

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

% Date of decision: 31st October, 2018

+ FAO(OS) 161/2018

M/S BABA BUILDERS

..... Appellant

Through: Mr. Pankaj Bhatia, Mr. Dhruv Surana
and Mr. Ashish Choudhury, Advs

Versus

IRCON INTERNATIONAL LTD

..... Respondent

Through: Mr. Chandan Kumar, Adv.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE V. KAMESWAR RAO

V. KAMESWAR RAO, J. (ORAL)

CM. No. 45654/2018 (for exemption)

Exemption allowed subject to all just exceptions.

Application stands disposed of.

FAO(OS) 161/2018

1. This appeal has been filed by the appellant challenging the order dated 1st October, 2018 passed by the learned Single Judge in O.M.P 611/2014 whereby the learned Single Judge has accepted the objections filed by the respondent herein and set aside the award given by the learned Arbitrator.

2. The facts as noted from the record are, a notice inviting tender for construction of 317 dwelling units for Married

Accommodation Projects, Ministry of Defence at Old Cantonment (Works) was issued by the respondent IRCON International Limited (IRCON in short). The appellant was found successful for the award of the contract and accordingly LOI was issued to the appellant on 17th February, 2005. As per the contract, the period of completion of work was 18 months from the date of issue of LOI, i.e., 16th August, 2006. It is noted from the record that notice dated 24th August, 2005 was issued by IRCON to the appellant stating that the progress of the work is very slow inasmuch as instead of completing 25% of the total work, only less than 3% of the work has been executed. A show-cause notice was issued to the appellant seeking reply within 7 days as to why action under Clause 50 of the General Conditions of Contract be not initiated against the appellant. The aforesaid show-cause notice was followed by a letter dated 16th September, 2005, wherein it was recorded that no improvement was found at the site and accordingly 48 Hrs. notice was issued. Finally, on 21st September, 2005, a notice was issued “*partially withdrawing works*”. The aforesaid action of the IRCON resulted in forfeiture of performance security as well.

3. It appears that in December, 2006, IRCON demanded a sum of Rs.248.54 Lacs as risk purchase cost. On 10th February, 2007,

after adjusting an amount of Rs.47.22 Lacs, a balance of Rs.201.3 Lacs was demanded by IRCON. That apart, time period for executing the part of the contract, which remained with the appellant was extended till 30th June, 2010. On 8th August, 2011, arbitration was invoked by the appellant who raised various claims. IRCON also raised its counter-claims. The sole Arbitrator rendered the Award on 07th March, 2004, whereby he has allowed the claims of the appellant in the following manner:

- (i) refund of 60% of the security deposit.
- (ii) refund of performance bank guarantee which was invoked by IRCON by holding that the contract was not part-terminated but was merely modified under Claus 55 of the General Conditions of Contract.
- (iii) directed payment of final bills RA 26 and 27 which were withheld for risk and cost recovery on the ground that since the contract was merely modified no risk purchase was involved
- (iv) interest @ 12%.

4. The counter-claims filed by IRCON were rejected on the ground that no recovery in respect of work executed on the basis of risk and cost could be permitted as there was no termination of work. It was the case of the IRCON that the Arbitrator has erred in holding that the case involved modification of the work under Clause 55 and not part-termination of the contract under Clause 50.

5. The learned counsel appearing for the respondent IRCON relied upon three notices issued by IRCON which according to him are clear and a reading of the same would show that large amount of work was withdrawn which cannot be treated as modification. It was also his submission that the appellant herein had not sought any declaration that the termination was in fact a modification and as such the Arbitrator has gone beyond the mandate by holding that the termination is merely a modification. A plea of limitation was also taken inasmuch as the partial termination was effected in the year 2005 whereas the arbitration was invoked only in the year 2011.

6. The submission on behalf of the appellant was that the Arbitrator had granted the amount on the basis of what was stated

by the respondent IRCON in the arbitration proceedings. It was contended that the issue which has been argued before the learned Single Judge was never argued before the learned Arbitrator. Reliance was placed on the minutes of the meeting dated 12th July, 2011, wherein it was admitted that the termination of the work was not correct. In substance, the plea on behalf of the appellant was that as the entire work has not been taken away, the action of the respondent IRCON only constitutes a modification under Clause 55 and not termination under Clause 50. Reliance was placed on Section 34 of the Arbitration and Conciliation Act, 1996 (Act of 1996) to contend that the scope of interference by Court is very limited. The learned Single Judge, by interpreting the provisions of Clauses 50 and 55 of the General Conditions of Contract, was of the view that it is the case of the appellant that the work was “*terminated and withdrawn*” from the contractor to be got executed at its risk and cost. In other words, learned Single Judge held that the conclusion of the learned Arbitrator that IRCON’s action was under Clause 55 of Modification to Work, is untenable. It is based on the said finding the learned Single Judge has set aside the claims awarded by the learned Arbitrator in favour of the appellant. In fact, the learned Single Judge granted

an opportunity to the parties to seek a fresh arbitration in the light of the findings given by her in the impugned judgment.

