

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ORDINARY ORIGINAL CIVIL JURISDICTION****COMMERCIAL ARBITRATION PETITION NO.1 OF 2009****WITH****COMMERCIAL ARBITRATION PETITION NO.2 OF 2009**

Municipal Corporation of Greater Mumbai

....Petitioner

vs

Anupam Engineers

...Respondent

.....

Mr. Yashodeep Deshmukh, a/w. Mr. D.S. Shingade, for the Petitioner-MCGM.

Mr. Kishore M. Jawale, a/w. Mr. Adwait A. Agashe, for the Respondent.

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CORAM : S.C. GUPTE, J.**DATED: 18 APRIL 2019****P.C.:**

. This arbitration petition filed under Section 34 of the Arbitration and Conciliation Act ("Act") challenges an award made by a sole arbitrator in a reference arising out of an engineering contract.

2. The Petitioners invited tenders for fabrication and transport of welded mild steel pipes and plates. The Respondents submitted their bid, which was accepted by the Petitioners and a contract was awarded to the former. The total estimated cost put to tender was about Rs.1.96 crores. The contract awarded was a percentage rate contract having an accepted contract cost of Rs.87.15 lakhs. The date of commencement was 1 June 1985 and the original period of completion was 33 months including monsoon period. The contract amount was later revised to

about Rs.2.16 crores. The original contract period was extended from time to time. The contract work was finally completed on 30 June 1996. During the course of execution of the contract work, a total number of 51 running account bills (RA Bills) were prepared and submitted by the Petitioners. The Respondents accepted the correctness of these RA bills. The dispute between the parties pertains to the last bill prepared by the Petitioners, which was said to be a final bill, i.e. Bill No.50. The Respondents did not accept this bill. It was the Respondents' case that this bill was not passed by Joint Commissioner and was unilaterally prepared by the Petitioners. It was the Petitioners' case that various claims reflected in the final bill submitted by the Respondents were never earlier demanded and were made for the first time in the purported final bill. Since the final bill was rejected by the Chief Engineer, the Respondents issued a notice under Clause 26 of the General Conditions of Contract demanding various sums. These claims were rejected by the Municipal Corporation, whereupon the Respondent issued a notice under Clause 97 for suggesting names for appointment of an arbitrator. The Chief Engineer, in response, suggested names of arbitrators, out of which the present sole arbitrator was chosen as an arbitrator by the parties. After the Respondents filed their statement of claims and the Petitioners filed their written statement, the learned arbitrator directed the parties to make a joint verification of measurements. Based on the details prepared during such joint verification, the Respondents prepared computerized tabular statements giving challan-wise details, including description of items, their dimensions, weight, place/agency of delivery, etc. The learned arbitrator crystallized the controversy between eight different types of

disputes. The computerized tabular statements together with submitted documents were taken on record by the learned arbitrator as Exhibit CL-XII. Based on these details, the Respondents submitted reconciled claims together with explanatory notes, which were taken on record as CL-XIII. The outcome of these details was treated as the correct claim upon reconciliation. The total claim, thus, considered was in the sum of Rs.6.51 crores as against the original claim submitted to the Municipal Commissioner and on which a reference was sought originally in the sum of about Rs.4.55 crores, whilst the claim forming part of the statement of claims was about Rs.5.60 crores.

3. The main objection of the Petitioners to the impugned award was on the basis of the arbitrator's jurisdiction to consider a claim, which was different both in nature as well as quantum than what was originally made as part of the submission to the reference. It was submitted by the Petitioners before the learned arbitrator that taking shelter of joint measurement, which was held without prejudice to the rights and contentions of both parties, the Respondent could not be permitted to expand the scope of the reference by increasing the claim referred to arbitration. It was submitted that these additional claims were not made to the Municipal Commissioner under clause 96 of General Conditions of Contract, a compliance whereof was mandatory and that the additional claims were beyond the scope of reference and were not arbitrable and without jurisdiction. At the hearing of this arbitration petition, learned Counsel for the Petitioners relies on the decision of the Supreme Court in **Orissa Mining Corporation Ltd. vs. Prannath Vishwanath Rawlley**¹ in

¹ AIR 1977 SC 2014

support of his case.

