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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **FAO(OS) 72/2019 and CM APPL. 16793-16794/2019**

UNION OF INDIA

..... Appellant

Through: Mr. Ajay Digpaul & Ms. Arti Bansal,
Advocates.

versus

M/S RAMA CONSTRUCTION CO

..... Respondent

Through: Mr. Avinash Trivedi & Ms. Ritika
Trivedi, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MS. JUSTICE REKHA PALLI

ORDER

09.04.2019

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1. The Union of India has preferred the present appeal under Section 37 of the Arbitration and Conciliation Act read with Section 10 of the Delhi High Court Act to assail the order dated 15.02.2019 passed by learned Single Judge in OMP No. 175/2015, whereby the objections to the arbitral award dated 17.10.2014 preferred by the appellant under Section 34 of the Arbitration and Conciliation Act were rejected.

2. The Arbitral Tribunal was appointed to adjudicate the disputes that arose between the petitioner and respondent contractor in relation to the work of upgradation, renovation and new construction for CWG Games, 2010 in JLN Stadium Sports Complex, New Delhi (SH: C/o Sub Station building I, III, IV and underground water tanks and pump rooms under

Agreement No: 03/EE/CWG- VII/2008-09). The respondent contractor was awarded the said work with the stipulated date of start of work as 01.02.2009 and stipulated date of completion as 28.09.2009. The tendered amount was Rs. 7,41,02,300/-.

3. Admittedly, during the course of execution of the contract, certain additional works were given to the respondent contractor. The appellant also added two more Sub-Stations No. II and V to the scope of the work.

4. Claim 1 of the respondent was for the balance amount of the final bill dated 30.11.2010. The said balance amount was claimed by the respondent on account of reduction of the rates by the petitioner from the contractual rates. The claim pertains to the claim for contractual rates. The learned Arbitrator awarded the said claim in favour of the respondent primarily relying upon the fact that the petitioner has reduced the rates without issuing the notice under Clause 12.3 of the Agreement to the respondent.

5. The submission of the appellant was that the respondent was entitled to market rates for the deviated items for which it was essential for the respondent to submit invoices and other supporting materials to justify the rates claimed. The appellant claimed that the respondent had failed to do so and the amount was rightly deducted from the final bill raised by the respondent. After taking note of Clauses 12.2 and 12.3 of the Agreement, which are quoted in the impugned order, the learned Single Judge concluded that the said clauses showed that for deviated items, in case the contractor claims escalation of price, it must give notice to the employer so as to justify such demands. At the same time, if the employer claims reduction in the

price, it must also give notice to the contractor and justify such decrease in price. Thus, the onus of showing decrease in price is on the employer. The Arbitrator had found that the appellant employer had not issued any notice under Clause 12.3 of the Agreement to the respondent contractor and also did not produce any evidence before the Arbitral Tribunal to justify the reduction in the contractual price. The learned Single Judge has concluded that the said approach of the Arbitrator could not be faulted. The objection to the award made on claim No. 1 was, therefore, rejected.

6. The appellant had also challenged the award made on claim No. 4, which was towards incentive for early completion of work as per Clause 2A of the Agreement. The submission of the appellant was that the work was completed by the respondent contractor only on 15.07.2010, i.e. beyond the stipulated date of completion and, therefore, the respondent was not entitled to claim incentive. The learned Arbitrator had considered the said submission in detail that there was additional work awarded to the contractor during the currency of the work, including construction of two Sub-Stations and there was delay on the part of the appellant in handing over the site of work to the respondent. The respondent was entitled to extension of time and, therefore, was deemed to have completed the work before the stipulated date of completion.

7. The learned Single Judge upheld the said award by placing reliance on a decision of Division Bench of this Court in ***Union of India Vs. M/s N.N. Buildcon Pvt. Ltd.***, FAO (OS) No. 438/2015 decided on 01.09.2015. The submission of the appellant that the claim for incentive had not been raised by the respondent in the final bill and, therefore, the respondent was

not entitled to claim the same later in Arbitration, was also considered and rejected by the learned Single Judge by holding that the said argument had not been raised before the Arbitral Tribunal. The learned Single Judge observed that no ground had been raised in the objection petition, to the effect that, the claim for incentive had not been raised at the time of raising the final bill, and was raised for the first time only in the Arbitral Tribunal. The learned Single Judge also referred to documents including letters dated 13.10.2009, 09.12.2009 and 11.07.2011, which showed that not only before, but even after the final bill, the respondent contractor had represented to claim incentive for early completion of work. The appellant had rejected the said representations vide letter dated 02.08.2011, whereafter the respondent had no choice but to accept the payment against the final bill and raise its claim in arbitration.

8. The submission of learned counsel for the appellant, once again, before us is that the respondent contractor has not tendered any justification to claim the contractual rates for the deviated items. The Arbitral Tribunal and the learned Single Judge have taken note of and interpreted the contractual rates contained in Clauses 12.2 and 12.3 of the Agreement. Since the respondent contractor was claiming the contractual rates, it was not essential for the respondent contractor to furnish any justification therefor. It was not the case where the contractor was claiming higher rates than the contractual rates. Since the appellant decided to give rates lower than the contractual rates, it was entirely for the appellant to justify the said reduction, which it failed to do. We, therefore, find no merit in the submission of learned counsel for the appellant.

9. So far as the award made on claim No. 4 is concerned, learned counsel for the appellant has again submitted that the claim for incentive could not be made since the work was not completed in the initially provided stipulated period for completion. However, there is no dispute about the fact that the scope of work was increased and the site was also not delivered to the respondent contractor within time. The award made by the learned Arbitral Tribunal on the said aspect is entirely premised on factual findings which cannot be interfered with either under Section 34 of the Arbitration and Conciliation Act, or in appeal before us. It is not the case of the appellant that the said findings of fact are perverse. The learned Single Judge has taken note of the decision of the Division Bench in *M/s N.N. Buildcon Pvt. Ltd.* (supra) and also correctly considered the submission of the appellant that the claim for incentive had not been raised at an earlier point of time and before the same was raised in arbitration.

10. We, therefore, do not find any merit in this appeal.

11. Dismissed.

VIPIN SANGHI, J

REKHA PALLI, J

APRIL 09, 2019

B.S. Rohella