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

\+ O.M.P. (COMM) 178/2019 & I.A. No. 6489/2019

RITES LTD. ..... Petitioner

Through: Mr. R.P. Aggarwal and Mr. Nitish Kumar, Advs.

versus

MR. SUBRATA KUMAR GHOSE ..... Respondent

Through: Mr. Uday Jha and Mr. Vivek Pathak, Advs.

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

<u>O R D E R</u>

% 02.09.2019

1. This is a petition under Section 34 of the Arbitration and Conciliation Act, 1996 (Act in short) read with Section 10 (2) of the Commercial Court, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 challenging the Arbitral Award dated January 7, 2019 by the Sole Arbitrator.

2. Suffice it would be to state that on May 3, 2019 while issuing notice, the statement of the counsel for the petitioner was recorded that he is challenging the Award with regard to the findings against claim nos. 4, 6 and 9. Mr. R.K. Aggarwal, learned counsel appearing for the petitioner did not press the challenge with regard to the findings of the learned Arbitrator in respect of claim no.4. If that be so, the petition shall be confined to the findings arrived at with regard to claim nos. 6 and 9.

3. Before I deal with the submissions made with regard to findings on

claim Nos. 6 and 9, it is important to give brief facts of the case.

4. A tender dated June 10, 2010 was floated by the petitioner on behalf of the SAIL (Kolkata) for design, supply, erection, testing and commissioning of Railway electrification work of existing / proposed railway tracks including modification of existing 25 KV AC, 50 HZ Single Phase overhead equipment at Bolani Ores Mines (Bolani Khadan). Respondent participated in the said tender process by submitting a bid. Pursuant to the tender, respondent being declared successful**,** petitioner issued a letter of acceptance in favour of respondent on September 23, 2010 for a total contract price of ₹1,32,34,113/-. The date of completion of work was six months from the date of the LOA. Respondent had submitted a Performance Security Guarantee of ₹6,62,000/-. Finally, contract was entered between the parties on October 28, 2010.

5. It is a conceded position that the petitioner on the alleged ground of delay on the part of the respondent terminated the contract on April 21, 2014. It is also a conceded position that disputes have arisen and the matter was referred to the Sole Arbitrator for adjudication of the disputes. It may be relevant to note here that the Sole Arbitrator with regard to the termination of the contract has held that the same was an uncalled-for action absolutely illegal and beyond contract stipulations. This finding of the Sole Arbitrator is not under challenge. So, one should proceed on the premise that the claims which are subject matter of this petition have been considered by the learned Arbitrator on the finding the termination of the contract was illegal.

6. Claim No. 6 is towards loss of mandays. The claim was made by the respondent for an amount of ₹13,80,000/- towards loss of mandays. In other words, the total days for which the employees of the respondent were sitting idle for which the respondent had to spend money on them. The learned Arbitrator has against this claim came to a conclusion that the number of idle days considered payable is 284 and had accordingly awarded an amount of ₹4,26,000/- by multiplying 284 x ₹1500 (as the money spent per day on the employees.) In this regard, learned Arbitrator has relied upon the exhibits August 12, 2012; August 14, 2012, August 18, 2012 and December 17, 2012 of the respondents. These are the letters which were addressed to different authorities by the respondent, wherein the respondent had informed the authorities in the petitioner organisation that they are spending ₹1,500/- per day towards salary, food and lodging expenses on their site supervisor, fitters and skilled helpers, who are permanently appointed at the site.

7. It is the submission of Mr. Aggarwal by drawing my attention to ground 'L' of the contract that there is no provision under the contract entered between both the parties with respect to any claim based on loss of mandays. According to him, in fact, the respondent had written to the petitioner vide its letter dated December 30, 2012 requesting the petitioner to add new provision in the contract regarding loss incurred on account of mandays. He states, that this letter itself is an admission on the part of the respondent that the contract between the parties does not provide for any compensation based on loss of mandays. He further states, respondent has not produced list of workmen, their attendance record, statement of accounts, brief of disbursement of salary, PF numbers, number of deposits

