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

Date of Decision: 16th July, 2021

+ O.M.P. (COMM) 463/2020 & I.A. 7764/2020

UNION OF INDIA

..... Petitioner

Through: Mr. P.S. Singh and Mr. Zeeshan
Ansari, Advocates.

versus

M/S UNITY BUILDERS

..... Respondent

Through: Mr. Ashish Chauhan, Advocate.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

[VIA VIDEO CONFERENCING]

SANJEEV NARULA, J. (Oral):

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 [*hereinafter 'the Act'*], has been filed by Petitioner, *being* the Executive Engineer (Civil), Construction Wing, All India Radio [*hereinafter referred to as 'UOI'*] seeking setting aside of interim Arbitral Award dated 21st November, 2019 [*hereinafter 'Impugned Award'*], whereby the learned Sole Arbitrator has allowed certain claims of the Respondent – M/S Unity Builders (being the Claimant in the arbitration proceedings) [*hereinafter referred to as 'Unity'*].

BRIEF FACTS

2. The events giving rise to the present petition are summarized as follows:

2.1. UOI undertook construction work, funded by the National Brain Research Institute (NBRC), in the capacity of management consultant.

2.2. By way of a Notice Inviting Tender, UOI invited bids/offer for the balance construction work of “*Block-1 (Main Institute Block) Phase-II for National Brain Research Centre at Manesar, Haryana*”. [hereinafter referred to as the ‘**NIT**’].

2.3. Unity submitted its bid/offer on 26th November, 2010. It was found to be 30.23% above the estimated cost of work of Rs. 4,15,66,538/-. The same was accepted by UOI *vide* letter dated 24th January, 2011, with a direction to Unity to submit Performance Guarantee (PG) within four days from the receipt of the letter, which was duly complied with.

2.4. An agreement bearing No. 13/EE(C)/MHPD/AGT/2010-11 was executed between the parties for execution of the tender work on 27th January, 2011. The work was to be completed within 13 months with stipulated date of start and completion being 31st January, 2011 and 29th February, 2012 respectively. [hereinafter referred to as the ‘**Agreement**’].

2.5. On account of certain disputes having arisen between the parties during execution of the agreed work, Unity invoked arbitration under Clause 25 of the Agreement and sought appointment of an Arbitrator, *vide* letter dated 21st May, 2014.

2.6. Since UOI did not appoint an Arbitrator, Petitioner approached this Court under Section 11(6) of the Act in ARB. P. 217/2018. The same was

disposed of on 17th August, 2018 in light of the undertaking given by the Counsel for UOI regarding appointment of Arbitrator. In compliance thereof, UOI *vide* letter dated 14th September, 2018, appointed Mr. S. R. Pandey, (Retd. ADG, CPWD) as the Sole Arbitrator.

2.7. Statement of Claim, Statement of Defence and Counter Claims were filed. Whilst the proceedings were continuing, Unity moved an application under Sections 17(1)(ii)(b) (for granting interim protection) and 31(6) of the Act (for passing of an interim Award) for securing and releasing of admitted amount of Rs. 3,77,12,541/-.

2.8. The learned Arbitration allowed the application with respect to prayer for interim award u/S. 31(6) *vide* interim Award dated 21st November, 2019, and directed UOI to pay to Unity a sum of Rs. 5,06,31,927/- inclusive of interest @ 8% p.a. and future interest @ 10% p.a. With respect to relief under Section 17(1)(ii)(b) of the Act, the same was held to be infructuous as there was no apprehension of any undue loss or damage.

CONTENTIONS OF THE PETITIONER:

3. Mr. P. S. Singh, learned counsel for UOI, impugns the Award by making the following submissions:

3.1. Learned Arbitrator has passed the impugned award mechanically and without application of mind.

3.2. The amount of Rs. 3,77,12,541/- claimed to be admitted by UOI was, in fact, only an estimate, as shown in a draft bill prepared by UOI which was

annexed as document R-70 in its Statement of Defence. As per procedure, the bill should have been submitted in measurement book, duly signed by both the parties, which was not done. The bill is disputed and needs to be verified in the presence of both the parties, in terms of Clause 6A of GCC, relevant portion whereof is extracted hereinbelow:

“Clause 6A (excerpts):

All measurement of all items having financial value shall be entered by the contractor and compiled in the shape of the Computerized Measurement Book having pages of A-4 size as per the format of the department so that a complete record is obtained of all the items of works performed under the contract.

All such measurements and levels recorded by the contractor or his authorized representative from time to time, during the progress of the work, shall be got checked by the contractor from the Engineer-in Charge or his authorized representative. After the necessary correction made by the Engineer-in-Charge, the measurement sheets shall be returned to the contractor for incorporating the corrections and for resubmission to the Engineer-in-Charge for the dated signature by the Engineer-in-Charge and the contractor or their representative in token of their acceptance.

Whenever bill is due for payment, the contractor would initially submit draft computerized measurement sheets and these measurement would be got checked/test checked from the Engineer-in-Charge and/or his authorized representative. The contractor will, thereafter, incorporate such changes as may be done during those checks/test checks in his draft computerized measurements, and submit to the department a computerized measurement book, duly bound, and with its pages machine numbered. The Engineer-in-Charge and/or his authorised representative would thereafter check this MB, and record the necessary certificates for their checks/test checks.

