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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 20th September, 2018

+ O.M.P. 522/2015

RAIL VIKAS NIGAM LTD.

..... Petitioner

Through: Mr.Anil Seth & Mr.Udit Seth,
Advts.

versus

COBRA INSTALACIONES Y SERVICIOS,S.A

..... Respondent

Through: Mr.Kamal Mehta, 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 25.06.2015 passed by the majority of the Arbitral Tribunal.

2. The disputes between the parties have arisen in relation to the work of Design, Supply, Erection, Testing & Commissioning of 25 KV, 50 HZ., Single Phase, Traction Over-Head Equipment, Switching Stations, Traction Substation, Feeding Post, Shunt capacitor bank and other associated works for Phase I work between Venkatachalam Road Jn. to Krishnapatnam including works of connecting Venkatachalam Road Jn. to main line at Venkatachalam

station in connection with laying of New BG Line between Obulavaripalle-Krishnapatnam Section of South Central Railway, which was awarded by the petitioner in favour of the respondent vide Letter of Acceptance dated 12.03.2008. The parties had thereafter executed the Agreement dated 20.06.2008.

3. The first challenge to the Award is on the claim no. 1 of the respondent. This claim of the respondent was for the recovery of Rs. 2 crores allegedly wrongly adjusted by the petitioner against the forfeiture of the Bid Security in another tender relating to Railway Electrification works between Gooty-Dharamavaram vide Invitation for Bid No.RVNL/SC/GY-YNK/RE/142.

4. The Arbitral Tribunal in the Impugned Award had allowed the said claim and held as under:-

“8.32 AT observes that if RVNL had to forfeit the bid security of Rs.2.0 Crores in terms of Clause 19.6 of ITB, then they could invoke the BGs given by the 'JV' as bid security. It is a matter of common knowledge that such a BG is an unconditional agreement between RVNL and the bank. Invoking of such BGs cannot be refused by the bank.

If, however, the bank refused for encashment, which is the case here, then the right course for RVNL for realization of its right of encashment was to invoke the court and get the appropriate orders issued to the bank for encashment of the BGs. However, without adopting the right course, RVNL issued orders to the 'JV' vide letter dated 21.03.2012 (RD I Annexure R-344), followed by reminder dated 01.05.2012 for depositing Rs.2.0 Crores with CPM/RVNL/SC within one month failing which the amount shall be recovered from their running bills of other projects. Being a State Instrumentality, such orders at the hands of RVNL are unjust and unreasonable because neither there is any law nor any contractual provision brought out by RVNL under which it

can recover the amount from the bills of other projects in the face of refusal of encashment of BGs by the Bank.

What action RVNL would have taken if the 'JV' or its lead partner had no contract with RVNL? Certainly for realizing the cash against the BGs, RVNL would have invoked the legal course of approaching the court.

8.33 Finding that the 'JV' was not depositing the ordered amount of Rs.2.0 Crores, RVNL started withholding the payment of M/s. Kobra Instalaciones y. Servicios, S.A relating to another contract of Venkatachalam Road Jn. to Krishnapatnam, which is the contract under which the dispute has arisen. The contractor M/s. Kobra Instalaciones y. Services, S.A continued giving reminders to RVNL for release of their payments but RVNL did not.

In Reminder-III dated 25.05.2012 (CD II Exhibit C-42), the Contractor brought out that the total payment due is almost 25% of the total contract value and RVNL was not initiating the payment process even though the entire project was completed and put under commercial use for the past twelve months.

When the bills of the Contractor had been intentionally and illegally held up by RVNL to such an extent, there appeared to be no other option, under such circumstances, except to agree to the dictates of RVNL so that at least the Contractor gets the amount of bills over and above Rs.2.0 Crores. Therefore, this appears to be a clear case of use of dominating position by RVNL in obtaining an unfair advantage over the Claimant by way of consent of the Contractor for adjusting Rs.2.0 Crores from their bills.

Evidently this authority/ consent is not arising out of the free consent. Moreover as recorded in the Claimant's letter dated 30.07.2012, (CD II Exhibit C-323), it clearly states that this consent is being given as desired by RVNL's letter dated 29.05.2012. Thus this is a case of undue influence exercised by RVNL and falls under Section 16 of the Indian Contract Act 1872.

8.34 When RVNL informed the Contractor vide its letter dated 14.03.2013 (CD II Exhibit C-15) that bid security of Rs.2.0 Crores had been recovered from their bills as penal recovery, the Contractor accused RVNL, vide its letter dated 21.05.2013 (CD II Exhibit C-16), forcefully stating that the action of RVNL is contrary to law and wrongful and arbitrary etc. If RVNL had made the recovery on the basis of a voluntary authority dated 30.07.2012, as being contended by RVNL, then why did not RVNL respond to their letter dated 21.05.2013 wherein they have accused RVNL, a State Instrumentality, in a big way. The contents of letter dated 21.05.2013 and non reply by RVNL to that letter constitute adequate inference that authority letter dated 30.07.2012 as given by the Contractor, was not out of the free consent.

