

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 17.05.2018

+ **O.M.P. (COMM) 343/2016**

RAJESH GUPTA

..... Petitioner

versus

SOUTH DELHI MUNICIPAL CORPORATION Respondent

Advocates who appeared in this case:

For the Petitioner :Ms Anusuya Salwan and Ms Nikita Salwan.
For the Respondent :Mr Diwankar Sethi for Mr Gaurang Kanth.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, impugning the arbitral award dated 22.04.2016 (hereafter 'the impugned award') delivered by the Arbitral Tribunal constituted of a sole arbitrator, namely, Sh Bharat Bhushan (Retired) (hereafter 'the Arbitral Tribunal'). The impugned award was rendered in the context of disputes that had arisen between the parties with respect to the Work Order dated 24.01.2007.

2. By the impugned award, the Arbitral Tribunal has awarded an aggregate sum of ₹11,88,600/- in favour of the petitioner. The said amount comprises of (i) ₹3,30,878/- on account of the work done as

per the contract (Claim No. 1); (ii) ₹3,72,050/- towards the refund of the security deposit (Claim No.2); and (iii) ₹4,85,672/- as compensation for termination of the contract (Claim No. 6).

3. The principal controversy involved in the present case relates to compensation for termination of the contract calculated at the rate of 2% of the balance unexecuted work as provided for in case of foreclosure of the contract. The petitioner claims that this was a case of wrongful termination and the same entitled the petitioner to claim damages on account of loss of profits, which the petitioner had computed at the rate of 10% of the work that remained to be executed.

Factual Context

4. On 24.01.2007, the Municipal Corporation of Delhi (hereafter 'MCD') invited tender for the work of construction of Road Under Bridge (RUB) at the level crossing at Sarai Kale Khan, Nizamuddin SH. Construction of retaining walls along with approaches on either sides of proposed RUB.

5. The petitioner submitted his bids pursuant to the said invitation, which was accepted. MCD issued a Work Order dated 24.01.2007 for execution of the works at a value of ₹2,46,14,495/-. The works were to commence on 03.02.2007 and were to be completed within eighteen months, that is, by 02.08.2008.

6. There was an inordinate delay in commencing execution of the works, which the petitioner claims were for reasons either attributable

to the respondent or otherwise beyond his control and admittedly, the petitioner could only execute works of the value of ₹3,30,878/-. MCD rescinded the contract on 03.10.2008. MCD also issued an order dated 07.10.2008, blacklisting the petitioner from participating in future contracts with MCD for a period of five years. The petitioner challenged the aforesaid order by way of a writ petition (being ***W.P.(C) 7538/2008*** captioned “***Shri Rajesh Gutpa v Municipal Corporation of Delhi***”). The said petition was disposed of by an order dated 22.01.2009, whereby the impugned order dated 07.10.2008 was set aside. However, it was clarified that the said order would not preclude MCD to blacklist the petitioner provided the petitioner is afforded sufficient opportunity to be heard before passing any adverse order. MCD issued another order dated 06.05.2009 removing the petitioner from the MCD panel of contractors. This too was challenged by the petitioner before this Court by way of a writ petition - ***W.P.(C) 9236/2009*** – which was allowed and by an order dated 10.08.2009, the order dated 06.05.2009 was set aside.

7. The petitioner invoked the arbitration clause and the Arbitral Tribunal was constituted by an order dated 22.09.2009 passed by this Court.

Arbitral Proceedings

8. The petitioner filed his statement of claims before the Arbitral Tribunal, *inter alia*, claiming that the works could not be executed at the site for the following reasons:-

(a) Non-removal of *Jhuggies* on the site: the petitioner claimed that there were 129 *Jhuggies* at the site, which were removed on 14.05.2007 and, therefore, no work could be commenced before that date;

(b) Non-shifting of the overhead tank: the petitioner claimed that there was an overhead tank constructed by the Railways towards eastern side of the site and unless an alternative overhead tank was constructed, there was no possibility to execute the work on that side of the site;

(c) No permission for removal of trees: the petitioner claimed that permission was not granted for removal of trees from the site. The work could not be executed;

(d) Delay in awarding work to other agencies for executing the works which were necessary to be executed to enable the petitioner to execute the work awarded;

(e) Non-availability of structural drawings;

(f) No permission from the Archaeological Survey of India; and

(g) Other delays on the parts of the respondent.

