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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 10th July, 2018

+ O.M.P. 352/2015

BUDHIRAJA ELECTRICALS Petitioner
Through: Mr.Aakash Sherwal, Adv.

versus

UNION OF INDIA Respondent
Through: Mr.Sarat Chandra, Adv.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Arbitral Award dated 30th January, 2015 passed by the Sole Arbitrator adjudicating the disputes that have arisen between the parties in relation to the Work Order No.54(826)/ECD-6/10-11/432 dated 14th May, 2010.
2. By the Work Order dated 14th May, 2010, the respondent had awarded to the petitioner the electrical work to be carried out by the respondent in the Boys Hostel 'D' near Satpura Hostel at IIT Delhi (SH : SITC of Rising Mains). The tendered amount accepted by the respondent was Rs.39,40,577/- and the period of completion was prescribed as two months starting from 24th May, 2010 to 23rd July, 2010. The actual date of

completion of work was 31st July, 2012 that is an extended period of almost 24 months. The Arbitrator, in the Impugned Award, has held the respondent responsible and liable for prolongation of the work period, as it found that the prolongation was due to non-completion of the civil work by the respondent.

3. The first challenge of the petitioner to the Impugned Award is to the recovery of Rs.3,86,954/- made by the respondent from the final bill of the petitioner on account of not providing two runs of copper earth strip, size 25x5 mm stipulated under agreement item No.3.

4. The payment for the cable earth strip had been made by the respondent to the petitioner while making payment against the first to the fourth Running Account Bills. The earth strip had not only been duly installed but also commissioned. There is no dispute to this aspect on part of the respondent. The respondent sought to make deductions on this account because the earth strip having been commissioned, was found stolen at the time of final hand over of the site by the petitioner to the respondent, which occurred on 31st July, 2012. The bone of contention between the parties is as to whether the petitioner was liable for such theft and therefore, the respondent could have made the said deduction. It is also relevant to note that the earth strip was installed by the petitioner between the period of two years from 2010 to 2012.

5. The Arbitrator after considering the evidence led by the parties upheld the deduction made by the respondent observing as under:-

“I have considered submission made by both the parties. There appears no doubt that copper earth strips provided by claimant were stolen before completion of work on 31.07.2012 as evident from R-23 dt.16.07.2012 and R-18 dt. 13.07.2012 and C-38 dt. 21.02.2012 where

claimant was directed to re-fix the copper earth strips. It is matter of record that rising main was installed and commissioned in phased manner in different blocks of hostel from 16.07.2010 to 21.07.2012 (details available on page 4-5 of RD-2) depending up on completion of each block. It is also not case of the contractor that recovery has been made without notice. Claimant has taken a stand that once the each of the rising main fixed with copper earth strips was commissioned, it stands handed over to respondents and they are no more liable for its security. If earth strips were stolen, these were to be replaced by respondents at their expenditure. I find it hard to buy the argument advanced put forth by claimant. The work involved installation of 14 rising mains under one contract having one single date of completion of entire work. It is not the contract where separate dates of completion of each rising main or group of rising mains was stipulated under clause 5 of the contract. Moreover, under clause 17 of the contract, if any damage shall happen to the work while in progress from any cause, it will be responsibility of contractor to make good the damage at his own expanses. I therefore hold that contractor was liable for safety of all works and materials till date of completion of work. As such, I find no infirmity or illegality with the action of respondents and I reject the claim.

I award 'NIL' amount to the claimant."

