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

\+ O.M.P. 404/2015

Reserved on: 04.12.2018
Date of decision : 02.05.2019

JAMIA MILLIA ISLAMIA ..... Petitioner
Through: Dr.Amit George, Mr.Alamgir and Mr.Rishabh Dheer, Advs.

versus

AIRWAVES ENGINEERS PVT.LTD. ..... Respondent
Through: Mr.Ankit Jain and Mr.Sarvesh Rai, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') challenging the Award dated 25.03.2015 passed by the Sole Arbitrator adjudicating the disputes that have arisen between the parties in relation to the Agreement dated 14.06.2011 by which the petitioner had awarded the work of 'Air-conditioning and Associate Civil & Electrical Works at Centre for Interdisciplinary Research in Basic Science Building at Jamia Milia Islamia' to the respondent.

2. The Scheduled Date of Commencement of work was 21.06.2011 and the work was to be completed within a period of three months. It is important to note at this stage itself that though the estimated cost of the work was Rs.2,23,30,347/-, the respondent had submitted its bid only at

Rs.1,66,52,193/-, which was 25.42% lesser than the estimated cost and the same had been accepted by the petitioner.

3. It is the case of the petitioner that the respondent having bid below the cost price and having obtained the Contract, first submitted defective drawings to the petitioner, which could not be approved by the petitioner, leading to the petitioner calling upon the respondent to revise the same. It was only on 17.01.2012 that the respondent finally submitted the corrected drawings and the same were approved on the same day by the petitioner. In spite of approval of the drawings, the respondent did not carry out any work forcing the petitioner to issue a Show Cause Notice dated 16.03.2012 to the respondent asking it to show cause why the Contract be not terminated. The respondent did not give any reply to this notice and the petitioner, left with no other option, terminated the Contract by its letter dated 24.04.2012. It is only after the termination of the Contract that the respondent raised its claims challenging the said termination.

4. It is submitted by the counsel for the petitioner that the Arbitrator has wrongly held that the termination of the Agreement by the petitioner was not correctly made, and hence, cannot be sustained.

5. On the question of delay and the termination of the Contract, the counsel for the petitioner has further submitted that the respondent had not only caused delay in submission of the drawings but also claimed escalation by its letter dated 04.11.2011. This was contrary to the terms of the Agreement, as Clause 55 of the Additional / Particular Conditions and Specifications (hereinafter referred to as 'Particular Conditions')

attached to the Agreement specifically prohibited grant of any escalation during the period of the Contract. He submits that even beyond the period of Contract, such escalation can be awarded only as damages for which not only must there be a finding of default by the petitioner but also proof of such damages by the respondent. The respondent had not produced any proof in support of its claim for escalation. In fact, the Arbitrator has rejected Claim no.4 of the respondent, which was towards escalation, holding that since the period of completion was less than 18 months, no escalation was permissible, however, has accepted the same as a justification for the respondent to stop the work.

6. Counsel for the petitioner has further submitted that the Arbitrator has also held the termination to be illegal on account of petitioner's failure to grant extension of time for completion of the work. He submits that the petitioner had in its communications dated 30.12.2011, 04.01.2012 and 11.01.2012, not only requested the respondent to expedite the work but also assured that the extension of time will be given according to the work as needed. However, the respondent abandoned the work totally and did not even choose to reply to the Show Cause Notice dated 16.03.2012. Therefore, the plea of the respondent that the work could not be completed for want of a formal extension of time by the petitioner could not have been accepted by the Arbitrator.

7. On the other hand, the learned counsel for the respondent submits that the Arbitrator has found that there was an unexplained delay on the part of the petitioner in the approval of drawings, which were put off every time the respondent submitted the same. The drawings were

approved only in January, 2012, that is, after the period of the Contract had already expired. The Arbitrator has further found that the claim of the petitioner that the respondent had been submitting incomplete drawings could not be proved as the petitioner never produced the drawings that were earlier submitted by the respondent or prove any record of the defects pointed out in the same. The Arbitrator, infact, examined the drawings submitted by the respondent and found them to be complete except for some corrections in subsequent drawings. The Arbitrator therefore concluded that either the petitioner herein was not giving all objections at one time or the site situation had been changing so fast that the petitioner herein had to keep asking for change in the drawings as well. The Arbitrator further concluded that the respondent cannot be faulted for the delay in submission of the drawings.

