IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.606 OF 2015

Mahanagar Telephone Nigam Ltd. … Petitioner
Versus
M/s ASCO Engineering … Respondent

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Mr. Niranjan P. Shimpi for the Petitioner.
Mr. Ramesh Ramamurthy for the Respondent.

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CORAM : S.C. GUPTE, J.

DATE : 10 APRIL 2019

(Oral Judgement)

. Heard learned Counsel for the parties.

2 This arbitration petition challenges an award passed by a sole arbitrator in a reference arising out of a contract for provision of materials.

3 The Petitioner, herein, who was the respondent to the reference, invited tenders for provision of aluminium windows for RTTC Hostel Building, Powai, Mumbai-400 076. Accepting the tender submitted by the Respondent, the Petitioner awarded the contract for provision of windows to the Respondent at a cost of 23 per cent below the quoted tender rate. The contract provided for a scheduled date of completion, which was 24 December 2005. The contract work was, however, completed by the Respondent on 11 December 2006. The Respondent contractor invoked the arbitration agreement on account of non-payment of its bills. Out of eighteen original claims, and one claim submitted later, the learned

arbitrator awarded in all nine claims. Claim Nos.1, 2 and 3, awarded by the arbitrator fully or in part, have been duly paid by the Petitioner and are not the subject matter of challenge. The challenge pertains to award on Claim Nos.5, 7, 9, 12, 17 and 18.

4 Claim No.5 pertains to balance payment for extra item of toughening of glass. The arbitrator, in his impugned award, held that though the agreement provided for use of 6 mm thick brown glass (Item No.7) in the windows, during the execution of the work, it was requieed by the Petitioner to provide 6 mm thick toughened glass in the windows. The arbitrator observed that there was no dispute between the parties regarding the quantity of toughened glass provided, which was 345.95 sqm. The dispute was regarding the rate at which the Respondent was entitled to be paid. The arbitrator observed that from the records it was seen that the Petitioner's Executive Engineer, who was in-charge of the work at the time of its execution, had prepared a market rate analysis of the particular item of work, namely, toughening of glass over and above the agreement rate for Item No.7. After such rate analysis, the rate was determined at Rs.962.95 per sqm. and the same was approved by the DGM (Civil) of the Petitioner on 18 November 2005. The arbitrator noticed that this additional rate was paid in the running account bills upto the third R/A bill at part rate showing the full rate as Rs.962.95 per sqm. The arbitrator observed that the subsequent market rate analysis was prepared after taking into account the quotation acquired by the present Executive Engineer. The quotation for such market rate analysis was not obtained at the time of execution of the particular item of work but much after the completion of the work. The arbitrator was of the view that the

action of the Petitioner in reducing the rate from Rs.962.95 per sqm to 434.76 per sqm after the entire work was executed and after payments were made in R/A bills showing the rate to be Rs.962.95 per sqm, was not legal or valid. The arbitrator was of the view that since the rate was determined during the course of execution of the work, after market rate analysis, and was acted upon by the Respondent, reduction of the rate subsequently did not appear to be *bona fide* and the Respondent was accordingly justified in seeking payment for toughening of glass at the rate of Rs.962.95 per sqm. This clearly appears to be a possible view of the material placed by the parties before the learned arbitrator. There is nothing shocking about such a view. It is not a view, which can be described as a view, which no fair or judiciously minded person may take. There is, thus, no warrant for interfering with the award on this claim under Section 34 of the Arbitration and Conciliation Act, 1996 (“Act”).

