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

+ O.M.P. 663/2012

Date of Decision : 4th February, 2019

U.P. STATE BRIDGE CORPORATION LTD

..... Petitioner

Through: Mr.S.K.Chandwani, Mr.Sameer
Chandwani, Advs.

versus

DDA & ANR

..... Respondents

Through: Mr.Vaibhav Agnihotri, Mr.Bhrigu
Dhami, Mr.Rudresh Jagdala, Mr.Vinayak
Harshwardhan, Advs. for DDA.

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 09.04.2012 passed by the Sole Arbitrator adjudicating the disputes that had arisen between the parties in relation to the following work that had been awarded in favour of the petitioner by respondent no.1 vide its letter dated 24.02.2003:-

“(i) Construction of one clover leaf to Sarita Vihar flyover at intersection of NH-2 – Road No.13-A,

(ii) Construction of one clover leaf to Noida More flyover (under construction) at intersection of NH-24 – Noida More on Delhi side.

(iii) Construction of Culvert on slip road on Delhi side of Noida More Flyover.

(iv) Widening of existing culvert of NH-24 near Noida More Flyover.”

2. Disputes having arisen between the parties, the same were adjudicated by the Sole Arbitrator vide his Award dated 04.03.2009. By the said Award, the Arbitrator rejected Claim no.2 of the petitioner, which was for ‘loss suffered and additional expenses incurred on account of escalation in cost of labour and materials due to delays, defaults and prolongation of the contractual period for Rs.1,41,58,175.00’, holding as under:

“After going through the submissions made by the parties and conditions of the contract, I find that this claim has no merit as there is no escalation clause provided in the agreement. Hence, I reject this claim.”

3. The petitioner challenged the said Award before this Court by way of a petition under Section 34 of the Act, being OMP 406/2009. This Court by its order dated 20.01.2011 held as under:

“5. I find no merit in this submission of the respondent. Merely because clause 10CC was not inserted in the contract in question, it does not take away the right of the contractor to raise a claim for losses and damages suffered by it due to prolongation of the contract. Pertinently, there is no clause in the contract which limits

the right of the petitioner to make such a claim. This is a patent illegality in the award. The award made on claim no.2, therefore, cannot be sustained. The same is accordingly, set aside. I may make it clear that I have not gone into the merits of the said claim, and the same shall have to be adjudicated by the learned arbitrator on its own merits.”

4. The Court remanded the dispute with respect to, *inter alia*, Claim no.2 back to the Arbitrator for re-adjudication ‘on the basis of the record before him’.

5. The Arbitrator by the Impugned Award has rejected Claim no.2 of the petitioner holding as under:

“After going through the record, arguments advanced before me, I found that the Respondents rejected the request of the claimants for escalation in price of steel vide letter dated 02.07.2004 in response to claimants letter 30.06.2004.

The respondents further rejected the request of the claimants for the payment under clause 10-CC of the arguments vide letter dated 18.09.2004 in response to claimants letter dated 13.09.2004.

The claimants vide letter 15.06.2004 requested the respondents for the payment under clause 10-CC of the agreement without reference to any previous letter which is fifteen days before the actual completion of work.

The demand raised by the claimants for the price escalation in steel without submitting the detailed analysis of rates and bill or voucher has no meaning and in the agreement also there is no provision for reimbursement of any increment in rates for steel. The claimants vide their letter dated 13.09.2004 claimed the payment under clause 10-CC of the agreement which was

rejected by the respondents as the clause 10-CC was deleted in the agreement. The claim of the claimants to claim the compensation under clause 10-CC of the agreement vide letter dated 15.06.2005 just fifteen days before the actual completion of work is after thought and against the terms of the agreement.

I found that there is no provision in the agreement for reimbursement of price increase in steel and also there is no provision for escalation in agreement either under clause 10-CC or any other clause.

The claimants submitted 24th R.A. Bill on 30.06.2005 i.e. on the date of actual completion of the work and in the said bill, no demand for escalation in cost of labour and materials due to delays, defaults and prolongation of the contractual period was included. The claim raised by the claimants at a bleated stage i.e. at the time of submission of final bill on 25.09.2005 has no relevance as the work was completed on 30.06.2005.

The parties were entered into the agreement with the clear understanding that no escalation is payable, as such the clause 10-CC was deleted and hence, claim of the claimants under claim no.2 is not tenable.

