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

COMMERCIAL ARBITRATION PETITION NO.20 OF 2015
ALONG WITH
NOTICE OF MOTION NO.715 OF 2018
(NOT ON BOARD)

The Municipal Corporation of
Greater Mumbai … Petitioner
Versus
Angerlehner Structural and
Civil Engineering Company … Respondent

…..

Mr. Dipan Merchant, Senior Advocate a/w Mr. R.Y. Sirsikar for the Petitioner.
Mr. Javed Gaya a/w Ms. Vidya Chaudhari and Ms. Mona Malvade I/b Chambers of Javed Gaya for the Respondent.

…..

CORAM : S.C. GUPTE, J.

DATE : 27 FEBRUARY 2019

Oral Judgment

. Heard learned Counsel for the parties.

2 Learned Counsel for the Petitioner tenders draft amendment seeking to add some grounds of challenge in the petition. Learned Counsel for the Respondent has no objection to it. Accordingly, the Petitioner is permitted to amend the petition in terms of the draft taken on record and marked '**X**' for identification. Amendment to be carried out within three weeks.

3 This arbitration petition challenges an award passed by a sole

arbitrator in a reference pertaining to disputes between the parties arising out of an engineering and construction contract.

4 The short facts of the case may be stated as follows :

In 1999, the Petitioner-corporation invited tenders for rehabilitation of sewers in the city of Mumbai by lining and coating method. There was a pre-bid meeting and after clarifications were issued at this meeting, a bid was submitted by the Respondent on 11 November 1999. The bid was found responsive by the Petitioner and a contract for execution and completion of the work was awarded to the Respondent. The contract was followed by a work order. There was no dispute that the contract work was executed by the Respondent. The disputes concerned payment due to the Respondent for the contract work. After following the dispute resolution mechanism under the contract, the matter was referred to an arbitral tribunal. The award rendered by the tribunal was challenged before this court under Section 34 of the Arbitration and Conciliation Act, 1996 ("Act"). The award was set aside and the matter was remitted to a new arbitrator for a fresh hearing in accordance with law. The new arbitrator, by his impugned award dated 23 June 2014, held that the Petitioner-corporation was liable to pay to the Respondent (original claimant) an amount of US $ 9,00,000 towards additional quantity of grout of 900 cubic meters. The payment was ordered to be made 65 per cent in US Dollars and 35 per cent in Indian Rupees. The Petitioner was also directed to bear interest at the rate of 2.5 per cent per annum on the US Dollar component and 6 per cent per annum on the Indian Rupee component of the award.

5 The award has been challenged by the Petitioner-corporation on various grounds. Learned Counsel for the Petitioner, however, restricts his submissions to the challenge on account of an impossible view of the contract. Learned Counsel submits that as the contract stands, on its plain reading, the arbitrator's view on the nature of the contract as also on the payment purportedly due to the Respondent-contractor on account of extra work is clearly untenable.

6 The main controversy, thus, pertains to the nature of the contract and the cost incurred for the purported extra work carried out by the Respondent-contractor. It was the case of the Respondent that the contract was an item rate contract and not a lump-sum contract. It was submitted that Bill of Quantities (BOQ) forming part of the contract made it clear that quantities set out therein were merely estimated or provisional and were given merely to provide a common basis for bidding; payment would, however, be for actual quantities of work ordered and carried out, measured by the contractor and verified by the engineer, which quantities, were to be valued at the rates and prices set out in the price bill of quantities wherever applicable. On the other hand, it was the Petitioner's case that BOQ rates read with relevant terms of the contract indicated the nature of the contract as a lump-sum contract and the contractor could not claim anything over and above the quantities referred to in BOQ. The second important issue forming part of the reference was whether additional quantities over and above the quantities mentioned in BOQ were actually due to construction methodology and design adopted by the contractor and accordingly, whether payment could be demanded for these additional quantities.

7 On the nature of the contract, three issues were framed by the learned arbitrator. These, issue nos.2, 3 and 4, are quoted below :

> "(2) Whether payments under BOQ item no. 8 were lump-sum and were for a fixed length ?
>
> (3) Whether additional quantity of grouting, if any, amounted to variation under Clause 51.1 of FIDIC as alleged in paragraphs 43 and 64 of written statement ?
>
> (4) If answer to Issue No.3 is in affirmative, whether instructions in writing were obtained by the claimant from the engineer for such variation ?"