9. The petitioner claimed that in view of the above, the termination of the contract was wrongful and illegal. And, on the aforesaid basis, the petitioner claimed: (i) sum of ₹3,30,878/- on account of work done but not paid (claim no.1); (ii) ₹3,72,050/- for refund of security

deposit (claim no.2); (iii) ₹1,01,000/- as cost of barricading of the site for GI sheets (claim no.3); (iv) ₹4,96,000/- towards cost incurred to drain out storm water (claim no.4). ₹16,73,000/- as loss suffered on account of idle tools, plant, machinery and salary of staff (claim no.5); ₹24,28,362/- as loss of profits computed at 10% of the value of unexecuted work of ₹2,42,83,617/- (claim no.6); setting aside of blacklisting order (claim no.7); pre-suit, *pendente lite* and future interest at the rate of 24% per annum (claim no.8); and ₹5 lacs as cost of arbitration (claim no.9).

10. The Arbitral Tribunal considered the aforesaid claims, and since there was no dispute that the petitioner had executed works for the value of ₹3,70,878/- and had furnished the security for a sum of ₹3,72,050/-, the aforesaid claims were allowed in favour of the petitioner.

11. The Arbitral Tribunal also awarded a sum of ₹4,85,672/- against claim no. 6. The Arbitral Tribunal held that in view of the conduct of the parties, the contract was deemed to have been foreclosed and, therefore, the petitioner was entitled to compensation at the rate of 2% of the cost of unexecuted works (that is, 2% of ₹2,42,83,617/-), which worked out to a sum of ₹4,85,672/-. Insofar as the blacklisting order is concerned, the same had already been set aside by this Court and the Arbitral Tribunal held that it was not required to pass any order. The Arbitral Tribunal also awarded *pendente lite* interest at the rate of 9% per annum on the claims awarded and further future interest at the rate of 12% per annum.

Submissions

12. Ms Salwan, learned counsel appearing for the petitioner earnestly contended that the Arbitral Tribunal had erred in not awarding damages for wrongful termination of the contract. She submitted that a plain reading of the impugned award indicated that the respondent had been unable to contest the petitioner's claim that the termination of the contract was illegal. She contended that in the circumstances, 10% of the unexecuted works ought to have been awarded on account of loss of profits as claimed by the petitioner.

Reasons and Conclusion

13. It was contended on behalf of the respondent that the petitioner was not ready to execute the works and the delay in commencement of the works was attributable to the petitioner. However, this contention was not accepted by the Arbitral Tribunal as the reasons for the delay as set out by the petitioner, could not be refuted. However, the Arbitral Tribunal also noted that the petitioner had requested for closure of the contract and, accordingly, held that the contract be deemed to have been foreclosed under Clause 13 of the contract, which entitled the petitioner for compensation at the rate of 2% for the remaining unexecuted work.

14. This Court finds no infirmity with the aforesaid view for two reasons. First of all, there are several letters on record, whereby the petitioner had sought to persuade the respondent to foreclose the contract. In his letter dated 16.04.2008, the petitioner had, *inter alia*,

requested that the problems expressed therein be solved within seven days, as he may not be able to take up the work thereafter “*because of unprecedented increase in the rates of material like cement and steel.*” The petitioner followed up his request by a letter dated 21.04.2008, *inter alia*, stating as under:-

“3) It is also suggested that the closure of the contract has to be reported to the next authority. Any extension beyond the date of completion has also to be justified by the Chief Engineer concerned. Therefore, instead of inviting all the problems, the better course is to close the contract at this stage.”

15. On 04.08.2008, the petitioner sent another letter, *inter alia*, stating as under:-

“The date of completion of the work is 03.08.2008 and all the clauses of agreement have rendered inoperative on that date and the department requires to extend the time minimum for 18 months, provided the necessary permission is obtained from the different departments, which the department has not done till date. We, therefore, suggest that the only option available with the department is to close the contract and relieve us because it shall not be possible to execute the work within the stipulated date of completion on our quoted rates due to the unprecedented increase in the rates of material incorporated in the agreement. It is also requested that all our due payments including earnest money and performance guarantee may please be released.”

16. The above request was reiterated by the petitioner in his letter dated 08.08.2008.

17. Secondly, there is no evidence produced by the petitioner to

establish his claim for loss of damages. Ms Salwan had fairly conceded that there was no evidence on record to establish loss of profits and the said claim was based only on the standard formula applied to compute damages.

18. Clearly, the petitioner was required to substantiate his claim for loss of damages and in absence of any material or evidence, the said claim for loss of profits could not be allowed. In this view also, no interference with the impugned award is warranted.

19. The petition is, accordingly, dismissed. The parties are left to bear their own costs.

MAY 17, 2018
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VIBHU BAKHRU, J