The contention of the claimants that they are entitled under Section 73 of the Contract Act, 1872 has no force as the claimants failed to produce any notice for claiming the escalation in cost of labour and materials due to delays, defaults and prolongation of contractual period. Further, the judgments relied by the claimants are not applicable in the present case. Hence, I reject this claim and nothing is payable against Claim No.2.”

6. Counsel for the petitioner submits that the Arbitrator, in the Impugned Award has again placed reliance on the absence of Clause 10CC in the Agreement between the parties. He further submits that the Arbitrator has not considered the merit

of the claim of the petitioner only on the ground that the petitioner had raised this claim at a belated stage and not alongwith its 24th RA Bill that was submitted on the completion of the work. He submits that on both the counts, the Impugned Award is liable to be set aside. Relying upon the earlier order dated 20.01.2011 passed by this Court as also on the judgment of this Court in **Anurodh Constructions vs. Delhi Development Authority and Anr.** 2005 (Suppl.) Arb. LR 258 (Delhi) and **Paragon Constructions (India) Pvt. Ltd. vs. Union of India & Anr.** 2008(1) Arb. LR 358 (Delhi), he submits that even in the absence of Clause 10CC in the Agreement, such a claim is maintainable under Section 73 of the Indian Contract Act, 1872. Further relying upon the judgment of the Supreme Court in **McDermott International INC. vs. Burn Standard Co. Ltd. & Ors.** (2006) 11 SCC 181, he submits that the claim of the petitioner could not have been rejected merely on the ground of delay in raising the same as long as such demand had been raised prior to the invocation of the arbitration.

7. On the other hand, counsel for the respondents submits that the claim filed by the petitioner was not supported by any evidence on record. Merely relying upon the formula contained in Clause 10CC of the Agreement, the petitioner had not filed any other document on record to prove such claim. Even otherwise, the claim for escalation for the contractual period could not have been granted. He further submits that in terms

of Clause 1.27 in the tender document read with Clause 6.4.1(iii) of the Instructions to Tenderers, no extra amount was payable to the contractor on account of delay in handing over of the site or any unforeseen hindrance being faced by the contractor during execution of the work. Counsel further relied upon Clauses 1.2.1 and 1.17 in the tender document and 6.4.1 (i) and 6.4.1 (ii) to contend that it had been agreed that the possession of the site shall be given in stages and the contractor was advised to visit the site in order to inspect and take into account all relevant factors pertaining to the site in the preparation and submission of the tender. The petitioner was therefore, well-aware of the hindrance that it may face during the execution of the work and therefore, was not entitled to claim escalation on account of such hindrances.

8. I have considered the submissions made by the counsels for the parties. A reading of the Impugned Award would show that apart from the fact that Clause 10CC is missing from the Contract, the Arbitrator has further placed reliance on the absence of detailed analysis of rates, bills or vouchers supporting claim of the petitioner for price escalation in steel. The Arbitrator has further held that this demand was at a belated stage and in absence of any notice claiming escalation in cost of 'labour and materials' due to delays, defaults and prolongation of the contractual period, the petitioner was not entitled to this claim.

9. Counsel for the petitioner has been unable to show any document filed before the Arbitrator which would have supported the claim raised by the petitioner. The claim of the petitioner was based solely on Clause 10CC, which admittedly was not present in the Contract between the parties. It is true that such a claim, even in absence of Clause 10CC could have been maintained under Section 73 of the Contract Act, however, at the same time, it was for the petitioner to have proved the said claim. It could not have simply relied upon the formula as an evidence in support of such a claim. This being a matter of appreciation of evidence by the Arbitrator, in any case, cannot be interfered with by this Court while exercising its powers under Section 34 of the Act.

10. The next challenge of the petitioner is to the rejection of Claim no.7, which was for 'loss of head office expenses and reduced profitability / loss of profit due to prolongation of the contract for a period of 15 months as per Hudson formula for Rs.1,24,06,800/-.'

11. This claim had also been rejected by the Arbitrator in his earlier Award dated 04.03.2009, albeit along with Claim no.6 raised by the petitioner.

