

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***ORDINARY ORIGINAL CIVIL JURISDICTION*****ARBITRATION PETITION NO. 534 OF 2017****ALONGWITH****NOTICE OF MOTION NO. 590 OF 2018****IN****ARBITRATION PETITION NO. 534 OF 2017**

Union of India)
Through Director General Naval Projects)
Having office at Naval Dockyard,)
Shahid Bhagat Singh Road,)
Mumbai – 400 023) **..... Petitioners**

VERSUS

Richa Constructions,)
A Partnership Firm, having office at)
601, Runwal Centre, Near Lakme Factory,)
Chembur, Mumbai – 400 088) **..... Respondents**

Mr.B.B.Sharma, a/w. Mr.Ashwini R. Singh for the
Petitioners/Applicants.

Ms.Madhuri Rawat, i/b. M/s.Auris Legal for the Respondent.

CORAM : R.D. DHANUKA, J.

DATE : 3rd JUNE, 2019

JUDGMENT

By this petition filed under section 34 of the Arbitration and Conciliation Act, 1996, the petitioners have impugned the arbitral award dated 29th March,2017 and corrected on 19th April,2017 and 1st May, 2017 insofar as claim no. 13 and claim no.20 are concerned.

2. The petitioners have admittedly paid the awarded sums to the respondents insofar as other claims awarded by the arbitral tribunal are concerned.

3. Insofar as claim no.13 is concerned, the respondent had made claim for interest at the rate of 24% per annum on delayed payment of R.A. bills. The original claim was in the sum of Rs.3 lacs which was revised to Rs.7,80,860/-. It was the case of the respondents (original claimants) that there was delay of more than 7 days for making payment of the R.A. bills by the petitioners.

4. In paragraph 102 of the impugned award, the arbitral tribunal has considered seven days as a reasonable period for payment of the R.A. bill after submission of such bills by the claimant. The learned arbitrator accordingly awarded simple interest at the rate of 12% per annum for the period of delay as a reasonable compensation. The learned arbitrator computed the said claim at Rs.3,30,250/-.

5. Insofar as this claim is concerned, Mr.Sharma, learned counsel for the petitioners invited my attention to clause 64 of the General Conditions of Contracts applicable to the parties. The relevant portion of the said clause is extracted as under:-

64. Advances on Account - The contractor may at intervals of not less than 30 days submit claims on I.A.F.W.- 2263 for payment of advances on account of work done and of materials delivered in connection with Measurement and Lump Sum Contracts.

Advance payment against each individual work

order issued under a Term Contract shall be made also at intervals of not less than one month provided the estimated value of the work performed is not less than Rs.3,000 for new works and Rs.10,000 for repair services and the value of payment on account is not less than Rs.1,500 and Rs.5,000 respectively.

The Contractor shall be entitled to be paid in respect of such claims at the following percentages of the value of work executed on the Site to the satisfaction of the Engineer-in-Charge:-

- (a) For Works not exceeding Rs.5 lakhs - 90 per cent of the value of work executed
- (b) For Works exceeding Rs.5 lakhs but not exceeding Rs.10 lakhs – 90 per cent of the value of work executed for the first 5 lakhs and 92 ½ per cent of the value of work executed for the balance.
- (c) For Works exceeding Rs.10 lakhs - 90 percent of the value of work executed for the first 5 lakhs; 92 ½ per cent of the value of work executed for the next 5 lakhs and 95 per cent of the value of work executed for the balance.

6. Learned counsel also invited my attention to the contentions raised by the petitioners in paragraph (15.5.5) at page 286 of the compilation of the documents filed before this court. He also placed reliance on the judgment of the Hon'ble Supreme Court in case of ***State of Manipur and others vs. Shangreihan Muivah 2002(10) SCC 516*** and would submit that the arbitral tribunal has awarded the said claim of interest on alleged delay of payment of R.A. bill contrary to clause 64. He submits that the learned arbitrator has considered seven days period as a reasonable period for making payment of R.A. bills without any basis. Learned counsel submits that all the payments were released in favour of the respondents within the period of 1 to 24 days.