7. Mr. Pankaj Bhatia, learned counsel appearing for the appellant would reiterate the submissions made on behalf of the appellant before the learned Single Judge that it is a case of modification and not of termination / withdrawal of substantial part of the work. He also states, what has been granted by the learned Arbitrator, is what has been agreed to by the respondent IRCON before the Arbitrator.

8. We are unable to agree with the said submissions made by the learned counsel for the appellant for the reason that the claims of the appellant have been allowed pursuant to a finding by the learned Arbitrator that the letter dated 21st September, 2005, is a reduction in the awarded scope of work in terms of Clause 55 (Modification of Work) of the General Conditions of Contract. Hence, clauses 50.1 and 50.2 of the agreement which relates to determination of contract *inter alia* after giving 48 Hrs. notice in writing to terminate the contract as a whole or in part, or parts, have no applicability. To examine the conclusion of the learned Arbitrator, whether the letter dated 21st September, 2005 is in

terms of Clause 55 of GCC and is a modification of work and not action under Clauses 50.1 and 50.2, it is necessary to delineate the relevant finding:

“10.6 Findings: -

xxxx xxxxxx xxxxx

(iv) Respondent vide their letter dated IRCON / 7001/MAP-ALLAHABAD/Conf.1/780 dated 21.09.2005, support his action of withdrawal of works from this agreement and reduce the scope of work limited to the Construction of 23 no's blocks at Stanley Road, invoking provision of GCC Cl. 50.1(i) and 50.1(ii) and 50.2 of the agreement.

(v) Original awarded Contract for a total cost of Rs.15,71,97,243/- was supported with a common BOQ for all the scope. Action of the Respondent vide their letter dated 21.09.2015 is reduction in the awarded scope of work, allowing the completion of the reduced work in Extended period with the same rates, terms and Conditions, for which the Contract agreement has a separate provision under Clause 55 (Modification to Work) of the General Conditions of Contract. Hence Clause 50.1 and 50.2 is not attracted in this case.

(vi) I therefore consider that there is no breach of contract on the part of the Contractor and as such action of Respondent of En cashing performance Bank Guarantee is inappropriate and Un Contractual. The Claimant was contractually obliged for the performance till the Completion of Defect Liability Period, which has been completed on 30.06.2010.

9. It is clear from above, that there is no reason given, at all, by the learned Arbitrator to draw such a conclusion. In fact, he has

not cared to look at the letters issued to the appellant in August / September, 2005. Nor did he make an attempt to cull out the difference between Clauses 50 and 55, as has been done by the learned Single Judge. The learned Single Judge while rejecting the findings of the learned Arbitrator has in Paras 18 to 29 has held as under:

“18. The Arbitrator has interpreted Clauses 50 and 55 and has held that there was no termination of the contract but merely modification. On the said basis, the Arbitrator has gone on to award refund of the security deposit, release of performance bank guarantee, and the amount which was held back from the RA bill. The Arbitrator has also rejected the counter claims.

19. A perusal of Clause 50 which relates to determination of contract due to contractor's default shows that Ircon had the power to terminate the contract —as a whole or in part or parts as may be provided in the notice of termination. The manner in which the termination could take place was by issuance of, firstly, a 7 day notice to make good the default; secondly, a 48 hours' notice and finally, a notice of termination. The reasons for issuance of such a notice could be failure to adhere to the programme of work, failure to complete the work or part of the work within the stipulated/extended period of completion or even because of poor record of progress of work. Upon issuance of the notice, the consequences of the same would be that Ircon would be entitled to first take possession of the site, carry out measurements of the work executed and get the same completed. Under Clause 50.2 upon 50.1 (ii) (being satisfied), Ircon has the power to forfeit the entire performance security and the amount which is to

be recovered which was executed at the risk and cost of the contractor would be deductible from the retention money which was retained by Ircon. In contrast to Clause 50, Clause 55 deals with enlargement, extension, diminution, reduction or alterations or additions. This Clause is quite specific.

20. The question that arises is as to whether the action of Ircon in the present case is part termination/withdrawal or modification. The decision on almost all the claims depends on this issue.

21. While part termination/withdrawal is as per Clause 50, modification is as per Clause 55. There is no doubt that confusion has been created due to the manner in which the clauses are worded. A perusal of Clause 55 reveals that it relates to enlargement, extension, diminution, reduction, alteration or addition. But a further reading of Clause 55 clearly shows the intention behind the said Clause. Such enlargement relates to the design, character, position, site, quantities, dimensions, method of execution or use of materials and to additional works. It does not contemplate a withdrawal or termination of a substantial portion of the work. The words enlargement, extension, diminution, reduction and alteration have to be read together in the context in which the words have been used and not by their strict dictionary meaning.