8 On the question of methodology and design, the following issue, issue no.5, was framed by the learned arbitrator :

> "(5) Whether additional quantities over and above the quantities mentioned in BOQ was due to construction methodology and design on liners submitted by the Claimant and no extra amount for additional quantity could be claimed ?

9 For assessing the nature of the contract, which was the subject matter of issue nos.2, 3 and 4, quoted above, the arbitrator held that it was extremely important to note that in the preamble to BOQ in contract volume I, paragraph 2, it was clearly stated that the quantities given in BOQ were estimated and provisional, and were given to provide a common basis for bidding, but payment would be of actual quantities of work

ordered and carried out as measured by the contractor and verified by the engineer, and the rates and prices stated in BOQ, wherever applicable, were to be applied to such quantities. The arbitrator noted that paragraph-4 of the preamble had clearly stated that a rate or price should be entered against each item in BOQ, whether quantities were stated or not; the cost of items against which the contractor had failed to enter a rate or price would be deemed to be covered by the other rates and prices entered in BOQ. The arbitrator also noted that for item no.8 of BOQ, which was regarding grouting annular space between the host sewer and the lining, in the column of quantity, the quantity was mentioned as 'cubic meters' both in columns of 'quantity' and 'unit'. General conditions of contract, which were FIDIC conditions (Fourth Edition 1987), stated in clause 55.1 that quantities set out in BOQ were estimated quantities for the works and not to be taken as actual or correct quantities for the works to be executed by the contractor in fulfillment of his obligations under the contract. Clause 56.1 stated that the engineer would, except as otherwise stated, ascertain and determine by measurement the value of the works in accordance with the contract and the contractor would be paid that value in accordance with clause 60. Clause 60.1 stated that the contractor had to submit to the engineer after the end of each month, a statement in such form as the engineer might from time to time prescribe, showing the amounts to which the contractor considered himself to be entitled upto the end of the month and under clause 60.2, the engineer was bound to deliver to the employer an interim payment certificate in respect of such amount, as he considered due and payable. The arbitrator also considered minutes of meeting between the parties and recommendations of the Dispute Review Expert (DRE) on this aspect. The arbitrator noted that the recommendations of DRE were extremely relevant and important on this aspect. DRE had observed that joint measurements were not taken though it was recommended to keep such measurements for record purposes. The arbitrator noted that DRE had stated that normal understanding of rates quoted in BOQ in an item rate contract (as against the other type, namely, lump-sum contract) was that rates for relevant items per unit mentioned against each were binding, whilst quantities were estimated or approximate and actual payments would be made on joint measurements of quantity recorded for the respective items to be paid at the quoted rates. This was the universal understanding of the schedule of BOQ, which was borne out by the various notes preceding the BOQ in the contract and particularly, the provision under clause 29.1(b) of ITB, which stated that the amount calculated and filled in the schedule for any item was different from what was obtained by multiplying the corresponding rate by the quantity; the rate quoted would have precedence and govern the payment (except in cases of gross misplacement of decimal point in rate). The arbitrator noted that under a specific schedule, there were some items, for which unit was mentioned as lump-sum, whilst, for some others, it was mentioned as a running rate, the item of grouting at serial no.8 being the only item where the unit was in cubic metres. The arbitrator noted that requirements of WRC Manual were mandatory in so far as the design was concerned. In the light of material placed by the parties before the arbitrator, he was clearly of the view that item No.8 of BOQ was clearly a re-measurement item and not a lump-sum item for a fixed length and that the respondent was clearly entitled to be paid on the basis of actual annular space between the liner and the host sewer. The arbitrator noted that since the contract, being an FIDIC Red Book Contract, which was a re-measurement contract, provisions of clause 51.1 were not attracted but provisions of clause 51.2 applied to the contract. Clause 51.2 required the contractor not to make any variation without the instructions of the engineer. There was, however, a proviso in the clause which stipulated that no instructions would be required for increase or decrease in quantity of any work, where such increase or decrease was not the result of instructions given under the clause, but was the result of quantities exceeding or being less than those stated in BOQ. As far as actual quantities are concerned, the contractor relied on interim payment certificates as well as measurement sheets as also oral evidence of its Project Manager for actual quantities involved. In respect of its case of actual quantities, based on these, which were in excess of BOQ, the arbitrator held that these extra quantities were not the result of a variation under clause 51.1 of FIDIC, but of actual quantities over and above those stated in BOQ. The arbitrator also held that since what was attracted to the facts of the case was the proviso to clause 51.2, there was no question of any instructions in writing being obtained by the contractor before carrying out the work. The learned arbitrator, thus, answered all issues, namely, issue nos.2, 3 and 4, in favour of the Respondent-contractor.