12. This Court in its order dated 20.01.2011 passed on the petition filed by the petitioner challenging the said Award held as under:

“17. A perusal of the impugned award shows that the learned arbitrator dealt with claim nos.6 and 7 simultaneously. However, the learned arbitrator has not specifically dealt with claim no.7. The entire discussion pertains to claim no.6 alone. There is merit in the submission of learned counsel for the petitioner that so far as reduced profitability/loss of profit is concerned, as it pertains to events which have actually not taken place, and the claim is founded upon projections for the future, there can be no documentary proof of the said loss actually having been suffered. This aspect of the matter has been missed by the learned arbitrator. In my view, this is a patent error in the award. Accordingly, the award made on claim no.7 cannot be sustained and is set aside.

18. It is made clear that this Court has not examined claim no.7 on its merits and it shall be for the learned arbitrator to examine the same on its own merits.”

13. The Arbitrator while rejecting Claim no.7 of the petitioner, has held as under:

“After going through the records, arguments advanced before me, I found that the Claimants are responsible for delay in completion of work and also failed to produce any notice/demand made by them during the execution of work. The claimants also failed to produce any proof for the loss of head office expenses & reduce profitability loss of profit due to prolongation of the contract.

The claimants submitted 24th R.A. Bill on 30.06.2005 i.e. on the date of actual completion of work and in the said bill also no such demand was included. The claim raised by the claimants at a

bleated stage i.e. at the time of final bill on 25.09.2005 is after thought and has no relevance as the work had already been completed on 30.06.2005.

The Contention of the claimants that they are entitled for the payment under Section-73 of the Contract Act, 1872 has no force as the claimants failed to produce any notice for demanding the loss of Head Office expenses & reduce profitability / loss of profit due to prolongation of the contract. The letters/demand made by the claimants after the actual completion of work i.e. on 30.06.2005 is in vacuum. The judgment relied by the claimants are not applicable in the present case. Hence, I reject this claim and nothing is payable against Claim No.7.”

14. Counsel for the petitioner fairly admits that before the Arbitrator, apart from relying upon the Hudson formula in support of such claim, no other evidence had been filed. He, however, submits that after the Arbitrator had concluded hearing of the arguments from both sides, the petitioner had filed an application on 19.03.2012, that is prior to the making of the Award, placing on record a profit & loss statement from a Chartered Accountant in support of this claim. The Arbitrator, however, did not consider the said application or the document while passing the Impugned Award.

15. On the other hand, counsel for the respondents submits that the question whether the petitioner or the respondents were guilty of causing the delay in execution of the work was no

longer open to be adjudicated by the Arbitrator. This issue was also a part of claim nos.4 and 6 in earlier Award wherein the Arbitrator had held that the delay was caused for reasons attributable to the petitioner and in any case, it was an excepted matter. He further submits that even assuming that the delay is attributable to the respondents, in absence of any proof in support of this claim, the Arbitrator has rightly rejected the same.

16. I have considered the submissions made by the counsels for the parties. While the petitioner is placing reliance on the written submissions filed by the petitioner before the Arbitrator showing the reasons for the delay in execution of the work and especially the Part-2 proforma (Application for Extension of Time) prepared by the respondents itself, to contend that the question of the delay being caused by the petitioner is incorrect, the respondents have relied upon various letters written to the petitioner during the course of the work as also to the Site Order Book. I need not go into this question in detail as, in my opinion, the petitioner has been unable to prove this claim by filing any supporting document/evidence. This is also a ground taken by the Arbitrator in the Award. While it is open to an Arbitral Tribunal to rely upon the Hudson formula for awarding a claim of damages, the claimant has to file atleast some iota of evidence before the Arbitrator in support of such a claim. The claim cannot be based merely on formulas.

17. As far as the submission regarding filing of the certificate from Chartered Accountant is concerned, this Court while remanding the disputes back to the Arbitrator had clearly stated that the Arbitrator shall decide Claim no.7 on the basis of the record already filed before him. Apart from this prohibition, the petitioner did not choose to file this document while the Arbitrator was hearing the arguments on the said claim. It was only after arguments had been concluded that the petitioner suddenly woke up and wished to place the said document on record, however, even if one is to consider the application which was filed by the petitioner before the Arbitrator, it only sought another opportunity of oral hearing and did not plead any ground why the document should be taken on record or why the said document had not been filed earlier before the Arbitrator.

18. In absence of any proof in support of this claim, the Arbitrator has rightly rejected the same.

19. I therefore, find no merit in the present petition and the same is dismissed, with no order as to costs.

NAVIN CHAWLA, J

FEBRUARY 04, 2019
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