8.35 While giving the authority for adjusting Rs.2.0 Crores vide his letter dated 30.07.2012, what was consideration for the Claimant? What was the intention of the Claimant behind giving this authority letter? This needs to be looked into.

If we go through Claimant's letter dated 21.05.2013, (CD II Exhibit C-16), we find that the Claimant has been contesting the issue in a big way right from June 2011 and they have declared the recovery of Rs.2.0 Crores from their bills as unlawful, wrongful, unilateral and arbitrary.

Letter dated 21.05.2013, (CD II Exhibit C-16) and all other correspondence placed before the AT are testimony to the fact that the JV or even the lead partner had never considered themselves liable to pay Rs.2.0 Crores and that is why at no point of time since they gave bid, the 'JV' or even the lead partner had ever agreed to the decision of RVNL for depositing Rs.2.0 Crores or for recovery of Rs.2.0 Crores from their bills except the authority dated 30.07.2012 which was evidently obtained by RVNL by using its undue influence and dominating position. Thus it is wrong on the part of RVNL to say that the Contractor had agreed for the recovery of Rs.2.0 Crores to discharge their liability towards payment

against another tender. In fact, the Contractor never agreed for recovery of Rs.2.0 Crores; they had absolutely no such consideration in giving authority/consent dated 30.07.2012. Therefore ,the said authority as given by his letter dated 30.07.2012, is void in terms of Section 25 of the Indian Contract Act 1872, having no legal consequence.

8.36 The Respondent argues that under Clause 14.3 (f) of the Contract they have got power for making such deduction from the bills of the Contractor.

AT observes that Clause 14.3 (f) of the Contract does not give any authority to the Employer for making any such deduction as done by RVNL in this case. This clause only stipulates that while submitting application for interim payment certificate, the Contractor would also include in this statement an amount to be deducted for the payments to be made to different departments towards payments liable to be made by the Contractor. Such deductions include deductions for income tax, deduction for works tax etc which the Contractor considers himself liable to pay. This clause does not give any authority to the Employer to make any deduction of the nature done in this case.

8.37 Facts of the case indicate that the said authority was not given by free will and consent but it was obtained by undue influence as exercised by RVNL by using its dominating position.

Also AT holds that the so called authority/consent for such recovery as given by the Claimant vide his letter dated 30.07.2012, without any consideration, is void in terms of Section 25 of the Indian Contract Act which renders the deduction as illegal.

AT also holds that the recovery of Rs.2.0 Crores from the bills of the Contractor by RVNL, which is a State Instrumentality, is unjust, unreasonable, arbitrary and violative of Article 14 of Constitution of India.”

5. Learned counsel for the petitioner relying upon the various correspondences exchanged between the parties at the relevant time, submits that the Arbitral Tribunal had completely ignored the same thereby reaching at a perverse finding that the amount had been adjusted by the petitioner by exercising undue influence and coercion over the respondent.

6. On the other hand, the learned counsel for the respondent submits that the findings of the Arbitral Tribunal, being based on the appreciation of the evidence led before it, cannot be interfered with under Section 34 of the Act. He further submits that in the present case, the petitioner exercising its dominant position by withholding the amounts payable to the respondent against the running account bills, coerced the respondent to agree with the adjustment of the amount of Rs. 2 crores against the amount allegedly payable by the respondent to the petitioner as Bid Security in the other tender. The respondent had given its consent to such adjustment without prejudice to its right to claim the said amount by way of an arbitration. He further submits that the Impugned Award is justified on the facts of the present case.

7. I have considered the submissions made by the counsels for the parties. It is not in dispute that the petitioner has withheld the amount of Rs. 2 crores from the amount payable to the respondent under the Contract in question. The said amount has been adjusted by the petitioner against the bid amount which has been forfeited by it against the second tender mentioned hereinabove. The dispute is only as to whether the respondent agreed to such adjustment.

8. In this regard few letters were exchanged between the parties that would have bearing and need to be referred.

9. By the letter dated 21.03.2012 the petitioner called upon M/s COBRA - KALINDEE (JV) of which the respondent was the lead partner, to deposit a sum of Rs. 2 crores within one month of the date of issue of the letter, failing which the amount shall be recovered from the running bills of other projects. The petitioner again vide letter dated 29.05.2012 addressed to the respondent, stated as under:-

“Reference (ii) above, ED/Electrical has advised to deposit Rs. 2 Crores with CPM/RVNL/SC within a period of one month from the date of issue i.e., 21-03-2012, failing which the amount shall be recovered from your running bills. Action has been taken accordingly and a gross amount of Rs. 1,16,24,719 from bill no. PRG-II has been withheld. Remaining bills will be processed after approval of Final assessment of quantities which is under process duly adjusting a final amount of Rs. 2 Crores from your bills. Release of performance security for the subject work is under process and will be released shortly.”

