Conditions on ‘Liquidated Damages’. This clause recognises that Liquidated damages would be payable by the Contractor for any delays. The clause reads as under:

“44. Liquidated Damages

44.1 The Contractor shall pay liquidated damages to the Employer at the rate per week or part thereof stated in the Contract Data for the period that the Completion Date is later than the Intended Completion Date. Liquidated damages at the same rate shall be withheld if the Contractor fails to achieve the milestones prescribed in the Contract Data. However, in case the Contractor achieves the next milestone the amount of the liquidated damages already withheld shall be restored to the Contractor by adjustment in the next payment certificate. The total amount of liquidated damages shall not exceed the amount defined in the Contract Data. The Employer may deduct liquidated damages from payments due to the Contractor. Payment of liquidated damages shall not affect the Contractor’s other liabilities.

44.2 If the Intended Completion Date is extended after liquidated damages have been paid, the Engineer shall correct any overpayment of liquidated damages by the Contractor by adjusting the next payment certificate.”

16. Thus, the finding of the Arbitrator in respect of withholding of Security deposit, delay in submission of plans and obligation to pay liquidated damages are unsustainable. The Award is contrary to the express terms of the Agreement as also the General Conditions which were fully applicable.

17. The arbitrator has also made a distinction between the terms, conditions and specifications on one hand and commercial conditions on the other hand in paragraph 7 of the Award. Such a distinction is not borne out either from the agreement or the general conditions of the contract. The Arbitrator holds that in respect of the former, the General Conditions applied

but not in respect of the latter. This is again contrary to Clause 2 of the Agreement dated 4th November 2004, which categorically provides that the Special conditions, General Conditions and Technical Specifications of Contract of Rural Road would be read as part of the agreement.

18. The principle of *contra proferentem* also has no application, inasmuch as the contractor Navneet being completely conscious of the terms of the contract and General Conditions of the contract between the TCIL and MPRRDA, had tendered in response to the NIT. The said principle *contra proferentem* applies only when there is ambiguity and vagueness. There is no ambiguity to the extent that the General Conditions of the contract are applicable. The said principle could not have been applied by the arbitrator. There is a fundamental error in the award of the arbitrator that the General Conditions in the contract between the TCIL and MPRRDA are not applicable. This is not borne out and in fact a reading of the contract along with the NIT shows the opposite.

19. Under these circumstances, the impugned arbitral award is set aside with no orders as to the costs.

न्यायमेव जयते

**PRATHIBA M. SINGH
JUDGE**

JULY 10, 2018/dk