6. The Arbitrator has relied upon Clause 17 of the agreement between the parties. The same is reproduced hereinbelow:-

CLAUSE 17

"If the contractor or his working people or servants shall break, deface, injure or destroy any part of building in which they may be working, or any building, road, road kerb, fence enclosure, water pipe, cables, drains, electric or telephone post or wires, trees, grass or grassland, or cultivated ground contiguous to the premises on which the work or any part is being executed, or if any damage shall happen to the work while in progress, from any cause whatever or if any defect, shrinkage or other faults appear in the work within twelve months (six months in the case of work costing Rs.Ten lacs and below except road work) after a certificate final or otherwise of

its completion shall have been given by the Engineer-in-Charge as aforesaid arising out of defect or improper materials or workmanship the contractor shall upon receipt of a notice in writing on that behalf make the same good at his own expense or in default the Engineer-in-Charge cause the same to be made good by other workmen and deduct the expense from any sums that may be due or at any time thereafter may become due to the contract, or from his security deposit or the proceeds of sale thereof or of a sufficient portion thereof. The security deposit of the contractor shall not be refunded before the expiry of twelve months (six months in the case of work costing Rs. Ten lacs and below except road work) after the issue of the certificate final or otherwise, of completion of work, or till the final bill has been prepared and passed whichever is later. Provided that in the case of road work, if in the opinion of the Engineer-in-Charge, half of the security deposit is sufficient, to meet all liabilities of the contractor under this contract, half of the security deposit will be refundable after six months and the remaining half after twelve months of the issue of the said certificate of completion or till the final bill has been prepared and passed whichever is later.

In case of Maintenance and Operation works of E&M services, the security deposit deducted from contractors shall be refunded within one month from the date of final payment or within one month from the date of completion of the maintenance contract whichever is earlier.”

7. A reading of the above clause would clearly show that it is applicable only where the damage caused is found attributable to the contractor or its workers or there is any defect found in the work carried out by the contractor.
8. It is not the case of the respondent that the theft has occurred due to any fault attributable to the petitioner or its workers. It is not shown from any contractual term that the petitioner was responsible for the safety of the work carried out by it in accordance with the instructions issued by the respondent, specially where the work period has extended to 26 months

instead of and in place of two months as stipulated and the reason for such prolongation is wholly attributable to the respondent itself. As noted above, the earth strip had been commissioned over a period of two years between 2010 to 2012.

9. In view of the above, the finding of the Sole Arbitrator rejecting this claim of the petitioner cannot be sustained.

10. The next challenge of the petitioner is the rejection of its claim under Claim No.5 with respect to loss of profitability due to enlargement of completion period. The Arbitrator rejects this claim observing as under:-

“5.0 Claim. No. 05: Loss of profitability due to enlargement of completion period from 61 days to 740 days (excluding 61 days)- Rs.17,00,000/-

(i) In the present case, except making some written submissions and citing court judgment, claimant has not provided any detail that other work of same magnitude with same margin of profit was available to them but they could not take up such work because of their engagement in the present contract. Claimant could hire another lot of technical and supervisory staff for new work as no special T&P was required to carry out the work. In fact, after securing the present work, claimants have secured five more works in the same campus. As such, I find no reason that claimants were held up at work to that extent that they were not in position to take up another work provided it was available to them.”

11. The learned counsel for the petitioner submits that the Arbitrator has erred in recording the above finding as he has not considered the affidavit dated 28th November, 2014 filed by the petitioner before the Arbitrator. I have considered the submissions made by the counsel for the petitioner, however, I find no merit in the same.

12. The relevant portion of the affidavit sought to be relied upon by the petitioner is reproduced as under;-

“I say that in respect of claim no.5, pertaining to the loss of profitability/turnover, the profit adjudged by the Claimant firm in its price was in fact capable of being earned by Claimant elsewhere had the Claimant firm was free to leave the contract at proper time. I further say that the Claimant firm is not habitual in underestimating its cost when pricing and hence the profit percentage of 5% was a realistic one at that time and that there was no change in the market hence work of atleast same general level of profitability could have been available to Claimant firm at the end of contract period. I say that the Respondent had granted extension of time without levy of compensation upto the period 31.07.2012. The date of start of project as per agreement was 24.05.2010 schedule for completion on or before 23.07.2010. I say that Claimant firm's resources were forced to remain at site till the period 31.07.2012 due to delays not attributable to Claimant's firm.”