8. Learned counsel for the respondent submits that the petitioner did not convey any decision on the request of the respondent seeking revision of rates due to delay in execution of work, be it in form of a rejection. The respondent, therefore, was prevented from executing the work in absence of such a decision and therefore, the finding of the Arbitrator on the termination of the Contract not being unwarranted, cannot be faulted.

9. Counsel for the respondent submits that the above being a finding of fact by the Arbitrator, cannot be interfered with by this Court unless the same is found to be totally perverse or unreasonable.

10. I have considered the submissions made by the counsels for the parties in relation to the legality of the termination of Contract by the petitioner. As highlighted above, the respondent had submitted a bid

which was 25.42% below the estimated cost. It is also not denied that the respondent had submitted the drawings at least 5 times between the period from 29.06.2011 to 13.01.2012, which were finally approved by the petitioner only on 17.01.2012. Counsel for the respondent has been unable to show any document by which it protested against the revision in the drawings sought by the petitioner. The Arbitrator, however, has wrongly put the onus of showing the relevance of the revisions sought on the petitioner and has drawn an adverse inference against the petitioner on the ground that the petitioner has been unable to show that the revisions sought by it in the drawings on the earlier occasions were on account of some defects.

11. The Arbitrator has also not made any reference to the letters dated 30.12.2011, 04.01.2012 and 11.01.2012 addressed by the petitioner to the respondent wherein the petitioner called upon the respondent to make correction in the panel drawings.

12. The respondent submitted the revised site drawings on 17.01.2012 requesting the approval for the same as also for grant of extension of time. The drawings were approved by the petitioner on 17.01.2012 itself. The respondent never objected to the revisions sought by the petitioner and therefore, it was for the respondent to have positively shown before the Arbitrator that the revisions sought by the petitioner in the drawings were either not germane or were frivolous in nature. The Arbitrator has however, wrongly put this onus on the petitioner and thereafter proceeded to draw an adverse inference against the petitioner.

13. As far as the revision of rates is concerned, Clause 55 of the Particular Conditions prohibits grant of escalation of cost of material during the progress of work. Moreover, as pointed out by the counsel for the petitioner, the Arbitrator himself rejects Claim no.4 of the respondent on the account of the period of completion being less than 18 months.

14. The respondent, however, claims that the above condition would be applicable only during the period of the Contract, which was three months from 21.06.2011 and not thereafter and the respondent, therefore, was entitled to seek revision of rates.

15. The respondent by its letter dated 04.11.2011 sought increase in the item rates stating as under:

> *"In spite of our repeated reminders since June 2011 you have not approved the drawing/Machine submitted by us in 22nd June 2011 till date which has resulted heavy increase in Equipment/Raw material cost apart from labour cost etc. We could not place order for purchase of Equipment / Raw materials till date.*
> *Now it has become very difficult for us to execute the project at tender rates. Kindly look into the matter and increase our item rates accordingly as there is no delay at our end."*

16. It is important to note that along with this letter, the respondent, except stating that the rates had increased, did not produce any justification for the revision of rates. The Arbitrator has also not discussed in the Award if the rates of material had actually increased justifying the respondent to seek a revision of rates and if so to what extent. This gains additional importance because of the substantially lower tender rates submitted by the respondent at the first stage. Clearly,

the respondent having obtained the award of work by quoting a substantially lower price, cannot thereafter be permitted to seek a revision of rates based on the market rates of such material. This would have resulted in an unjustified profit for the respondent.

17. In ***National Thermal Power Corpn. Ltd. v. Gammon India Ltd. and Anr.***, 2008(3) Arb. LR 94(Delhi), this Court observed as under:

> *"Any contractor at the time of giving tenders/bids would deliberately quote low prices with the intention of making it up later on during arbitration. Such claims would actually make his price more profitable than what he has quoted at the time of giving tender. It is possible that a person may quote such a low price at the time of bidding in which doing work is not feasible, only with the intention to keep out the other contractors and later on deliberately delay the execution of the work by under deploying the proper workforce and not bringing the necessary equipment on the site in time, delaying the work and claiming additional amount on the grounds of escalation, labour rates, administrative costs, etc. as has been done in this case. By this device, the competition is killed and this is actually what is happening in many of the contracts of the Government, where invariably the arbitration clause is invoked for escalation or for other reasons and normally contractor is awarded a substantial part of the contract by arbitration awards resulting into killing of the competition at the initial stage and benefitting and rewarding the contractor for his wrongs."*

