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

Reserved on: 31.10.2018
Pronounced on: 27.03.2019

+ **FAO (OS) COMM. 246/2018 & CM Appl. 45466-67/2018**

M/S B R ARORA & ASSOCIATES PVT LTD Appellant

Through: Mr. Vaibhav Dang, Advocate.

versus

AIRPORTS AUTHORITY OF INDIA Respondent

Through: Mr. Sunil Ahuja, Advocate.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE PRATEEK JALAN

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1. The appellant is aggrieved by a judgment of a learned Single Judge dated 03.7.2018, insofar as an arbitral award dated 30.07.2015 has been set aside in respect of two claims awarded in its favour.

2. The arbitration arose out of an agreement dated 04.10.2007 between the parties, by which the appellant was awarded a contract by the respondent Airports Authority of India (hereinafter, "AAI") for the 'Expansion of Apron, Construction of Additional Link Taxi Way, Helicopter Parking Bay and allied works at Bagdogra Airport'. The arbitration culminated in an award dated 30.07.2015 in favour of the appellant on various heads of claims. On AAI's petition under Section 34 of Arbitration & Conciliation Act, 1996 (hereinafter, "the Act"),

the learned Single Judge has set aside the award in favour of the appellant in respect of two claims, being an award of ₹64,65,828/- on account of claim No.3 (overhead expenditure during the extended period of contract) and an award of ₹33,05,706/- on account of claim No.4 (loss of profits due to reduction in these scope of work).

Facts

3. Pursuant to a notice inviting tender for the aforesaid work AAI opened the bids on 06.08.2007 and accepted the bid of the appellant in the sum of ₹18,53,20,401.33. An acceptance letter was issued on 20.09.2007 and the contract signed on 04.10.2007. The work was to commence from 30.09.2007 and be completed by 29.09.2008. There was an admitted delay of four months in handing over of the site to the appellant and time for completion of the work was extended until 19.09.2009. In the meanwhile, AAI had sent revised drawings/plan/BOQ to the appellant on 04.01.2008 which contemplated a significant reduction in the scope of the work. The appellant protested and quantified the reduction at approximately 31% of the original scope of work. By a further communication dated 20.04.2009, AAI informed the appellant about the deviation in cost and stated that the project would be valued at approximately ₹13 crores. The appellant raised a final bill which was paid on 16.09.2010, but not in full.

4. This led to the arbitral proceedings before a sole arbitrator, Sh.Pradeep Kumar Gupta, a retired Special Director of the CPWD.

The appellant raised 11 claims and AAI raised five counter claims. As stated hereinabove, we are concerned with claims No.3 and 4 of the appellant's claims, which were for reimbursement of overhead expenses during the extended period of contract, and loss of profits due to the reduction in the scope of work, respectively.

5. The Arbitrator awarded ₹64,65,828/- in respect of claim no. 3 on the finding that the delay in completion of the contract was attributable to AAI. The extension of time granted by AAI for completion of the contract without any compensation, was held to be indicative of the fact that the appellant would also be entitled to the compensation sought in claim No.4 and consequently, a sum of ₹33,05,706/- was awarded on this ground.

6. In the impugned judgment, on the question of overheads, the learned Single Judge has found that the Arbitral Tribunal calculated the sum due to the appellant on the basis of the original contract value, rather than the reduced value. Although the Arbitrator had found AAI to be in breach of its contractual obligations, and thus liable to compensate the appellant for the overheads incurred by it during the extended period of contract, the learned Single Judge set aside the award on the aforesaid ground. As far as the award of loss of profit is concerned, the Award was set aside on the ground that it is contrary to clause 39 of the General Conditions of the Contract (hereinafter, "GCC"), which reads as follows:-

"39. If at any time after acceptance of the tender AAI shall decide to abandon or reduce the scope of the Works for any reason whatsoever and hence not require the whole or any part of the Works to be carried out, the

Engineer-in- Charge shall give notice in writing to that effect to the Contractor and the Contractor shall have no claim to any payment of compensation or otherwise whatsoever, on account of any profit or advantage which he might have derived from the execution of the Works in full but which he did not derive in consequence of the foreclosure of the whole or part of the Works."