of PF contributions etc. In fact, according to him, learned Arbitrator himself in Paras 11.3 and 11.4 of the Award raised doubts about the veracity and truthfulness of the record submitted by the respondent. Moreover, the learned Arbitrator has allowed the wages @ ₹1,500/- per day, which is a highly exaggerated amount. He also states that the learned Arbitrator has failed to appreciate that no actual claim has been made by the respondent at any time during the subsistence of the project contract for the actual loss suffered due to idleness of the workmen and therefore the claim is nothing but an afterthought. I am not in agreement with this plea of Mr. Aggarwal for the reason that the respondent through his letters as referred to above, which were written during the subsistence of the contract had expressed about the fact that it is incurring expenses of ₹1,500/- per day towards salary, food and lodging expenses of the employees engaged therein. So, it is not a case where the respondent had not put the petitioner to notice with regard to the expenses incurred. I find the learned Arbitrator while allowing the claim no. 6 has in Para 11.3 and 11.4 has stated as under:

> *"11.3. To buttress the support on claim of the Claimant on account of loss of man days, the Claimant has annexed the copies of Daily Progress Record (DPR) along with Rejoinder to the Statement of Defence Exhibited on Pages 23 to 131. The said document has neither been denied nor any plausible explanation offered by the Respondents while arguing their case, as to why the men employed at the site on other days were not allowed to work.*
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> *11.4. The Tribunal has gone through the documents submitted in detail and found that Claimant has claimed the loss of manpower, not considering the working for 6 days continuously the Claimant has bound to give them necessarily a paid holiday and considered them duly as*

working daily even on National Holidays like 26th January / 15th August / 2nd October etc. This cannot be allowed. Further no Contractor would keep manpower idle continuously and pay idle manpower for full one year. Hence the same is not considered justifiable and not allowed in totality."

8. No doubt, the aforesaid would only depict that the learned Arbitrator has disbelieved the case of the respondent with regard to the number of idle days, but he did not disagree in principle that the respondent did incur expenses for maintaining the employees at the site without any work. Accordingly, the learned Arbitrator has reduced the number of idle days from 920 to 284. Even the number of idle days arrived at by the learned Arbitrator is on a consideration of the pleadings of the parties.

9. In so far as the plea of Mr. Aggarwal that there is no stipulation in the contract for compensating a contractor on loss of mandays is concerned, suffice it would be state that the termination of the contract was proved to be illegal by the learned Arbitrator on the ground, that the site over which the electrification work was to be carried out was not ready nor the same was in a position to be handed over to the respondent herein for commencement of the execution work and on account of delayed payments by the petitioner. In such a scenario, it cannot be discounted that the respondent must have deployed labour / persons at the site who could not be provided work and were sitting idle and if a claim in that regard has ben made which has been granted by the learned Arbitrator as a consequence of loss suffered by the respondent herein as damages, the said conclusion cannot be faulted. The plea of Mr. Aggarwal that the respondent had not produced the list of workmen, their attendance records, statement of accounts, proof of

disbursement of salaries, PF numbers etc. is concerned the same is not appealing for the reason the claim has been made by the respondent on account of incurring an expenditure of ₹1,500/- per day towards salary, food and lodging expenses of the employees like site supervisor, fitters, skilled labours and not on account of salary and other statutory benefits not being paid during the period when the employees were sitting idle. The aforesaid being a plausible conclusion and the finding of the learned Arbitrator being finding of fact, cannot be faulted.

10. In so far as claim no.9 is concerned, the same is on account of loss of business, against which the learned Arbitrator has awarded an amount of ₹19,85,117/-. The finding of the learned Arbitrator in Paras 14.1 to 14.3 is as under:

> *"14.1. The Claimant at Para 41 exhibited on Page 44 of the SOC, has stated it has suffered a "Loss of Business" whereby the Claimant was earning a net Profit of Rs. 35 Lakhs per annum. The Claimant has cited reference to some Balance Sheets for earlier financial years enclosed with the Agreement. The Claimant claims to have suffered losses for the two years assessed at Rs. 35 Lakhs per annum totaling to Rs. 70 Lakhs which Claimant claims that it should be paid to it.*
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> *14.2 The Respondent in its rebuttal exhibited at Para 41 on Page 28 of the SOD has countered that the said claim claimed @ Rs. 70 Lakhs towards loss of Net Profit @ Rs.35 Lakhs per annum for a period of 02 years was baseless and totally denied. The total value of the Contract being Rs. 1 ,32,34, 113/-, the Respondent further states that it was absolutely unimaginable that the Claimant could have made a net Profit of Rs. 70 Lakhs out of the said Contract value.*

