IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.789 OF 2013

Delta Mechcons (India) Limited ....Petitioner
vs
M/s. Gammon India Limited ...Respondent

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Mr. Rishabh Shah, i/b. Pramod N. Patil, for the Petitioner.

Mr. Kirit J. Hakani, a/w. Ms. Niyati Hakani, for the Respondent.

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CORAM : S.C. GUPTE, J.

DATED: 21 JANUARY, 2019

P.C.:

. Heard learned Counsel for the parties. This arbitration petition challenges an award passed by an arbitral tribunal of three arbitrators. By the impugned award, the arbitrators allowed some of the claims of the Respondent (original Claimant), whilst rejecting the counter-claims of the Petitioner (original Respondent).

2. One Marubeni Corporation (Marubeni') had obtained a contract from BPL for construction of 2*260 MW Thermal Power Plant at Ramagundam, District Karimnagar (Andhra Pradesh). Marubeni Corporation, in turn, awarded a sub-contract to the Petitioner herein - Delta Mechcons (India) Limited ('Delta'). Delta floated tenders for the main plant foundation works for the project. The Respondent-M/s. Gammon India Limited ('Gammon') submitted its tender. The tender was accepted and a contract was entered into between Delta and Gammon

for construction of plant foundation. After part-execution, the contract was terminated by Delta. On the date of the termination, according to Gammon, they had run up a total RA bill of about Rs.1.83 crores. Considering payments made by Delta as of the date of the termination and adding extra work, as also other claims towards suspension costs and damages, Gammon claimed a sum of over Rs.4.16 crores. The arbitrators awarded a sum of Rs.39,00,663.49 together with interest at the rate of 18% per annum from 1 December 2001 till payment or realisation and arbitration costs in the sum of Rs.11 lakhs. The award granted total unpaid RA bill (Claim No.1) together with costs of suspension of work (Claim No.2) and termination of the contract (Claim No.3). Delta's counter-claims aggregating to over Rs.31.75 lakhs were rejected for want of evidence.

3. Learned Counsel for the Petitioner makes two broad submissions for challenging the award. It is, firstly, submitted that material evidence was ignored by the arbitrators whilst making the impugned award. Learned Counsel, in particular, draws my attention to two documents exchanged between the parties acknowledging validity of their respective claims, i.e. letter dated 7 September 2001 addressed by Delta to Gammon and minutes of meeting dated 8 November 2001. Learned Counsel submits that the arbitrators have selectively placed reliance on these documents and awarded claims of Gammon, whilst rejecting Delta's recoveries referred to in these documents. Learned Counsel, secondly, submits that the arbitrators have traveled beyond the terms of submission and awarded Gammon's claims, recovery of which was prohibited under the contract. Learned Counsel particularly refers to

the claims of costs of suspension and of termination awarded by the arbitral tribunal to Gammon in this behalf.

4. The letter dated 7 September 2001, addressed by Delta to Gammon, included summary statements prepared by Delta based on final bill value and balance payable to Gammon. The enclosed statement showed the gross RA Bill value at Rs.1,83,55,723. After taking into account statutory deductions, net payment due was said to be Rs.1,54,13,934. After giving credit for extra works executed (Rs.6,17,420.21) and suspension costs (Rs.9,00,000) and adjusting debit for recoveries towards chimney work - equipment hire (Rs.7,76,424) and concrete (Rs.8,063), the net payment worked out was Rs.1,37,55,657. Deducting the aggregate payment made from this sum, the balance amount was said to be an excess of Rs.2,30,685. After giving credit for two other items, namely, consideration for equipment for TG2 and bunker 2 as goodwill (Rs.3,52,906) and other equipment, material, etc., based on market rate as goodwill (Rs.2,92,747), the balance amount payable was worked out as Rs.4,14,967.49. This amount was reflected in the summary of payment due to Gammon annexed to the letter of 7 September 2001. The other two items, which form part of this summary, were release of works contract tax in the sum of Rs.7,34,234 and release of security deposit worth Rs.18,35,573. Adding up these payables, the net amount worked out in the summary of payment as due to Gamman was Rs.29,84,774.49. The arbitrators, in their impugned award, appear to have proceeded on the basis of this admission on the part of Delta. They, however, declined to give any credit to Delta for the two recoveries mentioned in this statement. These are recoveries towards debit notes

for chimney work - equipment hire (Rs.7,76,424) and concrete (Rs.8,063). The arbitrators held that these amounts included alleged dues of Delta towards chimney work. This work admittedly was not part of the contract, on which disputes arose between the parties. The arbitrators were of the view that these two items could not accordingly be considered or allowed in the arbitration reference. Deducting, thus, these recoveries unilaterally claimed by Delta, the total payable sum, which included Gammon's claim for suspension period (admitted in the letter of 7 September 2001 by Delta) of Rs.9 lakhs, was worked out. The arbitrators also considered one more item, namely, material lying at site at the date of termination, which was said to be of the aggregate value of Rs.1,31,402 in the minutes of meeting drawn between the parties on 8 November 2001. The arbitrators held that these minutes, read with the letter of Delta of 7 September 2001, made it clear that the statement of dues worked out by Delta on 7 September 2001 had not considered the balance material handed over to Marubeni through Delta. The agreed value of this material of Rs.1,31,402 (as per the minutes of 8 November 2002) was added by the arbitrators to the net amount payable to Gammon. That is how the total of amount of Rs.39,00,663 was awarded to Gammon.