Submissions

7. Mr. Vaibhav Dang, learned advocate for the appellant submitted, on the question of overheads, that the issue was a computational error, which ought to have been raised by AAI before the Arbitrator under Section 33 (1) of the Act. In the absence of such an application being made before the Arbitrator, he contended that the award was not liable to be set aside under Section 34 of the Act. With regard to the award on account of loss of profits, Mr. Dang argued that Clause 39 of the GCC would apply only in the event of notice of the reduction in the scope of work being given by the Engineer-in-Charge of the project. He drew our attention to various letters of protest addressed by the appellant to AAI in response to its intimation regarding the reduced scope of work.

8. Mr. Sunil Ahuja, learned advocate for AAI, on the other hand, urged that the award on both these claims had rightly been set aside in the impugned judgment. He submitted that the claim for overheads raised by the appellant was unduly inflated and that there could be no justification for awarding overheads in respect of a contract value which had concededly been reduced significantly. He further submitted that the Award of loss of profits clearly exceeded the scope

of the contract between the parties as the appellant's claim was in the teeth of an express stipulation in the GCC.

Discussion

9. Both the disputed claims require an appreciation of the facts surrounding the reduction in the scope of the contract. It is undisputed that the contractually stipulated date for starting work under the contract was 30.09.2007 but AAI had delayed handing over the site by four months i.e. at least until the end of January, 2008. Even prior thereto, AAI had issued revised drawings and plans under cover of a communication dated 04.01.2008. The appellant had understood therefrom that the value of the work had been reduced by approximately 31% and lodged its protest with AAI. AAI, by a letter dated 20.04.2009, stated that the total cost of the project will be reduced to approximately ₹13 crores (as opposed to the original value of approximately ₹18.5 crores). In response, the appellant addressed a letter dated 27.04.2009 requesting AAI to reduce the amount of the performance bank guarantee and security required under the contract. By another communication of the same day, this request was reiterated and it was also stated as follows:-

“.....further we would like to bring to your kind notice that we have now replanned the project accordingly &necessary instructions have been given to the project director with immediate effect.”

10. It is clear from the above that, although the appellant did protest the reduction in contract value, it ultimately accepted the same,

and sought a consequent reduction in the value of the performance guarantee and security amounts. It is in the context of these facts that the two disputed claims must be analysed.

(a) **Award in respect of Overheads (claim No.3)**

11. The Arbitrator's calculation of the amount to be awarded to the appellant with respect to overheads was premised on his finding that AAI was responsible for the breach of the contract and consequent delay. His computation of the amount to be awarded is contained in the following extract of the award:-

“No civil construction is possible without overhead expenditure like expenditure on site engineers/supervisory staff/office staff/watchmen, construction of labour huts and site office, arrangements for electricity and water supply, running expenses of water/electricity/telephone bills, installing/dismantling plant and machinery, operational cost of running plant and machinery, depreciation in plant and machinery cost, and various other day today miscellaneous expenditure etc. CPWD also assumes 50% expenditure towards overheads and rest 50% towards contractor's profit. I consider it reasonable to deduct 1.00% (20% of 5%) overhead for one time expenditure like construction of labour huts with toilets, site office, providing office equipments, arrangements for electricity and water supply etc. which remains unaffected whether work is completed in 12 months stipulated period or more.

It is not possible to work out overhead expenditure correct to a rupee but a reasonable estimation can be made. I consider it reasonable to allow 4% overheads during extended period of contract. No overheads are admissible for the 10% component of contractor's profit and overheads considered in the tendered cost of work.