10 The arbitrator's conclusion is a perfectly reasonable and possible conclusion based on the material placed by the parties before him. This part of the award is clearly supported by evidence; it cannot be termed as an award based on no evidence or a view which no fair or judiciously minded person would be expected to take or a view that would shock the conscience of the court. For arriving at this view, the arbitrator has reasonably construed the relevant clauses of the contract between the

parties, including the schedule of BOQ forming part thereof. There is accordingly no infirmity in the impugned award in so far as the arbitrator's determination of the nature of the contract, whether lump-sum or item rate, is concerned.

11 Coming now to the arbitrator's assessment on the aspect of construction methodology and design adopted by the Respondent and extra or additional quantities over and above the quantities mentioned in BOQ, the arbitrator noted in his award the Respondent's letter dated 11 November 1999, under which the bid submitted clearly gave “Methodology of Lining with MCS System” and the sequence thereof. A specific reference was made to MCS expansion technique used to compensate the wall thickness of repair system. A specific reference was made in Appendix 'A' to the bid which was a compliance chart. The arbitrator noted that the letter also had specifically mentioned that grouting, to the best of the Respondent's knowledge, was an essential part and could not be Nil for any WRC Type I method and the thickness of grout between the host sewer and liner was dictated by structural design and minimum thickness was recommended. The letter referred to unique expansion technology developed by the Respondent for the specialized work involved. The arbitrator also considered minutes of meeting between the parties bearing on the subject as also technical specifications given in the contract volume, which dealt with lining /coating as per recognized renovation techniques identified in WRC Manual. The arbitrator noted that the sequences of work methodology were also clearly outlined in BOQ. The arbitrator also considered affidavit evidence of the Respondent's witness, Christian Dobretsberger, who had worked as Deputy Project

Manager and Project Engineer on the project and was also involved in the preparation of the bid. The arbitrator also considered the evidence of the Petitioner's witness, Sardar. The arbitrator noted that the limit of maximum 4% cross section reduction was an essential mandatory condition of the contract and to achieve this technologically, reaming was absolutely essential. The arbitrator noted that reaming was an essential part of the execution of the contract and the evidence of the Petitioner's witness, Sardar, showed this to be an admitted position. The methodology and all steps including reaming, installation of pipe and grouting the annular space between the liner and the pipe were found in the contract. The arbitrator noted that all these aspects indicated that grouting, being essential part of the execution of the contract, whatever quantity of grout was utilized was necessary for satisfactory compliance of the contractual provisions. The arbitrator noted that the methodology was clearly indicated by the respondent and approved by the Petitioner. After taking into account oral and documentary evidence, the arbitrator was of the view that it was clear that the contract was a highly regulated contract, whereunder the contractor had disclosed the construction methodology, machinery and sequence of works to the Petitioner- corporation and the Petitioner had approved the methodology in detail. The arbitrator was, therefore, of the view that it could not be said that quantities over and above the quantities mentioned in BOQ were due to construction methodology and/or design of liner submitted by the contractor or for that reason, no extra amount for additional quantities could be claimed. The learned arbitrator, thus, answered even issue no.5 in favour of the Respondent contractor. Once again, even this view is a perfectly reasonable and possible view based on the material placed before him. The arbitrator has duly considered oral and documentary testimony placed before him by the parties and after reasonable construction of the contract and assessment of oral and documentary evidence, referred to above, come to a pre-eminently possible conclusion on the issues involved. This part of the award, accordingly, also does not merit any interference.

12 In addition to these issues, the arbitrator also considered some other supplementary issues, such as whether WRC Sewerage Rehabilitation Manual, 3rd Edition, forms part of the contract; whether the contractor had agreed not to claim any extra cost for additional quantity over and above the quantity mentioned in BOQ by reason of its communication referred to in paragraphs 8, 40 and 52 of the written statement. The arbitrator, after taking into account oral and documentary evidence of the parties, held that the contractor had not agreed not to claim any extra cost for additional quantities over and over quantities mentioned in BOQ. The issues were, accordingly, answered in favour of the Respondent-contractor. Even these views of the arbitrator are clearly possible views, based on a reasonable interpretation of the contract between the parties and a fair assessment of evidence led by the parties before the arbitrator.

13 Accordingly, there is no merit in the challenge. The Arbitration Petition is dismissed.

14 In view of the dismissal of the arbitration petition, Notice of Motion 715 of 2018 does not survive and the same is also disposed of.

(S.C. GUPTE, J.)