4. Clauses 96 and 97 of General Conditions of Contract are quoted below :

Clause 96 : Any dispute or difference to be referred to Commissioner:

“If any doubt, dispute or difference arises or happens between the Engineer or any other officer on the one hand and the Contractor on the other hand, touching or concerning the said works or any of them, or relating to the quantities, qualities description or manner of work done and executed by the Contractor, or to the quantity or quality of the materials to be employed therein, or in respect of any additions, deductions, alterations, or deviations made into or from the said works or any part of the, or touching or concerning the meaning or intention of this contract or of any part thereof or of any plans, drawings, instructions or directions referred to therein or which may be furnished, or given during the progress of the works, or touching or concerning any certificates, order or reward which which have been made or in any way whatsoever relating to the interests of the Municipal Corporation or of the Contractor in the premises, every such doubt, dispute and difference shall from time to time be referred to the Commissioner who shall give his decision within a period of 90 days and if the Contractor is not satisfied with the decision of the Commissioner or the Commissioner fails to give the decision within the period of 90 days, such dispute may be referred to arbitration as per Condition No. 97.”

Clause 97: Arbitration :

“All disputes or differences whatsoever which shall at any time arise between the parties hereto touching or concerning the works or the execution or maintenance thereof or this contract or the construction, execution, or maintenance thereof or this contract or the maintenance thereof or this contract or the construction meaning operation or effect thereof or, to the rights or liabilities of the parties or arising out of or in relation thereto whether during or after completion of the contract or whether before or after determination, foreclosure or breach of the contract (other

than those in respect of which, the decision of any person is by the contract expressed to be final and binding) shall after written notice by either party to the contract to the other of them specify the nature of such dispute or difference and call for the point or points at issue to be referred to the arbitration.

Arbitration shall be effected:

- (i) by an Arbitrator agreed upon by the parties or failing agreement upon such an Arbitrator,
- (ii) by an Arbitrator appointed by the President for the time being of the Institute of Engineers (India) or by the President of the Bombay Centre of the Institute of Engineers (India), or failing such appointment,
- (iii) by an Arbitrator appointed by the Chief Engineer, Buildings and Communication Department, Government of Maharashtra, or failing such appointment,
- (iv) by an Arbitrator appointed in accordance with the provisions of the Indian Arbitration Act which law governs the contract.

The Arbitrator so appointed shall be a person presently unconnected with the organization for which and by which the work is executed.

Submission to arbitration shall be deemed to be a submission to arbitration within the meaning of the Indian Arbitration Act, which law governs the contract.

If the Arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever another sole Arbitrator shall be appointed as aforesaid.

The work under the Contract shall, if reasonably be possible, continue during the Arbitration proceeding and no payment due or payable to the contractor shall be withheld on account of such proceedings.

The Arbitrator shall be deemed to have entered on the reference on the date he issues notice to both parties fixing the date of the

first hearing.

The Arbitrator may, from time to time with the consent of the parties, enlarge the time for making and publishing the award.

The Arbitrator shall give a separate award in respect of each dispute or difference referred to him.

The venue of Arbitrator shall be within the limits of Greater Bombay.

The fees, if any, of the Arbitrator shall, if required to be paid before the award is made and published, be paid half and half by each of the parties. The cost of the reference and of the award (including the fees, if any, of the Arbitrator) shall be in the discretion of the Arbitrator who may direct to and by whom and in what manner, such costs or any part thereof be paid and may fix or settle the amount of cost to be so paid.”

5. There is no dispute that in the notice issued by the Respondent under Clause 96 of General Conditions of Contract the claim made was of about Rs.4.55 crores. The position was the same when the Municipal Commissioner declined to decide the Respondent's claim under Clause 96 and a notice under Clause 97 of General Conditions of Contract was issued by the Respondents. Finally, when the parties agreed to the name of the arbitrator and the reference commenced before the sole arbitrator herein, the claim was reformulated and was stated to be of about Rs.5.60 crores. After joint verification and reconciliation, the revised claim submitted by the Respondents was made up of altogether different amounts, on the basis of which, the aggregate claim came to about Rs.6.51 crores. The learned arbitrator has indeed done a thorough exercise and gone through the merits of each individual claim of the Respondent-contractor. What, however, appears to have

