

psv

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

ARBITRATION PETITION NO.47 OF 2017

Shri Subhash Ramkumar Sharma	..Petitioner
Vs.	
Bharat Sanchar Nigam Limited	..Respondent

Mr.Arthav Sanghvi i/b. Ms.Priyanka Pawar for Petitioner.
Mr.Abhishek Shukla i/b. Arun Sapkal & Company for Respondent.

CORAM : G.S. KULKARNI, J.

DATE : 11th JANUARY, 2019

Oral Judgment:

This is a petition under Section 34 of the Arbitration and Conciliation Act, 1996 (for short, the “ACA”), whereby the petitioner challenges the award as passed by the learned sole arbitrator dated 1 October 2016.

2. At the outset, learned Counsel for the petitioner submits that the petitioner would confine the challenge to the award only in regard to findings of the arbitral tribunal on Claim No.1.

3. The disputes and differences arose between the parties under the agreement dated 13 September 2005 which was for the work of structural rehabilitation and other repairs of Ganga and Yamuna

Buildings at Juhu Danda Building in Mumbai. The petitioner in the statement of claim prayed for an amount of Rs.3,08,322/- which is stated to be an amount admittedly payable to the petitioner in respect of Part-A items of work as per the final bill prepared by the respondent and further for an amount of Rs.1,49,355/- payable to the petitioner in respect of part-B items of work as per the purported final bill prepared by the respondent, totaling to an amount of Rs.4,57,677/-. The limited averments which were made by the petitioner in regard to this claim are as under:-

“Claim No.1:

The Claimants say that the work under the contract had been completed by the Claimants on or about 15.01.2007. Thereafter, the Respondents had prepared an incorrect Final Bill, which had been accepted by the Claimants “under protest” for reasons recorded in the communications addressed by the Claimants to the Respondents at the contemporaneous point of time. Though the said purported Final Bill had been accepted by the Claimants under protest, the Claimants say that the Respondents have themselves admitted that an amount of Rs.3,08,322/- is due and payable to the Claimants in respect of Part – A items of work. The Respondents have also admitted that an amount of Rs.1,49,355/- is due to the Claimants in respect of Part-B items of work. The details and particulars of the said amounts is indicated in the purported Final Bill prepared by the Respondents (Exhibit C-29 (Colly) hereto). Thus, the Claimants say that a total amount of Rs.4,57,677/- is due and payable to the Claimants even as per the purported Final Bill prepared by the Respondents. The details and particulars of the said amount of Rs.4,57,677/- is submitted herewith marked as Annexure CA-2. The Claimants say that the Claimants are entitled to the said amount of Rs.4,57,677/- on this account from the Respondents and pray that the Learned Arbitrator may be pleased to award the same to be paid to the Claimants by the Respondents.”

4. The petition was contested by the respondent on the ground that the respondent had prepared final bills in respect of both the parts and that the final bills for both the parts were passed with NIL payment as the entire payable amount of Rs.4,39,371/- was kept withheld for sanction of EOT (Extension of Time). The extension of time was sanctioned by the competent authority upto 15 January 2007 by levying penalty under Clause 2 of the agreement of Rs.5,64,746/-. Against this penalty entire payable amount of final bills of Part A & B (the claim of the petitioner) was adjusted. Hence, the claimant was not entitled for any payment against final bill. In contesting the said claim, the respondent in their written statement stated thus:

“In respect of the work done and after taking into account the amounts paid through the R.A. Bills, the final bill was prepared in the month of June, 2007, all the items for which the amount were due and payable to the claimant were fully recorded when the bill was finalized. The final bill was passed for part-A for total value of work done for Rs.3,08,322/- after statutory deductions the sum payable was Rs.2,95,990/- for Part-B the final bill was passed for the amount of work done of Rs.1,49,355/- the payable amount was Rs.1,43,381/- however final bill for both the parts were passed with the above amounts with NIL payment as the entire payable amount of Rs.4,39,371/- was withheld for sanction of EOT. EOT was sanctioned by the competent authority upto 15/01/2007 by levying penalty under clause 2 of the agreement of Rs.5,64,478/-. Against this penalty entire amount payable against the final bills of part A and B were adjusted.”