14.3 Since the termination of the Contract by the Respondent vide its letter dated 21st April 2014 has been held up by the Sole Arbitrator to be an illegal action and in utter violation of the agreed terms and conditions of the Contract, as per the "FINDINGS OF THE SOLE ARBITRATOR" as outlined in Paras 5.1 to 5.38 above, the Claimant is entitled to compensation on this account and is as such entitled to loss of profitability. It is a well established practice in the Construction Industry that Contractor's overhead (0/H) costs generally include (i) office expenses, (ii) share of Head Office expenses, (iii) Legal charges, (iv) General Establishment, watch and ward, (v) local conveyance, (vi) Travelling expenses, (vii) Social welfare, (viii) Salaries of managerial and clerical staff etc and (ix) publicity etc.

In addition to the 0/H expenses, the Contractor has to be allowed certain amount towards the profits. This is usually expressed as percentage of total cost of the work. This percentage varies from job to job but usually a profit of 15 to 20% is anticipated by the Contractors in a job of such magnitude. The Sole Arbitrator, however, awards a sum of 15% of the awarded cost of the work, i.e., Rs 15/100 x 1,32,34,113/-= Rs. 19,85,117/- to the Claimant ,towards Loss of Business, entailing a loss of profitability, against a lumpsum of Rs. 70 Lakhs claimed by it."

11. Suffice it would be to state, while allowing this claim, the Arbitrator has held that the respondent is entitled to compensation in the nature of loss of profitability. The findings of the learned Arbitrator are based on the findings that the termination of the contract was in utter violation of the agreed terms and conditions of the contract. The termination of the contract was unjustified, illegal and arbitrary for the reasons attributable to the petitioner herein.

12. The distinction sought to be raised by Mr. Aggarwal between loss of profit and loss of business is without any merit. Since the petitioner was at fault, it was legally bound to compensate the other party to the agreement. In the absence of actual loss of profit, the Arbitrator can award damages in favour of a party not in breach of agreement that too nominal in nature. Surely, what is nominal in nature depends upon the subject matter of each case.

13. During the course of his submission, Mr. Aggarwal did not dispute that in similar claims, which have been awarded in favour of the same contractor and between the same parties the petitioner has accepted award. His only submission is that the amount granted against this claim is on the higher side. That cannot be a ground to set aside the conclusion of the learned Arbitrator, more particularly, when Mr. Aggarwal has not denied the fact that a contractor was entitled to claim damages for loss of profit, which he expected to earn by undertaking the works contract. If that be so, the learned Arbitrator has measured the profit @ 15% to 20% in a job of such magnitude. It is a matter of record, the court, without insisting for direct proof for measure of loss of profit has granted 10% to 20% of the contractual value as damages. That apart, I find that in the following three cases, similar claim was awarded in favour of the same contractor namely Subrata Kumar Ghose wherein the Coordinate Bench of this Court has upheld the award of grant of loss of profit in favour of the contractor and it appears that the same has been accepted by the petitioner:

1. ***O.M.P. (COMM) 176/2019, RITES Ltd. v. Mr. Subrata Kumar Ghose.***

2. ***O.M.P. (COMM) 177/2019, RITES Ltd. v. Mr. Subrata Kumar Ghose.***

3. ***O.M.P. (COMM) 178/2019, RITES Ltd. v. Mr. Subrata Kumar Ghose.***

14. There is no reason for this court to take a different view merely because the amount granted by the learned Arbitrator is ₹19,85,117/-. Having said that and noting the judgments to the effect, this court while exercising its power under Section 34 of the Act does not sit in appeal over the award to reassess and reappreciate the evidence and it is not a case that the findings of the learned Arbitrator was perverse or irrational, this court is of the view that the impugned award cannot be interfered with.

15. During the course of his submissions, Mr. Aggarwal has relied upon the judgment in the case of ***The Braithwaite Burn and Jessop Construction Company Limited (BBJ) versus Rail Vikas Nigam Ltd. (RVNL) 2019 (259) DLT 781*** to contend that the contractor was required to prove the loss suffered by him. The same is also without any merit more particularly when the RITES has accepted the award of granting similar claim in respect of similar contracts.

In view of the above, the petition is dismissed.

I.A. No. 6489/2019

Dismissed as infructuous.

V. KAMESWAR RAO, J

SEPTEMBER 02, 2019/*jg*