*Therefore, overhead expenditure per month works out to ₹5,55,961/- {0.90*18,53,20,401 * 0.04 * 1/12}. Total overhead expenditure for 11.63 months work out to ₹64,65,828/-.”*

12. In the impugned judgment, this part of the award has been set aside on the following reasoning:

“25. The first and foremost issue to be decided is whether the Arbitral Tribunal had erred in computing the loss of overheads on the basis of the contract value as originally awarded. There is no dispute that the original tender amount was for a value of ₹ 18, 53, 20,401.40/- and the stipulated period for completion of the contract was twelve months and the same was to be completed by 29.09.2008. However, the scope of the work was reduced at almost the commencement of the project as AAI had, by its letter dated 04.01.2008, revised the plans and the drawings. It was contended by Mr Dang that reduction in the scope of the work was communicated only on 20.04.2009, which was nearly six months after the stipulated date of completion of the works. This contention cannot be accepted because the respondent had, by its letter dated 17.01.2008, complained that the value of the work had been drastically reduced by ₹5, 66, 41,106/-, which is approximately 31% of the contract value. Thus, it is apparent that the respondent was fully aware of the reduction in the scope of the works from ₹ 18, 53, 20,401/- to ₹ 12, 86, 79,295/-. The Arbitral Tribunal had computed the expenditure on overheads during the extended period on the basis of the value of the work initially tendered. This is an apparent error. If the overheads are to be calculated on the basis of the value of works, the Arbitral Tribunal was required to compute the same on the value of works as reduced by AAI at the initial stage itself.

26. Thus, the award of the sum of ₹ 64, 65, 828/- against overhead expenditure during the extended period of contract (11.63 months) cannot be sustained.”

13. It is apparent that the Arbitrator has considered it appropriate to estimate the appellant's entitlement as a percentage of the value of the contract, and has incorporated the original contract value (₹18,53,20,401) in the calculation. The contractual value itself, as admitted by the appellant, was substantially reduced even prior to the site being handed over to it by AAI. In these circumstances, there was no justification for awarding the appellant overheads based on the original contract value rather than the reduced value. To this extent, the award of the Arbitrator is manifestly arbitrary and thus, within the scope of interference under Section 34 of the Act, as interpreted by the Supreme Court *inter alia* in **Associate Builders v. DDA** (2015) 3 SCC 49 (para 32).

14. We turn now to Mr. Dang's arguments regarding the remedy available to AAI under Section 33 of the Act. The said provision reads as follows:-

“33. Correction and interpretation of award; additional award.—

(1) Within thirty days from the receipt of the arbitral award, unless another period of time has been agreed upon by the parties—

(a) a party, with notice to the other party, may request the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award;

(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

(2) If the arbitral tribunal considers the request made under sub-section (1) to be justified, it shall make the correction or give the interpretation within thirty days from the receipt of the request and the interpretation shall form part of the arbitral award.

(3) The arbitral tribunal may correct any error of the type referred to in clause (a) of sub-section (1), on its own initiative, within thirty days from the date of the arbitral award.

(4) Unless otherwise agreed by the parties, a party with notice to the other party, may request, within thirty days from the receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.

(5) If the arbitral tribunal considers the request made under sub-section (4) to be justified, it shall make the additional arbitral award within sixty days from the receipt of such request.

(6) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, give an interpretation or make an additional arbitral award under sub-section (2) or sub-section (5).

(7) Section 31 shall apply to a correction or interpretation of the arbitral award or to an additional arbitral award made under this section.”

15. The scope of the power conferred by this section is limited. In *State of Arunachal Pradesh vs. Damani Construction Co.* (2007) 10 SCC 742 (paragraph 8) the Supreme Court has interpreted it to be restricted to:-

“.....correction in computation of errors, or clerical or typographical errors or any other errors of a similar nature occurring in the award with notice to the other party or if agreed between the parties, a party may

request the Arbitral Tribunal to give an interpretation of a specific point or part of the award.”

16. A Division Bench of this Court in *NTPC Limited vs. Marathon Electric Motors India Ltd.* (2012) 194 DLT 404 (DB) has drawn an analogy between Section 33 of the Act and the power of the Civil Court under Section 152 of the Code of Civil Procedure. The scope of the Section has been explained as follows:-

“25. Section 33 of the Act provides the Arbitral Tribunal to make correction of errors in arbitral award, to give interpretation of a specific point or a part of the arbitral award, and to make an additional award as to claims, though presented in the arbitral proceedings, but omitted from the arbitral award. Sub-section (4) empowers the arbitral tribunal to make additional arbitral award in respect of claims already presented to the tribunal in the arbitral proceedings but omitted by the arbitral tribunal.