5. The learned arbitrator considered the evidence on record and did not find favour to the entitlement of the petitioner to claim No.1. The learned arbitrator has reached a conclusion that the amount as claimed

by the petitioner in Claim No.1 was appropriately adjusted against the respondent against EOT and therefore, the award in respect of the said amount cannot be granted. The learned arbitrator observed thus:-

“Claim No.1: Claim on account of non payment of Part (A) item of work – Rs. 3,08,322/- and Rs.1,49,355/- on account of Part B totaling to Rs.4,57,677/-.

Findings: Found not justified.

Claimant submits that the final bill was not correct and it was accepted by them under protest. Respondent counters that the final bill payable amount, after statutory deductions for Part (A) & Part (B), was Rs. 2,95,990/- and Rs. 1,43,381/- respectively and thus totalling to Rs.4,39,371/-. The payable amount was kept withheld for want of sanction of Extension of Time (EOT) case. EOT case was sanctioned by competent authority with a levy of compensation, under Clause (2) of the agreement, amounting to Rs.5,64,746/-. The entire payable amount of Rs.4,39,371 was adjusted against the levy of compensation amount and therefore Claimant is not entitled for any payment against final bill.

It has been accepted by Claimants and Respondents that the work was completed on 15.1.07 and final bill passed on 18.6.07. Although the final bill was passed in reasonable period of time, the payment is seen to be delayed due to finalization of EOT case, which was done on 28.4.12. In normal case final bill should have been paid within 7 months of completion (as per Clause (9) of the agreement) i.e. by 14.8.07 and EOT decided earlier to that.

In effect, had the case been decided in time, the amount of Rs.465761/- could have been released by the due date of 17.8.2007. But this amount was actually released on 22.6.12. After adjustment of final bill and release of balance amount on 22.6.2012 there is no bill due now. The delay in release of amount of Rs.465761/- from 14.8.07 to 22.6.12 is unwarranted. However, issue of interest, if any, will be decided under relevant claims. Hence as far as claim for final bill amount is concerned the claim is not justified.

Award: I, therefore award NIL amount under this claim in favour of the Claimant.”

6. Learned Counsel for the petitioner in assailing the above findings of the arbitral tribunal would contend that the delay in execution of the

work is not on the part of the petitioner and it was on the part of the respondent. It is contended that the respondents failed to give decisions on time and also failed to comply with the provisions of the contract and release the due payments to the petitioner. It is submitted that thus the award is required to be set aside in regard to claim No.1.

7. On the other hand, learned Counsel for the respondent has supported the award.

8. I have heard learned Counsel for the parties. I have gone through the impugned award and the material placed on record. As the learned Counsel for the petitioner has confined his arguments only to claim in respect of Claim No.1 and no other claim as considered and decided by the learned arbitrator, the scope of adjudication of this petition is very narrow.

9. As can be seen from the material on record, the contention as urged on behalf of the petitioner cannot be accepted. This firstly for the reason that what is being urged in this petition is not the case of the petitioner when the Claim No.1 was made. This can be clearly seen from the averments as made in the statement of claim in regard to claim no.1 and as noted above. In fact, the case of the petitioner was on an

independent entitlement to this claim and not linked with any other aspect of the contract much less any issue on delay on the part of the respondent qua claim No.1. Even if it was to be so related it was required to be proved on evidence. There is none. Moreover, it was the case of the petitioner that the adjustment of the amount was not made and the same was considered under the EOT. The said ground was not made in the statement of claim and it cannot be now urged to contend that the adjustment of the amount was not made. In any case all these are clear factual issues.

10. The findings of the learned arbitrator in no manner are perverse considering the material placed on record to call for any interference in the proceedings under Section 34 of the Act. The petition is accordingly rejected. No costs.

[G.S. KULKARNI, J.]