22. While large scale reduction could constitute part withdrawal/termination of the work, the manner of reduction contemplated in Clause 55 is a small scale reduction/modification which may occur during the execution of work and not withdrawal or termination of a major portion of the works itself. Clause 55 thus primarily relates to enlargement, extension, reduction, alteration during the execution of the works and not a

termination of the works itself. The termination of a whole or part of a work is of immediate consequence i.e. in the sense that, the contractor can no longer carry out that part of the work whereas reduction, diminution and modification results in the contractor continuing to do the work and carrying out the modifications or reductions. Withdrawal/termination brings stoppage to the work whereas modification does not.

23. Viewed in this context, the three notices issued by Ircon have to be seen. The first notice dated 24th August, 2005 reads as under: —

Dear Sir,

The above work was awarded to you vide Letter of Acceptance bearing No.IRCON/CC/MOD-ALBD/ 41/Pkg-I/827 dated 27.2.2005 issued by IRCON as per clause 25.0 of the Special Conditions of Contract in the agreement, you were required to submit the programme for completion of work within two weeks but it is regretted that the same has not been submitted so far in spite of lapse of more than five months. A number of letters have also been written to you in this regard.

*The progress of work is very slow and there is no improvement in spite of repeated verbal and written requests and notices. Whereas up-to-date progress as per the milestones laid down in the agreement should have been more than **Twenty five percent**, the actual progress of work is less than **Three percent**. This is undoubtedly due to lack of interest on your part in deploying sufficient resources in terms of the manpower, materials and machinery/equipment.*

You are, therefore, by your wrongful actions made yourself liable for action as per

conditions laid down in para (g), (h), (I) & (j) of clause 50.1 of the contract

WHEREAS it appears to the undersigned that by reason of your slow progress and not following contractual obligations the work entrusted to you under the agreement referred to above will not be completed within the stipulated date of completion.

Therefore, I, V.S. Chauhan, Additional General Manager, in exercise of powers conferred on me by the aforesaid agreement for and on behalf of IRCON hereby give you notice to show cause within seven days to my satisfaction as to why appropriate action under clauses 50.1 (i), 50.1(ii) and 50.2 of the above agreement should not be taken against you on account of the breach of contract on your part. Please note that in case no cause is shown by you within the stipulated period or the cause shown is not upto my satisfaction, I shall take such actions against you as are contemplated under clause 50 and sub-clauses thereunder of the said agreement and/or other clauses thereof.

24. The first notice thus clearly records that while the contractor ought to have completed 25% of the work, the progress at that stage was less than 3%. The contractor is also put to notice as to why within 7 days action under Clause 50 ought not to be taken. This does not contemplate a modification or reduction but clearly a much bigger action i.e. termination.

25. The second notice dated 16th September, 2005 reads as under: —

Dear Sir,

While acknowledging receipt of your letter under reference in response to this office letter No.IRCON/7001/MAP-ALLAHABAD/

Conf./693 dated 24.8.2005, you are hereby informed that the said reply submitted by you is considered consciously and not found satisfactory. Also, no physical improvement of the work at site is found. Therefore, I, V.S. Chauhan, Additional General Manager, in exercise of powers conferred on me by the aforesaid agreement for and on behalf of IRCON hereby give you notice to show cause within 48 (forty eight) hours to my satisfaction as to why appropriate action under clauses 50.1(i), 50.1(ii) and 50.2 of the above agreement should not be taken against you on account of the breach of contract on your part. Please note that in case no cause is shown by you within the stipulated period or the cause shown is not upto my satisfaction, I shall take such actions against you as are contemplated under clause 50 and sub-clauses thereunder of the said agreement and/or other clauses thereof without any further notice. This notice also makes it abundantly clear that despite the 7 days period which was given to the contractor which is a notice under Clause 50, there was no physical improvement at the site. Thus, the second notice for termination was issued with 48 hours notice.

26. Finally, vide letter dated 21st September, 2005, the contract was in effect withdrawn/terminated in the following terms:

Dear Sir,

While acknowledging receipt of your letter under reference in response to this office letter No.IRCON/7001/MAP-ALLAHABAD/Conf./772 dated 16.09.2005, you are hereby informed that the said reply submitted by you is considered consciously and found not convincing and satisfactory. Also, no physical improvement in the works

at site is noted. The resources deployed at site are not matching with the required rate of progress in term of contract agreement.