13. The same does not give any evidence in support of its claim. Coupled with this, is the fact recorded by the Arbitrator in his Impugned Award and not denied by the petitioner, that during this extended period of contract, the petitioner had secured other works not only from third parties but also the respondent. It was for the petitioner to prove its claim of damages under Section 73 of the Contract Act and having failed to do so, the Arbitrator has rightly rejected this claim. In any case, this being a matter of appreciation of evidence, this Court in exercise of its power under Section 34 of the Act cannot sit as a Court of appeal to re-appreciate the same.

14. The last challenge of the petitioner is to the rejection of the claim of escalation with respect to the labour charges. It is submitted by the counsel for the petitioner that while the Arbitrator finds the respondent responsible for the extension of time in completion of work and even awards escalation in favour of the petitioner with respect to materials, the Arbitrator has wrongly rejected the petitioner's claim with respect to escalation of labour

charges.

15. The Arbitrator has considered the above claim and has observed as under:-

“3.3 Claimant has claimed increase in cost of labour on the basis of formula provided under clause 10CC. Statutory increase in minimum wages of labour is governed under clause 10CC of the contract which does not cease to exist at the end of original stipulated date of completion and like other clause remains in force till completion of work. It is provided under Clause 10CC of the agreement that if after submission of tender, the wages of labour prevailing at the time of the last stipulated date for receipt of tender are increased by any fresh law or statutory rule or order and if the contractor thereupon necessarily and properly pays such increased wages to labourers then the amount of contractor shall accordingly be varied and provided further that any such increase shall not be payable if such increase has become operative after stipulated date of completion. The contractor shall, for the purpose of the condition, keep such books of accounts and other documents as are necessary to show the amount of any increase claimed and shall allow inspection of the same by a duly authorized representative of the government, and further shall, at the request of the Engineer-in-Charge may require any document so kept and such other information as the Engineer-in-Charge may require. The contractor shall within a reasonable time of his becoming aware of any alteration in the wages of labour, given notice to Engineer-in-Charge stating that same is being given pursuant to this condition together with all information relating thereto which he may be in position to supply. But claimant has not followed provisions of clause 10C and no such claim was made before EE till completion of work. It has deprived respondents to examine reasonability of claim by examining labour records of the contractor to satisfy themselves that actual increase has been paid by contractor. Claimant cannot be allowed to circumvent provisions of existing clause of the contract by other formula not forming part of contract. If increase in cost of labour is claimed in the form of damages then it is to be established with documentary evidence supporting the claim. But no such evidence has been led by claimant. I have referred Fortnight Labour Reports submitted by claimant

*attached with final bill (RD-1) and it is observed that during the period of 01.02.2012 to 31.07.2012 only 2 skilled and 2 unskilled workmen has been engaged on the work but claimant has claimed Rs.29087/- towards escalation in cost of labour whereas actual increase comes at Rs.1608/- $[(270-203)*4*6]$. As such, the claim is not based on actual increase in expenditure incurred by the claimant. If increase in cost of labour is claimed in the form of damages then it is to be established with documentary evidence supporting the claim. But no such evidence has been led by claimant. **I, therefore reject the claim of Rs.52046/- towards increase in cost of labour claimed without any supporting evidence of actually paying such increase.***

16. A reading of the above finding would show that the Arbitrator has considered the evidence led before him by the parties and has found that the petitioner has been unable to sustain its claim with respect to increase in labour charges. In fact the Fortnight Labour Reports submitted by the petitioner itself have been found to have falsified its claim. This again being a matter of appreciation of evidence, this Court, cannot go into the same while exercising its power under Section 34 of the Act.

17. In view of the above, this petition is partly allowed, allowing the objection of the petitioner with respect to Claim No.2.2.

18. The petition is dismissed as far as other objections raised by the petitioner against the Impugned Award. There shall be no order as to costs.

NAVIN CHAWLA, J

JULY 10, 2018
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