He submits that in case of one R.A. Bill, there was delay of about 40 days.

7. Learned counsel for the respondent on the other hand submits that the judgment of the Hon'ble Supreme Court in case of ***State of Manipur & Ors.*** (supra) does not apply to the facts of this case since in this case the payment was not made as and by way of advance but was made for the work done by the respondents.

8. A perusal of clause 64 of the General Conditions of Contracts clearly indicates that the contractors are entitled to be paid in respect of the advance payment at intervals of not less than 30 days on account of work done and for materials delivered in connection with the measurement of lump sum contracts.

9. Insofar as clause under consideration of the Hon'ble Supreme Court in case of ***State of Manipur & Ors.*** (supra) is concerned, it was specifically provided in the said clause that all such intermediate payments shall be regarded as payment by way of advance against the final payment and not as payments for the work actually done and completed and shall not preclude the requiring of bad, unsound and imperfect or unskilled work to be removed and taken away. The judgment of the Hon'ble Supreme Court relied upon by the learned counsel for the petitioners thus would not advance the case of the petitioners. The clause under consideration before the Hon'ble Supreme Court and the clause 64 applicable to the parties are different.

10. Insofar as submission of the learned counsel for the petitioners that the arbitral tribunal has considered the period of seven days as reasonable without any basis is concerned, though clause 64 is silent about the period of making payment of R.A. bills, in my view the learned arbitrator has considered a period of seven days as a reasonable period for making payment of R.A. bills in the facts of this case. I do not find any infirmity with possible view taken by the learned arbitrator insofar as interest on delay in payment of R.A. bill is concerned. There is thus no merit in the submission of the learned counsel for the petitioner.

11. Insofar as the claim no.20 is concerned, the arbitral tribunal has allowed the said claim towards profit margin on account of prolongation of contract. The respondent has made claim of Rs.29,49,107/-. The learned arbitrator has allowed the claim at the rate of 5% towards profit margin and has worked out the said amount at Rs.9,83,000/-.

12. Mr.Sharma, learned counsel appearing for the petitioner invited my attention to clause 11 of the General Conditions of Contract which is extracted as under :-

11. Time, Delay and Extension -

(A) Time is of the essence of the Contract and is specified in the contract documents or in each individual Works Order.

As soon as possible after the Contract is let or any substantial Works Order is placed and before Work under it is begun, the G.E. and the Contractor shall agree upon a

Time and Progress Chart. The Chart shall be prepared in direct relation to the time stated in the contract documents or the Works Order for completion of the individual items thereof and/or the Contract or Works Order as a whole. It shall indicate the forecast of the dates for commencement and completion of the various trade processes or sections of the work, and shall be amended as may be required by agreement between the G.E. and the Contractor within the limitation of time imposed in the contract documents or Works Order. If the Works be delayed :-

- (I) by force majeure, or
- (ii) by reason of abnormally bad weather, or
- (iii) by reason of serious loss or damage by fire, or
- (iv) by reason of civil commotion, local combination of workmen, strike or lockout, affecting any of the trades employed on the work, or
- (v) by reason of delay on part of nominated sub-contractors, or nominated suppliers which the Contractor has, in the opinion of G.E., taken all practicable steps to avoid, or reduce, or
- (vi) by reason of delay on the part of Contractors or tradesmen engaged by Government in executing works not forming part of the contract, or
- (vii) by reason of any other cause, which in the absolute discretion of the Accepting Officer is beyond the Contractor's control ;

then, in any such case the Officer hereinafter mentioned may make fair and reasonable extension in the completion dates of individual items or groups of items of Works for which separate periods of completion are mentioned in the contract documents or Works Order, as applicable.

Upon the happening of any such event causing delay, the Contractor shall immediately, but not later than 30 days of the happening of the event, give notice thereof in writing to the G.E. but shall nevertheless use constantly his best endeavour to prevent or make good

the delay and shall do all that may reasonably be required to the satisfaction of the GE to proceed with the works.

Extension of time shall be granted as under:-

- (a) by G.E. for all Term Contracts;
- (b) by Accepting Officer of the contract for all other contracts.

