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

+ O.M.P. 307/2015

Date of Decision : 25th March, 2019

VICE CHAIRMAN, DELHI AGRICULTURAL MKTG.

BOARD

..... Petitioner

Through: Mr.P.C. Sharma, Adv.

versus

H.R.BUILDERS

..... Respondent

Through: Ms.Renuka Arora, Ms.Shreya
Sharma and Ms.Nikita Salwan,
Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') challenging the Arbitral Award dated 15.02.2015 passed by the Sole Arbitrator adjudicating the disputes that have arisen between the parties in relation to the 4 Nos. Building Blocks (5-8) for Commission Agent Shops, Wholeseller Shops including internal electrification and road work at fruit and vegetable and food grain market at IFC,

Ghazipur (PH-II) awarded by the petitioner to the respondent under Agreement No. F.25(22)/77/07/DAMB/Engg. dated 06.02.2008.

2. It is not in dispute that the scheduled date of start of work was 28.02.2008 and the scheduled date of completion was 27.11.2009, that gives, completion period of 21 months. The actual date of completion of work was 13.04.2011, that is, there was a delay of 502 days in completion of the work.

3. Learned counsel for the petitioner submits that the petitioner, during progress of the work, did not give any notice as required under Clause 5.2 of the General Conditions of the Contract (GCC) or give a notice under Clause 5.3 thereof. He further submits that time being an essence of the contract, it was obligatory on the part of the respondent to give a notice to the employer that is, the petitioner, of its intention to claim damages/escalation for the period of delay that may be attributed to the petitioner. Having not done so, the respondent was not entitled to claim any damages/escalation for the period of delay, if any, caused by the petitioner in the completion of the work. In this regard, he places reliance on the judgment of the Supreme Court in *State of Kerala & Anr. v. M.A. Mathai*, AIR 2007 SC 1537.

4. He further submits that in the absence of notice(s) under Clause 5.2 and 5.3 of the GCC, the claim of the respondent was even otherwise not maintainable as has been held by the Supreme Court in *International Construction Company v. State of A.P. & Ors.*, (2001) 2 SCC 642.

5. On the other hand, learned counsel for the respondent has placed reliance on Clause 5.4 of the GCC to submit that even if the respondent has failed to make a proper application seeking extension of time within the time stipulated in the contract, it was the duty of the Superintending Engineer of the petitioner to have itself considered whether the respondent was entitled to the grant of the extension of time. She further submits that the petitioner had issued a notice under Clause 2 of the GCC, which stipulates levy of liquidated damages in case of delay in completion of work attributed to the respondent. The respondent had replied to the said Show Cause Notice, whereafter the petitioner did not take any further steps pursuant to this notice, clearly implying that it was satisfied that the delay in execution of the work was not attributable to the respondent. She submits that in any case, the Arbitrator having interpreted the terms of the Agreement and also having considered the case of delay through the Hindrance Register, it was not open to this Court to re-appreciate the same to arrive at a different conclusion.

6. I have considered the submissions made by the learned counsels for the parties.

7. Admittedly there was a delay of 502 days in completion of the work. It is not denied by the respondent that the respondent did not make a proper application in terms of Clause 5.2 and/or 5.3 of the GCC within the time stipulated therein.

8. Clause 5 of the GCC deals with grant of extension of time and is reproduced hereinbelow:

“Clause-5

The time allowed for execution of the Works as specified in the Schedule 'F' or the extended time in accordance with these conditions shall be the essence of the Contract. The execution of the works shall commence from such time period as mentioned in letter of acceptance or from the date of handing over of the site whichever is later. If the Contractor commits default in commencing the execution of the work as aforesaid, Government shall without prejudice to any other right or remedy available in law, be at liberty to forfeit the earnest money & performance guarantee absolutely.

5.1 As soon as possible after the Contract is concluded the Contractor shall submit a Time and Progress Chart for each mile stone and get it approved by the Department. The Chart shall be prepared in direct relation to the time stated in the Contract documents for completion of items of the works. It shall indicate the forecast of the dates of commencement and completion of various trades of sections of the work and may be amended as necessary by agreement between the Engineer-in-Charge and the Contractor within the limitations of time imposed in the Contract documents, and further to ensure good progress during the execution of the work, the contractor shall in all cases in which the time allowed for any work, exceeds one month (save for special jobs for which a separate programme has been agreed upon) complete the work as per mile stones given in Schedule 'F':

5.2 If the work(s) be delayed by:

i) force majeure, or

- ii) abnormally bad weather, or*
- iii) serious loss or damage by fire, or*
- iv) civil commotion, local commotion of workmen, strike or lockout, affecting any of the trades employed on the work, or ;*
- v) delay on the part of other contractors or tradesmen engaged by Engineer-in-Charge in executing work not forming part of the Contract, or;*
- vi) non-availability of stores, which are the responsibility of Government to supply, or*
- vii) non-availability or breakdown of tools and plant to be supplied or supplied by Government, or*
- viii) any other cause which, in the absolute discretion of the authority mentioned in Schedule 'F' is beyond the Contractor's control.*

then upon the happening of any such event causing delay, the Contractor shall immediately give notice thereof in writing to the Engineer-in-Charge but shall nevertheless use constantly his best endeavors to prevent or make good the delay and shall do all that may be reasonably required to the satisfaction of the Engineer-in-Charge to proceed with the works.

