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

+ OMP 175/2015

Date of Decision : 15th February, 2019

UNION OF INDIA

..... Petitioner

Through: Mr.Ajay Digpaul and Ms.Arti
Bansal,Advs.

versus

RAMA CONSTRUCTION CO.

..... Respondent

Through: Mr.Avinash Trivedi and
Ms.Ritika Trivedi, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Arbitral Award dated 17.10.2014 passed by the Sole Arbitrator adjudicating the disputes that have arisen between the parties in relation to the award of 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 D- VII/2008-09) by the petitioner to the respondent.

2. The stipulated date of start of work was 01.02.2009 and the stipulated date of completion was 28.09.2009. The tendered amount was Rs.7,41,02,300/-. During the course of the execution of the Contract, not only certain additional work was given to the respondent, but also the petitioner added two more Sub-Stations No.II and No.V to the scope of work.

3. Claim No.1 was for claim of balance amount of Final Bill dated 30.11.2010 submitted by the respondent to the petitioner. The Arbitrator has awarded the said claim in favour of the respondent primarily relying upon the fact that the petitioner had reduced the contractual rates without issuing notice under Clause 12.3 of the Agreement to the respondent.

4. Learned counsel for the petitioner submits that in terms of Clause 12.2 of the Agreement, the respondent is only entitled to the market rate for the deviated items. For determination of such market rates, the petitioner had called upon the respondent to submit invoices and other supporting materials to justify the rates. As the respondent failed to do so, the amount was rightly deducted from the Final Bill raised by the respondent.

5. I find no merit in the objection raised by the petitioner. Clauses 12.2 and 12.3 of the Agreement, have relevance and are reproduced hereinbelow:

“Deviation, Extra Items and Pricing

12.2 In the case of extra item(s), the contractor may within fifteen days of receipt of order or occurrence of the item(s) claim rates, supported by proper analysis, for the work and the engineer-in-charge shall within one month of the receipt of the claims supported by analysis, after giving consideration to the analysis of the rates submitted by the contractor, determine the rates on the basis of the market rates and the contractor shall be paid in accordance with the rates so determined.

In the case of substituted items, the rate for the agreement item (to be substituted) and substituted item shall also be determined in the manner as mentioned in the aforesaid para.

Deviation, Substituted Items, Pricing

(a) If the market rate for the substituted item so determined is more than the market rate of the agreement item (to be substituted); the rate payable to the contractor for the substituted item shall be the rate for the agreement item (to be substituted) so increased to the extent of the difference between the market rates of substituted item and the agreement item (to be substituted).

(b) If the market rate for the substituted item so determined is less than the market rate of the agreement item (to be substituted), the rate payable to the contractor for the substituted item shall be the rate for the agreement item (to be substituted) so decreased to the extent of the difference between the market rates of substituted item and the agreement item (to be substituted).

Deviation, Deviated Quantities, Pricing

In the case of contract items, substituted items, contract cum substituted items, which exceed the limits laid down in schedule F, the contractor may within fifteen days of receipt of order or occurrence of the excess, claim revision of the rates, supported by proper analysis for the work in excess of the above mentioned limits, provided that if the rates so claimed are in excess of the rates

specified in the schedule of quantities, the Engineer-in-Charge shall within one month of receipt of the claims supported by analysis, after giving consideration to the analysis of the rates submitted by the contractor, determine the rates on the basis of the market rates and the contractor shall be paid in accordance with the rates so determined.

12.3 The provisions of the preceding paragraph shall also apply to the decrease in the rates of items for the work in excess of the limits laid down in Schedule F, and the Engineer-in-Charge shall after giving notice to the contractor within one month of occurrence of the excess and after taking into consideration any reply received from him within fifteen days of the receipt of the notice revise the rates for the work in question within one month of the expiry of the said period of fifteen days having regard to the market rates.”

6. A reading of the above Clauses of the Agreement would clearly show that for the deviated items, incase the contractor claims for escalation in price, it must give a notice thereof to the petitioner as also justify such demands. At the same time, if the petitioner claims a reduction in the price, it must also give notice to the respondent and justify such decrease in price. The onus of showing the decrease in price was therefore on the petitioner. The Arbitrator in the Impugned Award has found that not only did the petitioner not issue any notice under Clause 12.3 of the Agreement to the respondent, but also did not file any evidence to justify the reduction in the contractual price. This approach of the Arbitrator cannot be said to be incorrect.