10. The respondent vide its letter dated 30.07.2012 while seeking release of the payments due under the Contract *inter alia* stated as under:-

“However RVNL at his sole discretion may adjust Rs. 2,00,00,000/-(Two Crores) as desired vide their above referred letter.”

11. By the letter dated 20.11.2012 the respondent acknowledged the fact that the petitioner had adjusted an amount of Rs. 2 crores against the bills payable under the present Contract and requested the petitioner to release the bank guarantee submitted towards the Bid

Security amount for the other tender.

12. Based on this request, the petitioner returned the bank guarantee of the other tender on 18.12.2012 and further vide letter dated 17.01.2013 informed the bank that its liability against the bank guarantee stands discharged. A copy of this letter was also marked to the respondent.

13. A reading of the above sequence of events would show that not only did the respondent give consent for the adjustment of Rs. 2 crores from its due amount under the present Contract, but also based on such adjustment sought release of the bank guarantee against the second tender and the petitioner duly surrendered the bank guarantee based on such adjustment of the amount. The respondent was therefore, estopped from now challenging such adjustment.

14. As noted from the Impugned Arbitral Award, much emphasis has been placed by the Arbitral Tribunal on the so called coercion and economic duress exercised by the petitioner on the respondent by withholding payments against the running bills. The Tribunal has, however, failed to appreciate that even in the letter dated 21.05.2013 which was addressed by the respondent almost five months after the release of the bank guarantee against the second tender, the respondent did not raise any such plea.

15. In any case, the respondent having enjoyed the benefit of the release of the bank guarantee against the second tender, cannot now turn the clock back by claiming economic duress or coercion against the petitioner.

16. The Arbitral Tribunal has also laid much emphasis on the fact

that the consent to make adjustment given by the respondent vide its letter dated 30.07.2012 was without consideration. This finding of the Arbitral Tribunal cannot be sustained as the consideration was the release of the Bank Guarantee of the other tender by the petitioner.

17. The Arbitral Tribunal has further held that in case the bank was not paying the amount on invocation of Bank Guarantee, the only remedy of the petitioner was against the bank and not against the respondent. This finding of the Arbitral Tribunal is also incorrect inasmuch as merely because the petitioner could have recovered its dues by encashing the bank guarantee, does not denude the petitioner of its right to proceed against the respondent as the principle debtor.

18. In view of the above, the findings of the Arbitral Tribunal are clearly contrary to the documentary evidence that had been led by the parties before it, therefore, cannot be sustained and are accordingly set aside.

19. The second challenge of the petitioner is to the Award of claim no. 2 (*Towards short payment for mast erection & stringing works executed manually*) and claim no. 3 (*Towards price variation on the above amount of Rs.52,32,052/- for manual erection of mast and stringing work*).

20. The learned counsel for the petitioner submits that the Arbitral Tribunal has failed to appreciate that the petitioner had already released the amounts to the respondent for the supply of material and if the formula of 80:20 towards supply of material cost and erection is to be applied, the respondent may become entitled to the payments

over and above the contracted rates. He further submits that in this regard the petitioner had made detail submissions, making reference to various Clauses of the Agreement, however, the Arbitral Tribunal has passed the Impugned Award without considering the same.

21. I am unable to agree with the submission made by the counsel for the petitioner. The Arbitral Tribunal while granting this claim has given the following findings:-

“8.50 The Respondent further argues that due to clerical mistake the calculation was made on rates claimed by the Contractor in assessment wrongly. The same were not corrected by PM/PEMS and also by RVL/SC. It was only during verification of the bills, the amount claimed for manual erection was examined and the same were found to be incorrect and hence corrected.

8.51 The Respondent also argues that the Claimant in R.A. bills had claimed as per agreed rates in the agreement without raising any objection. In view of Claimant's own conduct during course of execution, the Claimant is prohibited from contending otherwise. The Claimant is barred by the estoppels and waiver to change its stand.

8.52 After going through the arguments and counter arguments of both the parties, AT finds that the rates for the materials/equipment provided in Annexure 1 to Section 9 (RD I Annexure R-321), are meant for making 'on account payment' against supply. The so called 'on account payment' is in fact an advance payment to the Contractor against material brought at site so that the cash flow of the Contractor is maintained. Such advance payment is recovered from the next progress bill of the Contractor. Thus in effect the rates provided in this Annexure 1 to Section 9 are not used for making any actual payment to the Contractor and as such the rates provided in (RD I Annexure R-321), do not have any bearing on the BOQ rates at which

the payment is to be finally made to the Contractor.