5.3 Request for rescheduling of Mile stones and extension of time, to be eligible for consideration, shall be made by the Contractor in writing within fourteen days of the happening of the event causing delay on the prescribed form. The Contractor may also, if practicable, indicate in such a request the period for which extension is desired.

5.4 In any such case the authority mentioned in Schedule 'F' may give a fair and reasonable extension of time and reschedule the mile stones for completion of work. Such extension shall be communicated to the

Contractor by the Engineer-in-Charge in writing, within 3 months of the date of receipt of such request. Non application by the contractor for extension of time shall not be a bar for giving a fair and reasonable extension by the Engineer-in-Charge and this shall be binding on the contractor.

(Emphasis, supplied)”

9. The Arbitrator considered the effect of Clause 5.4 of the GCC reproduced hereinabove, and has held as under:

“13.6.6 Even if the unexplained silence of the respondent at the relevant time on the claimant's applications for grant of extension of time which were considered deficient by the respondent, is held in favour of the respondent, the fact of the matter is that the respondent was under mandatory contractual obligation to grant fair and reasonable extension as per the provisions of clause 5.4 of the agreement, reproduced in para 13.6.2 above. But, admittedly, the respondent did not act as per the provisions of clause 5.4.”

10. The Arbitrator has further placed reliance on the Hindrance Register produced before him to conclude that the nature of the hindrances recorded therein are such that that lead to the conclusion that the work was delayed due to hindrances attributable to the petitioner or on account of hindrances which were beyond the control of the respondent, thereby entitling the respondent to the grant of the extension of time. The relevant finding of the Arbitrator in this regard is reproduced hereinbelow:

“13.6.9 As noticed from the foot note of the 'Hindrance Register', the respondent itself has worked out the net effect of all the hindrances as 563 days which is more than the extension of time of 502 days required. The hindrance register also brings it out that contrary to the assertion made by the respondent that it discharged its obligation in regard to payment of each and every bill, there were as many as nine occasions when payment was not made to the claimant as per agreement condition (ref. hindrance at SL.No. 2, 6, 8, 10, 12, 17, 18, 19, 20 of the hindrance register.) It is also noticed that the nature of the hindrances as recorded in the hindrance register is such that the only conclusion one could arrive at is that the work was delayed either due to the hindrances attributable to the respondent or on account of the hindrances which were beyond the claimant's control. Thus, contrary to the contention of the respondent as stated in para 13.4 hereinabove, all these hindrances qualify to be considered as the events listed in clause 5.2 of the agreement which entitle the claimant to extension of time as per clause 5.4.”

11. The Arbitrator has also placed reliance on the fact that the petitioner, after issuance of notice to the respondent under Clause 2 of the GCC threatening to levy liquidated damages, did not do so upon receiving a reply from the respondent wherein the respondent not only justified the delay, but also sought extension of time for the hindrances as claimed.

12. Clause 5.4 of the GCC clearly stipulates that the Competent Authority of the petitioner shall consider the question of extension of time in a fair and reasonable manner even where the contractor/

respondent does not make an application for the same. The petitioner/Competent Authority has admittedly not taken any decision in exercise of such duty cast upon it under the contractual terms. The Competent Authority could also have rejected the said claim of extension of time on the ground that the respondent did not give a notice as stipulated under Clause 5.2 of the GCC. However, even this has not been done by the Competent Authority of the petitioner. On the other hand, the necessity of such notice under Clause 5.2 seems to have not been insisted upon as the Hindrance Register has itself recorded the hindrances that were faced by the respondent during the course of execution of work. The Hindrance Register was not disputed by the petitioner in the arbitration proceedings.

13. As far as the judgment of the Supreme Court in ***M.A.Mathai*** (supra) is concerned, the claim was one of damages. The Supreme Court has held that for claiming such damages for delay, the innocent party must give a notice at the time of the acceptance of the work of its intention to claim such damages. In the present case, the claim of the respondent is in terms of Clause 10 CC of the GCC and is, therefore, not one of damages.

14. In ***International Construction Company*** (supra), Clause 83 of the Agreement therein expressly provided that a claim must be made in writing to the Superintending Engineer within 15 days from the date of the cause of action so that the points at issue can be immediately verified at the site by the Field Officers. Clause 83 further stipulated that any claims raised subsequently at such a distant point of time so

as to make it impossible to verify the facts would be liable to be rejected. Interpreting this clause, the Supreme Court held that as the contractor had not made any such claims before the Department, the same were not maintainable. This judgment cannot come to the aid of petitioner in the facts of the present case.

15. In any case, the Arbitrator having interpreted the terms of the Agreement and also concluded the fact of delay relying upon the Hindrance Register, which interpretation and finding cannot be said to be unreasonable or perverse, this Court in exercising its power under Section 34 of the Act cannot interfere with such Award.

16. I, therefore, find no merit in the present petition. The same is dismissed with no order as to cost.

NAVIN CHAWLA, J

MARCH 25, 2019/Arya