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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

ARBITRATION APPEAL STAMP NO. 2682 OF 2020
WITH
INTERIM APPLICATION NO. 2 OF 2020

Maharashtra Industries
Development Corporation .. Appellant

Vs.

M/s. Kolwalkar Gupte Construction .. Respondent

Dr. Milind Sathe, Senior Advocate a/w Mr. Ankur Pahade i/by Jay & Co. for Appellant.

Mrs. Teja Katdare for Respondent.

CORAM: PRADEEP NANDRAJOG, CJ. &
SMT. BHARATI DANGRE, J.

FEBRUARY 18, 2020

P.C.

1. The Appellant had floated a tender inviting offers to construct K.T. Weir and Jack-Well on Bav River at Nivali, District – Ratnagiri pertaining to the Nivaliphata Water Supply Scheme.

2. The estimated cost of the tender was ₹ 1,00,92,506/-.

3. It was an item rate tender requiring the tenderers to submit the bid offer by indicating the price they would charge for different items of work specified in the schedule of quantity in the tender document.

4. The Respondent's bid being accepted, the contract was awarded to the Respondent.

5. Excluding four monsoon's months work was to be completed in 12 months. Date of start was 19.04.1994. Thus, completion had to be by 19.08.1995. Time was extended to complete the work till 05.05.1997 and was withdrawn on 31.03.1998.

6. 16 claims, as per page 35 and 36, were raised by the contractor.

7. Claim Nos.1 and 2 were for amount incurred for execution of bill of quantities beyond 125% of the works as per tender for K.T. Weir and Jack-Well and pump house. They were in sum of ₹ 1,78,781/- and ₹ 1,23,452.26.

8. Clause 41 of the Conditions of Contract and Clause 8 of the Additional Conditions of the Contract stipulated that quantities of items were subject to variation and the item rate offered would bind the contractor provided the variation did not exceed 25%. If variation exceeded 25%, price had to be paid at rates derived from the rates entered in the current schedule of rates and in the absence of such rates at the rate prevailing in the market.

9. Recording that for said Claim Nos.1 and 2 it was admitted that the works executed exceeded the tender quantities by 125%, the learned Arbitrator referred to the DSRs published and for the quantities in excess of 125% awarded full Claim No.1 and Claim No.2 reduced to ₹ 1,23,440/-.

10. Claim No.3 for extra items was divided into two parts i.e. 3A and 3B.

11. Claim 3A pertaining to open excavation for K.T. Weir was ₹ 3,25,925/-. The learned Arbitrator noted that as per tender this item of work was in soil with boulders not

exceeding 0.03 cum size. The work was to be executed in river bed after constructing cofferdam. As per the data supplied to the tenderers the excavation was to be through non sandy layer and was to be in an area where there was no standing water. As soon as excavation was started, sandy layer was found in the river bed. Apprehending seepage of water in the excavated pits despite cofferdam built, appellant instructed the claimants to excavate upto bottom of sand and then construct the cofferdam. This work was carried under the instructions of the appellant. Amount was claimed @ ₹ 200.00 per cubic metre supported by rate analysis. Accepting the extra work the appellant reduced the rate to ₹ 25.11 per cubic metre. The amount claimed was the difference. With reference to DSR rates the learned Arbitrator has awarded ₹ 3,72,720/-.

12. Claim 3B was on account of amount incurred for execution of extra item for K.T. Weir in sum of ₹ 41,16,599/- reduced to ₹ 28,00,059.60.

13. Learned Arbitrator noted that the original tender envisaged the structure of Weir to be made up of mass work

of Uncoursed Rubble masonry without any joints in cement mortar of 1:4 proportion but the design provided required cement mortar proportion to be changed to the 1:3 and provision of contraction joints at designated places in the Weir structure. With reference to the rate analysis the learned Arbitrator has awarded ₹ 28,00,060/-.

