IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.1043 OF 2009

Municipal Corporation of Greater Mumbai ....Petitioner
vs
Prestress Products (India) ...Respondent

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Mr. Yashodeep Deshmukh, a/w. Mr. R.Y. Sirsikar and Mr. D.S. Shingade, for the Petitioner.

Mr. Sunny Shah, i/b. Hemant Sethi & Co., for the Respondent.

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CORAM : S.C. GUPTE, J.

DATED: 18 MARCH, 2019

P.C.:

. This arbitration petition challenges an award dated 23 June 2009 made by a sole arbitrator in a reference arising out of a contract for construction of underground reservoir and pump house.

2. This contract was awarded by the Petitioner-Municipal Corporation to the Respondent-contractor in pursuance of tendering process. It was a lumpsum contract. The contract work comprised of construction of (i) an underground reservoir of 10 mega litres capacity, (ii) a pump house with mechanical and electrical works, (iii) B.E.S.T. Sub-station, and (iv) short lengths of inlet/outlet to the reservoir. The total cost of the work was about Rs.372 lakhs. The contract period was 24 months (inclusive of monsoon period) with two shifts working. The work commenced on 30 June 1984. The scheduled completion date was,

thus, 29 June 1986. The work could not be completed in time on account of various reasons. The parties have different perceptions about attributability of these reasons to either of the parties. The learned arbitrator, by his impugned award dated 23 June 2009, awarded a total sum of Rs.24,64,412/- towards six claims of the Respondent-contractor, including (i) for provision of water stopper not forming part of the original tender conditions but which the Respondent was required to provide, (ii) for extra work of anchor piles, (iii) for taking preventive measures against roots coming into the reservoir, (iv) for additional work to provide hard taping over the reservoir, (v) for additional sheet connection for skin wall and diaphragm wall, and (vi) for outstanding bills submitted upto 30 May 1994. The learned arbitrator also awarded a sum of Rs.44,55,000/- towards damages on account of loss of overheads for the extended period of contract.

3. The learned arbitrator, in the first place, held that there was no dispute about extra items as recorded in the measurement books and admitted in the contractor's Bill No.25. The disputed extra items were covered in Statement II, listed as A-1 and A-9 and B-1 to B-6. Each of these items was separately dealt with by the learned arbitrator. The learned arbitrator held that extra items could not be rejected on the ground that the contract was a lumpsum contract and it did not provide for payment of extra cost. The learned arbitrator, in this behalf, referred to the Municipal Commissioner's own statement made before the standing committee of the Petitioner Corporation seeking sanction of additional expenses. In this statement, the Commissioner had given detailed reasons justifying these additional expenses incurred by the

contractor and which had to be compensated for. These reasons included variation in sub-soil strata actually found at site, changes in the design necessitated by site conditions as also treatment to be given to structural arrangements to suit the site conditions. The Municipal Commissioner had, in the premises, sought sanction of the standing committee to allow the contractor to continue with the work and incur expenditure beyond the sanctioned cost in anticipation of standing committee's sanction. The arbitrator held that, in the premises, there was evidence to show that extra work did arise as a result of unforeseen conditions and change of design; and this had to be compensated for. The arbitrator's view is clearly a reasonable and possible view based on a fair construction of the contractual provisions and evidence placed by the parties before the arbitrator. The award on these claims cannot be termed as an award based on no reasons. So also, it cannot be said that the arbitrator took into account irrelevant or non-germane facts or material or disregarded any relevant or germane facts or material to arrive at his conclusion. Each of the items of extra work is supported by some material on record. There is, thus, no infirmity with the impugned award of Rs.24,64,412/- towards such extra work.

4. Coming now to the claim of damages for loss of overheads due to extended period of contract, the arbitrator held that though the contract appeared to have been terminated on 7 April 1994, it was proper to presume that the contract job had almost come to a standstill on 30 April 1993. The arbitrator observed that, if so calculated, total contract period came to about 100 months, whereas the effective period on job in terms of the work load was 34 months. The arbitrator held

that, thus, idle stay on job could be considered for 66 months, i.e 100 months less 34 months, as against total stay on the job claimed at 117 months by the Respondent-contractor. The arbitrator accepted the Respondent's case that overheads for the type of highly skilled industry expected in the present contract was about 15% of the job. Considering the work load per month, calculated on the basis of the contract value and period, of Rs.9 lakhs per month, according to the learned arbitrator, the overhead expenses incurred for idle period could be computed at Rs.1,35,000/- per month. Considering the overrun period of 66 months, the total overheads came to about Rs.89,10,000/-. The arbitrator awarded half of this, i.e. a sum of 44,55,000/-, to the arbitrator. The arbitrator held that he would not hold either party exclusively responsible for the delay; it would be proper to hold both parties to be equally responsible for the delay and, accordingly, awarded only 50% of the sum towards loss of overheads to the Respondent. Even this assessment of the learned arbitrator and the conclusions arrived at by him after such assessment, cannot be described as impossible views or views which no fair or judiciously minded person would have arrived at or views that would shock the conscience of the Court. Accordingly, there is no merit in the challenge to the award of damages on account of loss of overheads within the parameters of Section 34 of the Arbitration and Conciliation Act, 1996.

5. The arbitrator has judiciously awarded interest at a fair rate, i.e. 10% per annum, from 22 January 2000 till payment on the award of damages. Considering that the arbitration commenced admittedly on 22 January 2000, this award of interest cannot be faulted.

6. Coming, however, to the interest awarded on the award for extra work, though the rate of 10% cannot be faulted as such, the period for which such interest has been awarded, i.e. since 1 May 1994 till payment, appears to be untenable. Considering the fact that the disputes between the parties arose as far back as in 1994 but the arbitration agreement was invoked wrongly before the Institution of Engineers (India) by the Respondent (Respondent's letter dated 31 March 1994), the time lost between 1994 and 2000 when a correct reference in accordance with the agreement between the parties on appointment of arbitrator was made the arbitrator's award of interest between 1994 and 2000 does not appear to be correct. There is absolutely no justification for this incorrect reference. The Petitioner Corporation cannot be held responsible for the time lost between 1994 and 2000, which is entirely on account of wrong invocation of reference on the part of the Respondent-contractor. The award of interest in case of extra work should also have been, accordingly, restricted to the period between 22 January 2000 and till payment. The learned arbitrator's award of interest for the period between 1 May 1994 till 22 January 2000 on the claim of Rs.24,64,412/- for extra work, thus, cannot be sustained and deserves to be interfered with.

7. Accordingly, the arbitration petition is partly allowed by setting aside the award of interest by the learned arbitrator on the claim of Rs.24,64,412/- for the period between 1 May 1994 to 22 January 2000. The rest of the award is sustained.

8. Learned Counsel for the Petitioner applies for stay of the impugned award for a period of four weeks from today. After the Petitioner's challenge to the impugned award has been comprehensively heard and decided against the Petitioner, there is no question of stay of the impugned award. The application is rejected.

(S.C. GUPTE, J.)