18. As far as formal grant of extension of time for the completion of the work is concerned, as noted above, the petitioner in its letter dated 11.01.2012, while requesting the respondent to expedite the work and complaining that the respondent had abandoned the site and the work, also assured the respondent that extension of time will be given according

to the work as needed. In spite of this assurance, the respondent did not start the work, eventually forcing the petitioner to issue a Show Cause Notice on 16.03.2012. Even this Show Cause Notice was not replied to by the respondent. Clearly therefore, the above two reasons of non-revision of rates and non-grant of extension of time were an afterthought and unsustainable.

19. It is true that this Court in exercise of its power under Section 34 of the Act cannot sit as a Court of appeal to re-appreciate the evidence and come to a different conclusion than the one reached by the Arbitrator, however, if the Arbitrator has completely ignored the evidence led by the parties and has reached a conclusion which cannot be said to be reasonable, such Award cannot be sustained.

20. In ***Associate Builders vs. Delhi Development Authority*** (2015) 3 SCC 49, the Supreme Court explained one of the components of Public Policy as under:

> *"**31.** The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:*
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> *(i) a finding is based on no evidence, or*
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> *(ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or*
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> *(iii) ignores vital evidence in arriving at its decision,*
>
> *such decision would necessarily be perverse.*

21. This now takes me to the specific claims allowed by the Arbitrator in favour of the respondent.

22. Claim no.1 of the respondent was towards the work executed but not paid for.

23. The respondent had claimed that the work done was for Rs.8,81,108/- and after deducting the amount received by it towards the First Running Bill, an amount of Rs.5,24,020/- remained payable by the petitioner to the respondent. The petitioner had placed reliance on the Final Bill certified by the Engineer, however, the Arbitrator rejected the same on the ground that it contains only part measurement sheets. The Arbitrator further holds that as the First Running Bill submitted by the respondent had been approved by the petitioner and as the letter of approval does not indicate any deductions made therefrom, the respondent is entitled to the value of the work shown in the First Running Bill along with the work of fabrication of cable tray amounting to 522.5 mtrs. at the rate of Rs.240/- per mtr.

24. Counsel for the petitioner submits that the Arbitrator has erred in his finding that no deductions had been made by the petitioner in the First Running Bill. He submits that the respondent had submitted the First Running Bill for an amount of Rs.5,96,301.74, however, on objection being raised by the petitioner, the respondent submitted the revised First Running Bill for an amount of Rs.3,55,073/-. In its Statement of Claim the respondent contended that the petitioner had wrongly asked for a revision in the bill by excluding the price for the materials. He submits that the finding of the Arbitrator that the petitioner had never challenged

the First Running Bill of the respondent, therefore, is incorrect. The Arbitrator has also not given any finding on the plea of the respondent that the deduction claimed by the petitioner from the First Running Bill was unjustified or that the respondent is entitled to the full amount of the First Running Bill.

25. I find merit in the submission made by the counsel for the petitioner. The relevant pleading in the Statement of Claim is as under:

> *"20. That the claimant on 03.11.2011 submitted his first running bill of Rs.5,96,301.74p upon the respondent. A true copy of the first running bill is annexed herewith and marked as **Annexure C-13.***
>
> *xxxxx*
>
> *23. That on 15.12.2011 the claimant, on the request of the respondent submitted the revised running bill for an amount of Rs.3,96,765/-. It is submitted that the said bill was revised on the specific request of the respondent that bill be raised only for the work done and the supplies of the material may be excluded from this bill, which shall be considered in the next bill. Though the claimant was not obliged to revise the bill, however as the claimant never wanted any conflict, it agreed to the request of the respondent and raised a revised bill. A copy of the said revised bill is annexed herewith and marked as **Annexure C-16.**"*