26. This Section deals with the correction and interpretation of award and additional award. Following types of errors may be corrected-

- (i) Computation errors*
- (ii) Clerical errors*
- (iii) Typographical errors*
- (iv) Any other errors of a similar nature occurring in the award.*

27. Under the said provision, a party can seek certain correction in computation of errors or clerical errors, in case, it occurs in the award, but the arbitral tribunal has no power to review of merit.

28. The said provision is akin to the provision of Section 152 CPC, in which also the Court can correct the errors like clerical and arithmetical, if they occur in the judgment or order. In the case reported in (1999) 3 SCC 500, Dwaraka Das v. State of M.P., the Supreme Court

has observed that, “Section 152 CPC provides for correction of clerical or arithmetical mistakes in judgments, decrees or orders of errors arising therein from any accidental slip or omission. The exercise of this power contemplates the correction of mistakes by the Court of its ministerial actions and does not contemplate of passing of effective judicial orders after the judgment, decree or order.”

29. In the decision of the Supreme Court in the case reported in (2001) 4 SCC 181 : AIR 2001 Supreme Court 1084, Jayalakshmi Coelho v. Oswald Joseph Coelho, explaining the scope of the power to correct clerical or arithmetical errors, the Supreme Court has observed as follows-

“The power of rectification of clerical, arithmetical errors or accidental slip does not empower the court to have a second thought over the matter and to find that a better order or decree could or should be passed. There should not be re-consideration of merits of the matter to come to a conclusion that it would have been better and in the fitness of things to have passed an order as sought to be passed on rectification. On a second thought court may find that it may have committed a mistake in passing an order in certain terms but every such mistake does not permit its rectification in exercise of Courts inherent powers as contained under Section 152 C.P.C. It is to be confined to something initially intended but left out or added against such intention.”

17. In *NTPC* (supra), the Division Bench dealt with an "additional award" passed by an arbitral tribunal on an application under Section 33 of the Act. The said application claimed that errors in the original award, regarding the costs of certain goods, had resulted in an unjustified diminution in the awarded amount. This Court, on the basis

of the reasoning above, held *inter alia* that the application was not maintainable under Section 33 of the Act.

18. The present case is similar, inasmuch as the controversy relates to the base on which the amount of overheads has been calculated. It cannot be presumed that the incorporation of the original contract value, rather than the reduced value, was an inadvertent oversight capable of correction as a clerical mistake. To the contrary, if indeed any presumption is to be drawn, it must be that the arbitrator acted with due deliberation and application of mind in making his award. Consequently, the objections raised by AAI on this ground could not, in our view, have been addressed by the arbitrator under Section 33.

19. In any event, we are also not persuaded by the argument that the availability of a remedy under Section 33 would disentitle a litigant to ventilate its objection before the Court under Section 34 of the Act. Neither does the statute say so, nor have we been referred to any authority in support of this proposition. The two provisions operate in different fields, although there may be a small extent of overlap.

20. As noted above, we have come to the conclusion that the appellant was entitled to overheads based on the reduced contract value, but that the arbitrator's award of overheads based on the original contract value was not sustainable. We have considered whether we can, in the circumstances, set aside the award on this account to a limited extent, i.e., to the extent that it exceeds the amount which was legitimately due to the appellant (by applying the formula employed by the arbitrator to the reduced contract value). While the Court under Section 34, no doubt has the power to set aside

an award in part, it is also indisputable that the Court will not vary or modify an award. After considering several authorities on both side of this question, the Division Bench in *Puri Construction Pvt. Ltd. v. Larsen & Toubro Ltd.* 2015 SCC OnLine Del. 9126 and *Delhi Metro Rail Corporation Ltd. v. Delhi Airport Metro Express Pvt. Ltd.* (2018) 250 DLT 330 came to the conclusion that Section 34 does not permit such a course. Partial setting aside is permitted if the award satisfies the test of severability: to the extent that the vitiated portion of an award is severable from the rest, that part can be set aside and the rest upheld. Reference may be made in this regard to the judgment of the Full Bench of the Bombay High Court in *R.S.Jiwani v. Ircon International Ltd.* (2010) 1 Arb LR 451, which has been noticed in the Division Bench judgments of this Court in *MMTC Limited (India) v. Alcari, SA(Switzerland)* 2013 SCC OnLine Del 2932 and *Delhi Metro Rail Corporation Limited v. Delhi Airport Metro Express Private Limited* (2018) 250 DLT 330. In the present case, the award on claim no.3 was a single and composite one. The Court is, therefore, unable to excise the vulnerable portion of the award, and are bound to set aside the entirety of the award under claim no.3.