been lost sight of by the learned arbitrator is that the claim originally submitted to the Petitioner, on which disputes arose between the parties, was substantially altered and enhanced in the course of the reference on a purported reconciliation. The record does not admit of any doubt that the reconciliation exercise, so far as the parties were concerned, was “without prejudice”. Based on this exercise, the original claim of Rs.5.60 crores in the statement of claim was substantially altered and reformulated and re-submitted as an aggregate claim of about Rs.6.51 crores. The original claim in the statement of claim towards non-payment of final bill and price variation of about Rs.1.60 crores was reformulated as a claim of about Rs.2.74 crores. The entire calculation of the claim towards the final bill including price variation was on the basis of completely different individual items purportedly based on joint verification. The main objection to be considered was whether the Respondents were within their rights to reformulate the claim and demand any increased sum on the basis of an altogether different working. The arbitrator simply rejected the Petitioner's objection to his jurisdiction on the ground that these changes were inevitable due to joint verification of measurements and regrouping of the claims. This is hardly any reason worth the name for disposing of an important objection to the arbitrator's jurisdiction to consider altered claims. In **Orissa Mining Corporation** (supra), where the reference was upon filing of an agreement under Section 20(1) of the Arbitration Act, 1940, the Supreme Court has held that when an agreement is filed in court and an order of reference is made, the claim as a result of the order of reference is limited to the particular relief and the arbitrator cannot enlarge the scope of the reference and entertain fresh claims without a further order

of reference from the court. What is at the heart of the matter is that an arbitration reference commences upon a submission to the arbitrator. The submission itself is based upon a claim made by a party against its counterparty which is denied by the latter. The submission outlines the scope of the arbitrator's jurisdiction. It is not permissible to an arbitral tribunal, which is but a creature of the contract and which operates within the terms of the submission, to entertain matters or disputes not contemplated by or falling within the terms of submission or beyond the scope of the submission.

6. No doubt, it would have been permissible for the learned arbitrator to have individually scrutinized reformulated claims and applied its mind to the question of his jurisdiction from the stand-point of the real alterations proposed in the claims. The difficulty with the impugned award is that there is no such application of mind or at any rate, such application, if at all there be any, is not reflected in the award. Ordinarily, in a case such as this, I should have remitted the reference to the same arbitrator for a decision on this limited issue on an application to be made by the Respondents under sub-Section (4) of Section 34. That would have given an opportunity to the arbitrator to resume the arbitration reference or take such other action which would eliminate the grounds for setting aside the arbitral award. That course is, however, not open in the present case, since the arbitrator, who passed the impugned award, is no more. In these circumstances, I called upon both parties to respond to a suggestion by this Court as to whether the impugned award should be set aside on the ground of exercise of jurisdiction by the arbitrator in respect of reformulated and reworked claims aggregating to

a different amount and remit the matter to a new arbitrator for a fresh hearing in accordance with law only on that point, leaving the other determination on merits intact. Learned Counsel for the Respondents was prepared to do so. Learned Counsel for the Petitioners, however, indicates his unwillingness to do so. Learned Counsel submits that he has no such instructions from his clients.

7. In the premises, I have no option but to simply set aside the award. I must, however, make it clear that I am in full agreement with the learned arbitrator's view on merits. The learned arbitrator has done a perfectly fine job with the assessment of the merits of the claim. As I have noted above, what the learned arbitrator has sadly missed is the consideration of the altered and reformulated claim from the point of view of his jurisdiction. As I have noticed above, he could have well applied his mind to see that the reformulated claims were brought within his jurisdiction having regard to the nature of the alerted claims as well as the quantum of the claims. For example, he could have refused the claims so as to make them fall within the originally quantified claims, eliminating by that means any ground of challenge on that score. In short, I must make it clear that I am not setting aside this award on merits and the setting aside of the impugned arbitration award has not resulted into discharge of the arbitration agreement.

8. With these clarifications, the impugned award is set aside. It is for the Respondents to adopt suitable steps to initiate a fresh reference of the disputes between the parties. There shall, in the facts of the case, be no order as to costs.

9. The companion petition, namely, Commercial Arbitration Petition No. 2 of 2009, challenges the impugned award, which is rendered on the same footing as the award considered in Commercial Arbitration Petition No. 2 of 2009 as above. Even here, the award is based on a joint verification of measurements (which was essentially “without prejudice”) and reformulated and reworked claims in accordance with the purported joint verification. As in the case of the petition discussed hereinabove, the objection to jurisdiction was disposed of by a one liner, namely, that the nature of the claims had remained the same “except for inevitable changes due to joint verification of measurements”. Accordingly, for the reasons stated above and with the same clarifications as in connection with the award discussed above, the impugned award in this petition is also set aside. No order as to costs.

(S.C. GUPTE, J.)