26. The petitioner in its reply to paragraph 23 of the Statement of Claim had stated as under:

> *"23. Save and except what are matter of record, the rest of the contents of para 23 are wrong and vehemently denied. It is denied that the bill was revised on the specific request of the Respondent that the bill be raised only for the work done and the supplies of the material may be excluded from the bill. It is humbly submitted*

that the Respondent had made their displeasure evident to the Claimant as the Claimant were seeking remuneration for the un-executed work and the Respondent was unwilling to pay the Claimant for the undue delay and deficient services provided by the Claimant. It is pertinent to note here that the Claimant had given items which cover the supply, installation, testing and commission of galvanized sheet steel duct work of approved quality complete with all support, splits as shown in the drawings and as covered under specification complete with all accessories and ancillary items of below gauges 'A' 22 gauge 'B' 24 gauges which was completely incorrect. It is further pertinent to note here that a letter from AXEN was already given on 19.12.2011 in which AXEN had asked to clarify the measurements. ANNEXURE-VII"

27. Clearly therefore, the petitioner had not only challenged the veracity of the First Running Bill as raised by the respondent, but the respondent also, on objection being raised by the petitioner, revised the First Running Bill. The Arbitrator, however, has proceeded on a totally incorrect basis that the First Running Bill was fully accepted by the petitioner. Whether the petitioner was justified in asking for reduction in the First Running Bill was an issue to be considered by the Arbitrator, which the Arbitrator completely failed to adjudicate upon. Therefore, the Award on Claim no.1 cannot be sustained.

28. Claim no.2 of the respondent was for alleged loss of profit on the unexecuted work. The respondent had claimed an amount of Rs.23,55,000/- towards such claim. Arbitrator having held that the termination of the Contract by the petitioner was unjustified, awarded a sum of Rs.5 lacs against such claim in favour of the respondent.

29. As such damages are premised on the fact that the termination of the Contract by the petitioner was unlawful, such finding being set aside by this order, the Award on the said claim cannot be sustained.

30. Claim no.3 of the respondent was for loss towards the labourers remaining idle for want of drawings and other delays. Here again, the Arbitrator allowed 60% of the claimed amount in favour of the respondent without giving any reason for the same. Infact, apart from a chart filed by the respondent in support of this claim, the respondent had not produced any evidence of labour being deployed for the work and remaining idle due to delay in approval of the drawings. Therefore, apart from the fact that the delay cannot be attributed to the petitioner, there is absolutely no proof for award of such damages in favour of the respondent. It may be true that the Arbitrator does not have to give reasons as a judgment of the Court, however, at the same time, the Arbitrator cannot completely ignore the evidence or lack thereof, and award arbitrary amounts as damages. The Award on claim no.3 therefore, cannot be sustained.

31. Claim nos.5 and 6 for Earnest Money Deposit and Performance Guarantee have been allowed in favour of the respondent only on the ground that the termination of the Contract was found to be unjustified.

32. Counsel for the respondent has submitted that even if the termination of the Contract is held to be justified, the petitioner was to prove its damages for retaining such amount. He places reliance on the judgment of the Supreme Court in ***Kailash Nath Associates vs. Delhi Development Authority*** (2015) 4 SCC 136.

33. In my opinion, as the Award has been passed by the Arbitrator only on the finding that the termination of the Agreement by the petitioner was unjustified and as such finding is being set aside by this Court in the present order, such claim cannot be sustained. At the same time, the legal proposition advanced by the counsel for the respondent also cannot be stated to be incorrect. Whether the petitioner was able to justify its retention of the Earnest Money Deposit and the Performance Bank Guarantee would be for the Arbitrator to consider on the evidence led before it by the parties. As this issue has not been adverted to by the Arbitrator, it would not be proper for this Court to give a finding on the same as if exercising its jurisdiction as a Trial Court. This Court in exercise of its power under Section 34 of the Act does not have the power to modify the Award and therefore, cannot equally adjudicate as to what proportion of the Earnest Money Deposit and Performance Bank Guarantee, if any, the petitioner was entitled to retain based on the evidence led by the parties before the Arbitrator.

34. The same also applies to the counter claims raised by the petitioner which were rejected by the Arbitrator holding that as the termination of the Contract has been held to be illegal, the same are not sustainable.

35. In view of the above, while setting aside the finding of the Arbitrator on Claim Nos.1, 5 and 6 as also on the counter claims, it is left open to the parties to have such claims and counter claims adjudicated through proper proceedings in accordance with law.

36. The last challenge of the petitioner is to the rate of interest awarded by the Arbitrator. This challenge has been rendered infructuous due to the findings recorded in the present order.

37. In view of the above, the petition is allowed, with no order as to costs.

NAVIN CHAWLA, J

MAY 02, 2019
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