Therefore, I, V.S. Chauhan, Additional General Manager, in exercise of powers conferred on me by the aforesaid agreement for an on behalf of IRCON hereby determine the contract under clause 50.1(i) and 50.1(ii) and 50.2 of the agreement and decide to partly withdraw the works from this agreement and reduce the scope of work limited to the construction of 23 no. of OR Block at Stanley Road which are already started by you. All other building blocks/DUs where the works have not been started by you at Stanley Road, Pawan Vihar, Prayag Vihar and Wellington Road, are hereby withdrawn from your scope of work. The other terms and conditions of the contract remain unchanged. Please acknowledge receipt of this letter.

27. This was a final notice to “determine the contract” i.e., terminate the same. Counsel for the contractor argues that the word partly withdrawn constitutes a modification under Clause 55 and not a termination under Clause 50. This submission though appealing at first blush, when seen in the context of all the three letters and a reading of the contract, is clearly untenable. The intention behind issuance of all three letters is clear i.e. this was a termination under Clause 50.

28. Clause 50 permits Ircon —to terminate the contract as a whole or parts. The three letters have to be read as a termination in part. Use of word “withdrawal” does not change the nature of action. In effect, what happened was that except the construction of 23 numbers of OR Blocks out of a total of 47 blocks at Stanley Road, all other building blocks i.e., at the other localities i.e.

Stanley Road, Pawan Vihar, Prayag Vihar and Willington Road were withdrawn from the scope of work itself - meaning thereby, that the contractor was to no longer carry out the said works at all in their entirety. Thus, this was a surgical termination of a substantial portion of the contract, barring 23 OR Blocks, rather than modification or reduction carried out during the execution of the works.

29. The use of terms “reduction in the scope of works” does not mean modification, it was only a dignified exit to the contractor. The effect of the three letters was that, Ircon took possession of the site and carried out the said entire work on its own by engaging third parties. Mr. Bhatia, counsel for the contractor has argued that there was no reason as to why letter dated 21st September, 2005 did not use the word termination but used the word part withdrawal. This is more than a mere question of semantics. The last letter uses the term “determine the contract” which is nothing but termination. Also, what is to be seen is the actual events that transpired rather than the mere wording in a letter. In effect the contractor merely executed the construction of 23 numbers of OR Block and a substantial portion of the work was taken away from him. This cannot by any stretch of imagination be called as modification. The finding of the Arbitrator that the action of Ircon resulted in modification is thus completely contrary to the terms of the contract and is not a plausible view to take. This is more than a trivial illegality. The interpretation of Clauses 50 and 55 goes to the root of the matter and hence as per the view taken by the Supreme Court in Associate Builders v. Delhi Development Authority A.I.R. 2015 SC 620, the same calls for interference under Section 34.”

10. We agree with the aforesaid conclusion of the learned

Single Judge. Additionally, it must be noted that the letters dated

24th August, 2005 and 16th September, 2005 of respondent IRCON contemplate an action under Clause 50.1 (i) and 50.1 (ii) and Clause 50.2 of the General Conditions of Contract. In other words, the said letters do not refer to Clause 55 of the General Conditions of Contract at all. In other words, the intent of IRCON while issuing the letters dated 24th August, 2005 and 16th September, 2005 was to take action against the appellant under Clauses 50.1(i), 50.1(ii) and 50.2 of the GCC. In fact, letter dated 21st September, 2005, vide which the action was taken against the appellant clearly notes that respondent IRCON has determined the contract under Clause 50.1(i) & 50.1(ii) and 50.2 of the General Conditions of Contract. There was no ambiguity at all that the action against the appellant was under Clause 50. As there was no ambiguity, there was no reason for the learned Arbitrator to go into the aspect whether, vide letter dated 21st September, 2005, the contract was terminated or modified. The conclusion of the learned Arbitrator was clearly untenable and on the face of the record was illegal. The interpretation given by the learned Arbitrator surely is one which no fair-minded or reasonable person could have arrived at. We agree with the reliance placed by the learned Single Judge on the judgment of the Supreme Court in the case of *Associate*

Builders v. Delhi Development Authority A.I.R. 2015 SC 620,

wherein, the Supreme Court in para 42, has held as under:

“42. In the 1996 Act, this principle is substituted by the —patent illegality principle which, in turn contains three subheads:

42.3. (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under: —

28. Rules applicable to substance of dispute.—(1)-

(2)***

(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction. This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.”

Even reliance placed by learned Single Judge on the judgment of this court in the case of ***M/s JSC Centrodstroy v. M/s National Highways Authority of India bearing case number FAO (OS) 508/2013*** is also appropriate in the facts of this case. Based on the aforesaid conclusion the learned Single Judge has rightly allowed the petition under Section 34 of the Act of 1996

and has set aside the award. We do not see any merit in the appeal.

The same is dismissed.

V. KAMESWAR RAO, J

CHIEF JUSTICE

OCTOBER 31, 2018/jg