14. Claims 4, 5, 6, 7 and 8 pertain to the delay. Noting that the work order was issued on 12.04.1994, just on the verge of commencement of monsoon, the contractor commenced the work but had to stop the same due to rain. After the rain, the contractor, inspite of deploying any machinery, could not proceed with the work on account of approved drawing for the K.T. Weir not made available. Correspondence shows that the department forced the contractor to continue the work based on his experience without the drawing. Approved drawing of Jack-Well was issued in February 1995 i.e. 10 months after the work order. Remaining drawings were approved on 13.07.1996. During execution of the work extra work items such as removal of sand, anti corrosive treatment etc. had to be executed. Local people obstructed the work because the land

acquisition issue was not sorted out. License for using explosive was issued only on 01.02.1995. Learned Arbitrator recorded that the appellant was responsible for the delay.

15. Claim No.4 on overheads towards establishment supervisory expenditure in sum of ₹ 31,66,667/- was reduced to ₹ 17,77,160/-.

16. Claim No.5 in sum of ₹ 20,26,880/- for extra expenditure on machinery and equipment at site was reduced to ₹ 3,84,036/-.

17. Claim No.6 in sum of ₹ 3,95,837.50 due to centering and scaffolding materials at site during the prolonged period of the contract was reduced to ₹ 75,000/-.

18. Claim No.7 on expenditure on direct labours in sum of ₹ 15,20,016/- has been reduced to ₹ 2,64,600/-.

19. Claim No.8 towards extra expenditure on account of increased prices of material and labour wages during prolonged period of the contract in sum of ₹ 8,60,750/- has been rejected.

20. Claim No.9 in sum of ₹ 34,35,387/- for loss of profit for balance work due to wrongful termination has been reduced to ₹ 13,31,275/- by treating profit at 15% of the cost of work.

21. Claim No.10 on account of non payment of final bill has been awarded in sum of ₹ 59,467/- on account of admitted work done as per contract quantity but final bill not approved due to the department terminating the contract alleging breaches by the contractor.

22. Claim No.11 on account of wrongful encashment of the bank guarantee has been directed to be adjusted in the total account of the payments but due to charges incurred for extended bank guarantee, ₹ 10,661/- has been awarded.

23. Claim No.12 for refund of security deposit in sum of ₹ 2,12,953/- has been disallowed on account of the adjustment from the mobilization advance. The learned Arbitrator has noted that full mobilization advance was not deducted.

24. Claim No.13 in sum of ₹ 2,00,000/- for re-excavation of foundation pits has been disallowed in the absence of any proof.

25. Claim No.14 in sum of ₹ 27,334/- on account of construction of office shed and godown shed has been rejected as the same was a part of the site overheads.

26. Interest claimed @ 18% has been reduced to 15% for pre-claim amount and 12% for the pendente lite period and at the same rate for future period.

27. Cost of arbitration has been awarded at ₹ 1,76,000/- against a claim of ₹ 2,91,517/-.

28. Challenge to the award before the learned Judge, Commercial Court, Ratnagiri has failed vide impugned order dated 15.07.2019.

29. Learned Senior Counsel for the Appellant restricts challenge to the award to Claim Nos. 4 to 8.

30. The quantification of the said claims awarded by the learned Arbitrator has not been questioned. What is questioned is the very entitlement to lay the claim.

31. The argument is without any merit for the reason if a contract is prolonged due to acts of commission or omission attributable to the owner of the work, the contractor is entitled to overheads towards establishment and supervisory expenditure; for expenditure incurred due to machinery and equipment being retained at site which could be used elsewhere to earn profits. Similarly, if centering and scaffolding material has to be retained at site during the prolonged period of the contract recompense has to follow and likewise for labour; and if the contract does not provide for adjustment in the increase of price of material and labour for the prolonged period of the contract, if proved that prices of material or wages payable to labour increased, said price adjustment benefit to flow.

32. On merits a finding of fact has been arrived at by

the learned Arbitrator that delay was occasioned due to acts of commission and omission of the Appellant which we have succinctly noted in paras 11 to 14 above.

33. The contention that a tender for works at an estimated cost of ₹ 1 Crore has resulted in the Government being saddled with additional liability of a near equal amount is noted and rejected by us for the reason about 30% of the increased amount relates to the extra items executed for the K.T. Weir and good reasons have been given by the learned Arbitrator for the rest.

34. There is no merit in the Appeal which is dismissed.

35. Interim Application No. 2 of 2020 does not survive and is disposed of as infructuous.

SMT. BHARATI DANGRE, J. **CHIEF JUSTICE**

Pravin D. Pandit

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