5. The analysis of the arbitrators and the findings arrived at by them for ascertaining the claim payable to Gammon do not suffer from any infirmity within the meaning of Section 34 of the Arbitration and Conciliation Act, 1996 ('Act'). The analysis clearly displays a possible view of the material placed before the arbitrators. It does not take into account any irrelevant material or circumstance, or disregard any

relevant or germane material or circumstance. It cannot be described as a view, which no fair or judiciously minded person would take, or which would shock the conscience of the court. If that is so, under the law stated by the Supreme Court in **Associate Builders vs. Delhi Development Authority**[1], no fault can be found with the award.

6. Learned Counsel for the Petitioner submits that though the arbitrators have taken into account the letter of 7 September 2001 and the minutes drawn by the parties on 8 November 2001, the arbitrators have considered only selective statements from these documents to arrive at their calculations. Learned Counsel submits that the recoveries payable to Delta are not considered by the arbitrators. The letter of 7 September 2001 is used by the arbitrators not as a bilaterally agreed position, but as an admission on the part of Delta. Whilst admissions in the letter were relied on for awarding Gammon's claim, recoveries claimed by Delta, being outside the contract and not relating to the contract work, were not taken into account for working out the amount payable to Gammon. So also, since minutes of 8 November 2001 referred to recoveries of Delta from other contracts, there were not, as indeed they could not have been, considered by the arbitrators whilst arriving at the net payable amount. There is, thus, no infirmity found in the impugned award on this count.

7. Insofar as the claims for costs of suspension and of termination are concerned, learned Counsel for the Petitioner submits that the arbitrators have exceeded their jurisdiction and awarded

1 (2015) 3 Supreme Court Cases 49

Gammon's claims, recovery of which was prohibited by the contract. Learned Counsel in this behalf refers to Clause 12.4 of general conditions of contract. Clause 12.4 deals with sub-contractor's loss of profit. The clause provides that the sub-contractor (Gammon) would not be entitled on the termination of the sub-contract to any payment in respect of, or compensation whatsoever for, any loss of profit, loss of opportunities or expenditure incurred in expectation of completing the whole of sub-contract works. Learned Counsel submits that costs of both suspension and termination are, accordingly, prohibited. Clause 12.4 deals with claims, if any, raised by the sub-contractor on termination of the sub-contract. It does not deal with any suspension ordered during its subsistence by the employer. If the contractor sustains any damages as a result of any such suspension, a claim for such damages cannot be said to be barred under Clause 12.4. Such claim is clearly covered within the terms of submission, since it pertains to the very contract work, claims out of which were being considered by the arbitrators. As for the costs of termination referred to in the award, it is really credit given to Gammon for the materials that were handed over to Marubeni through Delta. There is no prohibition in the contract for awarding this amount. Credit for these materials was not considered by Delta in their letter of 7 September 2001 as the letter itself makes it clear. These claims were considered in the minutes of meeting between the parties on 8 November 2001. Under these minutes, the amount payable to Gammon towards material lying at site was bilaterally agreed to be of Rs.1,31,402. This claim was very much within the arbitrators' jurisdiction and not prohibited by Clause 12.4. In fact, it is something, which is accepted in Clause 12.8 as part of termination value, and not prohibited in Clause

12.4 of the general conditions of contract. And there is evidence for the claim in the form of agreed minutes of 8 November 2001. Accordingly, there is no infirmity in the impugned award for awarding the claim.

8. As far as the interest awarded by the arbitral tribunal is concerned, no fault can be found with the rate at which such interest is awarded. The rate was clearly within the jurisdiction of the arbitrators and permissible under the provisions of Section 31 of the Act. It is, however, noticed that the arbitral tribunal closed the reference for award on 11 April 2011; the award, however, was declared on 11 May 2013. Obviously, for this long period of delay the arbitrators cannot award interest, since that would imply burdening the guilty party with interest for the time, which the arbitrators took for their deliberation and declaration of award. With consent of the Respondent, the award is read down by deducting the interest payable for the period between 11 April 2011 and 11 May 2013 from the award. Subject to such reading down, the award is sustained. The arbitration petition is disposed of accordingly.

(S.C. GUPTE, J.)