(b) Award in respect of loss of profit

21. In the impugned award, the award of loss of profits has been supported by the following reasoning:-

“Clause 39 of the agreement is not attracted as the Respondents have themselves granted EOT till 19.09.2009 without levy of compensation as well as committed fundamental breaches as already brought out

earlier. Thus the Respondents (AAI) cannot absolve themselves from the responsibility of payment of loss of profit due to reduction in turn over to the Claimants. It is admitted fact by both the parties that scope of work was reduced from Rs.18,53,20,401.40 by 31% to Rs.12,86,79,295.74 and final bill amount as per Exhibit C-69 was ₹11,92,06,275/- (i.e. actual reduction was to the tune of 36%). In the case of M/s A.T. Brij Paul Singh & Ors. vs. State of Gujrat contract was rescinded and it was held by Supreme Court of India (Bench of 3 Judges) that loss of profit was payable on the balance amount of work remaining unexecuted. Therefore, in the present case I hold the view that similar loss of profit on scope of work actually reduced i.e. Rs.6,61,14,126/- (Rs. 18,53,20,401.40 – Rs.11,92,06,275/-) is payable. Schedule “E” as per page 26 of the agreement Sl. 14 clearly defines ‘Market rate percentage addition to cover overheads and profit’ as “10.00 percent”. Hence considering overheads and profit to be equal as 50% each i.e. 5% for profit, I consider it appropriate if Claimant is compensated for loss of profit @ 5% of Rs.6,61,14,126/- i.e. Rs.33,05,705/-.”

22. The award of this amount has been set aside in the impugned judgment with the following observations:

“32. It is apparent from the plain reading of Clause 39 of the GCC that AAI was entitled to reduce the scope of work “at any time after acceptance of the tender”. As noticed above, the respondent was aware of the reduction of work and had complained about the same in its letter dated 17.01.2008. Thus, in terms of Clause 39 of the GCC, the respondent was not entitled to claim any amount on account of loss of profits or any other compensation for the advantage which the respondent may have derived from execution of the works in full.

33. It is difficult to understand as to why Clause 39 of the GCC would not be attracted merely because AAI had

granted extension of time till 19.09.2009. Further, the Arbitral Tribunal had held that Clause 39 of the GCC would not be applicable as AAI had committed the fundamental breach of the contract. Plainly, the respondent would be entitled for damages of breach of contract; however, that cannot entitle the respondent to claim loss of profits on reduction of scope of work, as the parties had expressly agreed that the contractor would have no such claim.

34. In view of the above, the award of ₹ 33,05,706/- awarded on account of loss of profits on the unexecuted portion of works cannot be sustained.”

23. The justification offered in the impugned award for disregarding Clause 39 of the GCC does not commend to us. The parties had expressly agreed that a reduction in the scope of work would not lead to such a claim. The applicability of Clause 39 was not dependent upon the grant of an extension of time by AAI or otherwise. In fact, a reduction in the scope of the contract as contemplated by Clause 39 can occur in situations where no extension of time is sought or granted. The correspondence referred to hereinabove demonstrates that the reduction in the scope of work was communicated to the appellant at a very early stage of the contract, and the appellant's main contention in response thereto was with respect to the consequent reduction in the value of the bank guarantee submitted by it. The contemporaneous correspondence does not reveal even an attempt on the part of the appellant to assert a claim for loss of profits or to reserve its right in any manner. In these circumstances, we are of the view that the award on this score has rightly been set aside in the impugned judgment.

Conclusion

24. For the reasons aforesaid, the impugned judgment dated 03.07.2018 in OMP (Comm.) 06/2016 does not call for any interference. The appeal is dismissed.

PRATEEK JALAN, J

S. RAVINDRA BHAT, J

MARCH 27, 2019

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