

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ORDINARY ORIGINAL CIVIL JURISDICTION****ARBITRATION PETITION NO.677 OF 2015**

M/s. Asco Engineering

....Petitioner

vs

The Chief Engineer (BW) MTNL And Anr.

...Respondents

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Mr. Ramesh Ramamurthy, a/w. Mr. Saikumar Ramamurthy, for the
Petitioner.

None for the Respondents.

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CORAM : S.C. GUPTE, J.**DATED: 26 FEBRUARY 2019****P.C.:**

. Heard learned Counsel for the Petitioner. This arbitration petition challenges an award passed by a sole arbitrator in the matter of disputes arising out of a contract for building maintenance and miscellaneous civil works. The Petitioner was the contractor, whereas the Respondent was the employer. The controversy in the petition mainly concerns Claim No.2 of the Petitioner-contractor. The claim was for extra payment for additional/deviated work beyond 50% at market rates. The case of the Petitioner before the arbitrator was of having carried out excess quantity of work beyond 50% permissible deviation and that this excess quantity should be paid for at the market rates. The learned arbitrator, after taking into account the relevant provisions of the

contract, including clauses 13.3, 3.7, 21.4, 51 and 52 of the contract, rejected the Petitioner's claim. The arbitrator held that under clause 13.3(i), the Petitioner-contractor was not entitled to any increase in rates for deviated quantities and that extra work had to be paid for in accordance with the rates specified in the schedule of quantities. The arbitrator also held that even if the additional work beyond the deviation limit of 50% were to be considered as extra item under clause 13.3(ii), even then, as per the same clause, within 15 days of the order of deviation, the contractor was expected to make a demand with a proper rate analysis. Upon such analysis being submitted, the rates for extra items were to be determined by the engineer in charge. In case the parties were unable to reach any agreement on the rates proposed by engineer in charge, the contractor was free to refuse the extra work. The arbitrator noted that no such process was carried out by the claimant-contractor and, in its absence, the rates determined by the engineer in charge were to be treated as final. The arbitrator also noted that the claimant-contractor could not produce any record or document showing that he had made any protest or objected to the rates at which the work was paid for, whilst accepting certification of various RA bills/final bill. The arbitrator noted that making of a demand for market rates at a later date had the effect of depriving the Respondent-employer of the right of seeking competitive rates. The arbitrator also noted that by not making demand of extra rates at the appropriate time, the claimant-contractor had acquiesced his rights. The learned arbitrator, accordingly, rejected the claim. The view expressed by the learned arbitrator on this claim is clearly a possible view based on a reasonable construction of the suit contract. There is nothing unconscionable or

perverse about such assessment. The award, accordingly, does not merit any inference.

2. Learned Counsel, alternatively, submits that the award must be set aside on the ground of justifiable doubts as to the arbitrator's independence or impartiality. Learned Counsel refers to the objections raised in this behalf by the Petitioner-contractor in an application under Section 12(3) of the Arbitration and Conciliation Act, 1996 ('Act'). The application made by the Petitioner in this behalf merely suggests that there were certain other disputes arising out of another contract dated 5 July 2007, which was under the management and control of DGM (C) North; these were under arbitration and the present arbitrator, as the then DGM (C) North, had taken a decision in those other matters against the Petitioner and merely conveyed it through EEC North, who was the actual arbitrator. It was claimed that he was expected to take an identical decision in the present disputes, and hence, there was a likelihood of bias giving rise to justifiable doubt as to his independence or impartiality. The grounds raised by the Petitioner do not suggest any justifiable doubt as to the arbitrator's independence or impartiality. The arbitrator, in his order on the application passed on 30 June 2011, has duly considered all objections of the Petitioner. The arbitrator has made it clear that the other contract was not under his management or control as an officer of the Respondent-employer. The arbitrator has noted that the other contract was concluded even before he joined as DGM with the Respondents. The arbitrator also noted that the contract work in the other disputes was entirely different from the present contract; he had never been associated with the work under it. The arbitrator, in the

premises, held that there was no reason, which could give rise to any justifiable doubt about his independence or impartiality. The arbitrator also noted that the other disputes raised by the Petitioner were decided by EEC North and these were not identical to the disputes herein referred to him. These are perfectly legitimate grounds for rejecting the Petitioner's application under Section 12(3) of the Act and no fault can be found with the same.

3. Accordingly, there is no merit in the petition. The petition is dismissed.

(S.C. GUPTE, J.)