7. The next challenge of the petitioner is to the award of Claim No.4 in favour of the respondent. The said claim was towards

incentive for early completion of work as per Clause 2A of the Agreement.

8. Learned counsel for the petitioner submits that work was completed by the respondent only on 15.07.2010, that is, beyond the stipulated date of completion and therefore, the respondent was not entitled to claim any incentive.

9. The Arbitrator has considered the above submissions in detail and held that as there was additional work awarded to the respondent during the currency of the work, including for the construction of two Sub-Stations, as also there was delay on part of the petitioner in handing over the site of work to the respondent, the respondent was entitled to an extension of time and therefore is deemed to have completed the work before the stipulated date of completion. For arriving at this finding, the Arbitrator has considered the record placed before him.

10. In the judgment dated 01.09.2015 of this Court in FAO(OS) 438/2015, titled ***Union of India v. M/s N.N. Buildcon Pvt.Ltd.***, this Court rejected a similar objection by holding as under:

“7. We are of the view that the Arbitral Tribunal has correctly interpreted the bonus provision and applied the principles of calculation of the bonus. If the stipulated period awarded to the contractor for completion of the work, as in the present case, was 14 months then the contractor was entitled to complete 14 months for completion of the work. If the commencement of the work is delayed or there are hindrances in the completion of the work, which lead to a delay of a particular period, then the period by which the commencement is delayed and/or the period during

which the hindrances occurred have to be excluded from the period stipulated for completion of the work. The total period available to the contractor to complete the work would be the stipulated period of completion plus the additional period during which the hindrances occurred. If after exclusion of the delay period so computed the work is completed by the contractor in a period lesser than the stipulated period for completion, the contractor would be entitled to bonus.

8. In the present case, the period of completion available to the contractor was 14 months. Because of additional work awarded to the contractor, the contractor would be entitled to additional time of four months i.e. the total time available to the contractor to complete the originally stipulated work and the additional work was 18 months. In addition, the contractor would be entitled to the benefit of the time during which delay occurred on account hindrances caused by the employer. In the present case, the delay in completion of the work as held by the Arbitrator is 5.3 months only. While computing the period taken by the Arbitrator to complete the work, the period of hindrances and delay have to be excluded from the time taken by the contractor. The Arbitrator has accordingly worked out the period of delay comprising of hindrances as 9.7 months from which 5.3 months have been excluded and the balance left was 4.4 months. This period of 4.4 months will enure to the credit of the contractor and clearly, the contractor has completed the work in a period less than the period available to the contractor. The originally stipulated period available to the contractor was 14 months and the period of hindrances (including time for extra work) as worked out was 9.7 months thereby totaling to 23.7 months. The work has been completed with a delay of 5.3 months. This added to the stipulated period of 14 months would make it 19.3 months. If this is excluded from the total

*period as available to the contractor (i.e. 23.7 month),
the balance left is 4.4 months.*

11. Applying the above ratio, the finding of the Arbitrator cannot be faulted.

12. Learned counsel for the petitioner has further asserted that the claim of incentive was not raised by the respondent in its Final Bill. Having not raised this claim in the Final Bill, the respondent could not maintain such a claim at a later date.

13. I again find no merit in the said submission. Firstly, the Arbitrator in paragraph 4.5 of the Award states that the only contention raised before him against this claim was that the respondent has not completed the work within the stipulated date of completion. Therefore, the plea now raised does not seem to have been raised before the Arbitrator. Even in the present petition, it is not a ground of challenge that such a plea was raised before the Arbitrator but was not considered. Having not raised this plea, the petitioner cannot be allowed to challenge the Award on the said ground. In any case, the learned counsel for the petitioner has relied upon various documents, including letters dated 13.10.2009, 09.12.2009 and 11.07.2011, to show that not only before but even after the Final Bill the respondent has been making representations claiming incentive for the early completion of work, however, the petitioner rejected the said representations by the letter dated 02.08.2011, whereafter the respondent had no choice but to accept the payment against the Final

Bill and thereafter raised its claim for arbitration. In that view of the matter, the objection raised by the petitioner cannot be sustained.

14. In view of the above, I find no merit in the present petition and same is dismissed, with no order as to cost.

NAVIN CHAWLA, J

FEBRUARY 15, 2019/Arya