8.53 AT finds that the Contractor in its letter dated 21.01.2013 (CD II Exhibit C35), has rightly pointed out that if unit price for erection is to be worked out by deducting ONA unit price from BOQ unit rate, as being contended by the Respondent, then what will happen to those items where ONA rates are higher than the BOQ rates. The Claimant in its letter dated 21.01.2013 (CD II Exhibit C-35 Page 194), has brought out a number of such cases wherein the ONA rates are higher than the BOQ rates. In such cases the unit price for erection would come out to be negative. Thus there is no merit in the contention of the Respondent that the unit price for erection should be worked out by deducting the ONA unit price from the BOQ price unit.

8.54 As provided in Clause 13.3 of Contract for variation procedure, the Contractor submitted the proposal for working out the unit price of erection vide its letter dated, 01.11.2011 (CD II Exhibit C-31 Page 117). This proposal was based on a similar work of PWL-BTSR Project wherein there was a provision in the Contract itself that if for any item of work the price of material and erection is not separately available, 80% of the cost of item of work would be considered as material cost.

The sole argument of RVNL is that the terms and conditions of PWL-BTSR Project are different and, therefore, the provision of 80:20, made in that project is not applicable.

The contention so made by RVNL is without any merit. The provision of 80:20 was made in the bid documents before the contract for PWL-BTSR was entered into. This factor of 80:20 was not derived from the provisions of the contract of PWL-BTSR. This factor of 80:20 must have been arrived at by RVNL as a result of the experience of many projects. Every technical department evolves such factors / parameters for preparation of project reports and execution of works. If a factor of 80:20 was provided in the bid documents of PWL-

BTSR, it must be based on some experience of RVNL. Even the Contractor vide his letter dated 01.07.2013 (CD III Exhibit C-44 Page 244) has brought out to RVNL as under:-

"Our various existing contract for similar nature with RVNL(PWLBTSR) is having a clear advise that wherever the supply and, erection rates are not available separately, 80:20 percent shall be considered as supply/erection rate respectively".

Our forthcoming Contract of similar nature with RVNL is also having a same clear advice as above.

Many more tenders /contracts of RVNL are also having such' clear advises as above."

RVNL has .not contested the above said statements made by the Contractor.

8.55 Even Section 28 of the Arbitration & Conciliation Act 1996 says that trade usages shall be taken into account for resolving the disputes. Accordingly, the competent authority in this case has rightly approved the proposal of the Contractor. With the approval of the proposal vide letter dated 29.05.2012 (CD II Page 69), it becomes a contract between the two parties which cannot be altered unilaterally subsequently by the Employer as done in this case. Thus the action of reducing the rates in January 2013 by the Employer for Item No. 3(b)(ii), 3(b)(i) & 3(b)(iii) and Item No. 6(a) to 7(a) is illegal and not sustainable in the eyes of law.

8.56 AT also does not find any merit in the contention of the Respondent that the Claimant had been preferring RA bills against these items on the same procedure as being contended by the Respondent. For getting the 'on account payment' against supplies in RA bills, there is no option left with the Contractor except to adopt this procedure but that was only for the purpose of obtaining advance and whatever advance was taken that was recovered from the next progress bill. So those RA bills did not have any bearing on the final

decision of the determination of unit rate for erection.

8.57 In light of the above discussion AT finds that the Contractor is entitled to get back the outstanding sum of Rs.52,32,052/- against this claim.

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8.60 AT finds that in view of Clause 13.8 of the Contract, price adjustment is applicable in this Contract. The Claimant has stated that payment released by Respondent by way of price adjustment on the amount of work done, comes to average @ 20.35104%. This figure has not been contested by the Respondent. Based upon this percentage the price variation @ 20.35104% on Rs.52,32,052/- comes to Rs.10,64,776/-. Hence the contractor is entitled to Rs.10,64,776/-against this claim.”

22. The Arbitral Tribunal has therefore, considered the terms of the Agreement and passed an Award which cannot be said to be unreasonable or perverse in any manner. I, therefore, do not find merit in the objections raised by the petitioner to the award of claim no. 2 and 3.

23. In view of the above, the Impugned Award only insofar as it grants claim no. 1 in favour of the respondent is set aside. Accordingly the interest awarded in claim no. 4 shall have to be re-worked.

24. The petition is allowed to the above limited extent and with no order as to cost.

NAVIN CHAWLA, J

SEPTEMBER 20, 2018/rv