5 As regards Claim No.7, which was for recovery made by the Petitioner against the Respondent-contractor on account of non-employment of Engineer, it is the Petitioner's case that as per the provisions of Clause 30 of the agreement, the Respondent-contractor was required to employ a graduate engineer on the work site and such engineer was required to remain present during the course of execution of the whole work. The Petitioner, on account of non-engagement of such engineer, levied compensation in the sum of Rs.15,000/- and recovered the same from out of the bill payable to the Respondent. The arbitrator did not accept this recovery on the ground that there was no documentary evidence to show that any such notice was issued to the contractor regarding non-availability of the engineer during the execution of the work

and also that there was no document to show that due to non-availability of such engineer, any loss had been caused to the Petitioner. This part of the impugned award represents an impossible view or a view, which no fair or judiciously minded person should take of the material placed before him. In fact, there are several letters on record to show that the Petitioner had raised grievance in this behalf throughout the execution of the work. The observation that there is no evidence about a complaint of non-availability of the engineer is, thus, clearly contrary to the record. Secondly, as far as the issue of loss is concerned, it is pertinent to note that Clause 30 of the agreement between the parties provided for a sum by way of damages on account of non-engagement of an engineer. The sum was Rs.5,000/- per month. The reasonableness of compensation for non-engagement of an engineer was a matter to be left exclusively to the Engineer-in-charge as per Clause-30 of the agreement. If that is so, that was clearly an excepted matter. There being evidence on record that no engineer was actually employed and that the Petitioner's engineer infact thought it fit to levy Rs.15,000/- as reasonable compensation on that account, the recovery of Rs.15,000/- made by the Petitioner could not have been faulted by the learned arbitrator. The award in this behalf, thus, completely disregards the agreement between the parties as also evidence placed before the learned arbitrator and is, thus, liable to be set aside.

6 Coming now to Claim No.9, which was for underutilized materials lying at site, the learned arbitrator was of the view that the twelve windows, which were in finished condition and which were lying in the custody of the Petitioner herein, ought to have been paid for. That the material remained in the custody of the Petitioner was not a matter of

dispute. What was disputed was that this material was not required by the Petitioner. The learned arbitrator did not find this contention to be correct on the basis of the record placed before the arbitrator. The arbitrator, accordingly, calculated the cost of these twelve windows at Rs.1,59,120/- after taking into account the weight, material used and the rates for these items. So also, the arbitrator noticed that the other item, namely, marble stone lying at site was confirmed by AE(C) of the Petitioner in his letter dated 15 July 2006. The cost analysis for these materials, namely, marble sill and edge moulding, was not denied by the Petitioner. The arbitrator was of the view that the Petitioner's claim that this marble was rejected by the Chief Engineer was not substantiated by any record. The arbitrator, accordingly, held that the Respondent was entitled to receive payment for marble sill and edge moulding which was under the custody of the Petitioner. Taking into account the rates analysis, the arbitrator worked out the net rate payable at Rs.960/- per sqm as against the quoted rate of Rs.1160/- per sqm and worked out the cost of marble, thus, at Rs.2,14,650/-. The arbitrator, accordingly, worked out a total amount of Rs.3,73,770/- on account of Claim no.9. The award on this claim clearly exhibits a possible view and not a view which no fair and judiciously minded person would have taken or a view which would shock the conscience of the Court. The award on this claim, accordingly, does not warrant any interference.

7 Coming now to Claim No.12, which was for compensation for underutilization of overheads, it is to be noted that there was no evidence produced before the learned arbitrator of the Respondent having engaged the personnel referred to in the award. So far as the engineer is concerned,

the matter has already been dealt with above. Even as regards the Supervisor or Chowkidar referred to in the award, there is no evidence at all to establish their engagement during the course of idling or the remuneration paid to them. This part of the award is clearly based on no evidence and is liable to be set aside under Section 34 of the Act as an impossible view or a view which no fair or judiciously minded person would take. Accordingly, the arbitrator's award on Claim No.12 is liable to be set aside.

8 The award on interest and arbitration cost, which, respectively, were part of Claim Nos.17 and 18, does not deserve to be interfered with, save and except the interest ordered on Claim No.7, the award of which is being set aside.

9 In the premises, the arbitration petition partly succeeds. The impugned award of the arbitrator dated 16 September 2009 is partly set aside, that is to say, to the extent it allows Claim Nos.7 and 12 and interest on Claim No.7. The rest of the award is sustained. No order as to costs.

(S.C. GUPTE, J.)