In case the Contractor fails to notify the G.E. of happening of an event(s) causing delay within the period of 30 days stipulated in sub-para 3 above, he shall forfeit his right to claim extension of time for the delay caused due to such event(s).

Extension of time, as granted above, shall be communicated to the Contractor by G.E. in writing and shall be final and binding. PROVIDED THAT in the case of contracts (other than Term Contracts) accepted by the G.E., in the event of the Contractor not agreeing to the extension granted by the G.E., the matter shall be referred to the C.W.E. whose decision shall be final and binding.

(B) If the Works be delayed:

- (a) by reason of non-availability of Government stores shown in Schedule „B“, or
- (b) by reason of non-availability or breakdown of Govt. Tools and Plant listed in Schedule „C“;

then, in any such event, notwithstanding the provisions hereinbefore contained, the Accepting Officer may in his discretion grant such extension of time as may appear reasonable to him and the same shall be communicated to the Contractor by the G.E., in writing. The decision so communicated shall be final and binding and the Contractor shall be bound to complete the work within such extended time.

(C) No claim in respect of compensation or otherwise, howsoever arising, as a result of extensions granted under Conditions (A) and (B) above shall be admitted.

13. It is submitted by the learned counsel that admittedly in this case, the extension of contract was granted to the respondents at the

request of the respondent under clause 11(A) of the General Conditions of Contracts. He submits that in view of the clear bar under clause 11(c) of the General Conditions of Contracts, the arbitral tribunal could not have allowed the claim for profit margin at the rate of 5% or otherwise. He submits that no evidence was led by the respondents in support of the said claim for compensation.

14. Learned counsel strongly placed reliance on the judgment of the Supreme Court in case of ***Ramnath International Construction Pvt. Ltd. vs. Union of India, 2006(4) Arbitration L.R. 385(SC)*** and in particular paragraphs 10 to 14. He submits that the Hon'ble Supreme Court has considered identical clause i.e. clause 11(A) and 11(C) in the said judgment and has set aside the claim for compensation awarded by the learned arbitrator in the teeth of clause 11(C) of the contract.

15. Learned counsel for the respondents on the other hand submits that the fact remains that her clients have suffered loss of profit which is granted by the arbitral tribunal at the reasonable rate which part of the award shall not interfered with by this court.

16. Learned counsel for the respondents does not dispute that the contract was extended for the reasons recorded in clause 11(A) of the General Conditions of Contracts. A perusal of clause 11(C) of the contracts clearly indicates that there is bar in claiming payment of compensation or otherwise arising, as a result of extensions granted under conditions of clause 11(A) and 11(B) of the General Conditions of Contracts. Similar clause has been construed by the Hon'ble

Supreme Court in case of ***Ramnath International Construction Pvt. Ltd.*** (supra) and the claim for compensation has been set aside by the Hon'ble Supreme Court. In my view, the judgment of Hon'ble Supreme Court in case of ***Ramnath International Construction Pvt. Ltd.*** (supra) would squarely apply to the facts of this case. Clause 11(C) has been considered by the Hon'ble Supreme Court in the said judgment.

17. In view of the fact that there being no dispute that the contract was extended under clause 11(A), the bar provided under clause 11(C) was clearly attracted. In my view the claim for compensation made by the respondents was clearly in the teeth of clause 11(C) read with 11(A) of the General Conditions of Contracts. Arbitral tribunal thus could not have awarded any such claim of profit margin in the teeth of clause 11(C) read with 11(A) of the General Conditions of Contracts. The impugned award in my view is contrary to the principles of law laid down by the Hon'ble Supreme Court in case of ***Ramnath International Construction Pvt. Ltd.*** (supra) and thus this part of the award deserves to be quashed and set aside.

18. I, therefore, pass the following order :-

- (a) Award in respect of claim no.13 is upheld.
- (b) Award in respect of claim no.20 is set aside.
- (c) The arbitration petition is partly allowed in the aforesaid terms.
- (d) There shall be no order as to costs.

19. In view of the disposal of the arbitration petition, Notice of Motion No.590 of 2018 does not survive and is accordingly disposed of.

[R.D.DHANUKA, J.]