The final, fair, computerized measurement book given by the contractor, duly bound, with its pages machine numbered, should be 100% correct, and no cutting or over-writing in the measurements would thereafter be allowed. If all any error is noticed, the contractor shall have to submit a fresh computerised MB with its pages duly machine numbered and bound, after getting the earlier MB cancelled by the department. Thereafter, the MB shall be taken in the Divisional Office records, and allotted a number as per Register of Computerised MBs. This should be done before the corresponding bill is submitted to the Division Office for payment. The contractor shall submit two spare copies of such computerized MB's for the purpose of reference and record by the various officers of the department.

The contractor shall also submit to the department separately his computerized Abstract of Cost and the bill based on these measurements, duly bound, and its pages machine numbered alongwith two spare copies of the bill. Thereafter, this bill will be processed by the Division Office and allotted a number as per the computerized record in the same way as done for the measurement book meant for measurements.

The contractors shall, without extra charge, provide all assistance with every appliances, labour and other things necessary for checking of measurements/levels by the Engineer-in-Charge or his representative.”

3.3. The impugned award erroneously and perversely holds that the 2nd R.A Bill is duly admitted by UOI as a ‘final bill’, by wrongly relying upon the caption of the bill which states “2nd R.A-cum-Final Bill, passed but not paid”. Further it has been wrongly presumed that the said bill was duly certified by UOI.

3.4. Arbitrator has failed to appreciate that even though UOI had sent the draft-final bill to NBRC for release of payment, it cannot be construed to be a clear and unequivocal admission of its liability to pay to Unity.

3.5. The Arbitrator has failed to consider that the 1st RA bill was executed by Unity after 22 months, in brazen breach of Clause 6A of the GCC, which completely derailed physical and financial monitoring of the project.

3.6. UOI is fully dependent upon NBRC for providing funds to make payment to Unity. Thus, without getting funds from NBRC, UOI is incapable of paying the amount of Rs. 3,77,12,541/- as directed in the impugned interim award.

CONTENTIONS OF THE RESPONDENT:

4. Mr. Ashish Chauhan, learned counsel for Unity, on the other hand, controverts the contentions of UOI on the following grounds:

4.1. The total claims of Unity aggregate to Rs. 8 crores (approx). UOI, in its Statement of Defence, made an admission regarding the final bill amounting to Rs. 3,77,12,541/-. For this reason, the application under Sections 17(1)(ii)(b) and 31(6) of the Act was moved by Unity.

4.2. The interim Award at para 19(k) correctly notes the admission by UOI, in terms of R-70 (final bill), has to be considered as unassailable evidence for the admitted amount of Rs. 3,77,12,541/-, and no further evidence is required to be adduced by Unity in respect thereof.

4.3. UOI *vide* letter dated 18th February, 2015, admits that disputes regarding the measurements stood settled between the parties. On 10th February, 2015, Unity had accepted the corrected measurements, basis whereof, UOI subsequently passed the bill and sent it to NBRC for processing payment. Now, UOI cannot be allowed to go back on its own admission.

ANALYSIS:

5. The Court has considered the contentions of the parties. The impugned Award decides Unity's application under Section 31(6) of the Act on the basis of admissions made by UOI in its Statement of Defence. The short question that arises for consideration is whether there is an unequivocal admission made by UOI justifying the interim Award.

6. The crux of the matter relates to document No. R-70 filed by UOI as part of its Statement of Defence – captioned “*2nd R.A.-cum-Final Bill, passed but not paid*” – which forms the basis of the findings in the impugned interim award. Upon examining the document, the learned Arbitrator observed that the said bill had been certified under the seal and signature of UOI, thereby agreeing and admitting that the total value of the work done was Rs. 7,93,90,374/- and the balance amount payable to Unity was Rs. 3,77,12,541/-. Before this Court, UOI is not disputing the measurements carried out for raising the said bill. It is also not disputed that the said bill has been verified and sent to NBRC for processing and releasing payments. In fact, the learned Arbitrator has also taken note of Unity’s communication dated 10th February, 2015, to observe that the disputes relating to the measurements were resolved and were no longer an issue. Unity had accepted the measurements corrected by UOI on which basis final bill was raised. UOI had also conveyed Unity *vide* communication dated 18th February 2015 that – “*The final bill is now being processed and sent to NBRC for releasing funds.*”, and “*shall be paid as soon as funds are received*”. Therefore, there is a clear, unequivocal and unambiguous admission on the part of UOI relating to the payments due under the bill.

7. The court does not find any perversity in the impugned award. Once the measurements were verified and the bill was sent to NBRC for making the payment, it certainly became a piece of evidence that can be relied upon by Unity to show UOI’s admission. The two objections raised for assailing the award, in the opinion of the Court, are without merit.

8. First, it has been argued by UOI, that there was a delay on the part of

Unity in submission of bills. This does not, in any manner, take away or discount the admissions made by UOI. The delay in submission of a bill could not have precluded the learned Arbitrator from deciding the application under Section 3(6) of the Act.

9. Second, UOI has urged that there was a delay in completion of the project which resulted in loss to it, and it is thus entitled to claim damages/compensation. However, in terms of the Clause 2 of the GCC, UOI never made deductions from running bills on account of alleged damages. Nevertheless, UOI has filed a counter-claim before the Arbitrator, claiming compensation for delay in execution of work. It is pertinent to note that the quantum of counter-claim is only Rs. 5 lakhs. The counsel for Unity has clarified that UOI is retaining a fixed deposit for the said amount and therefore, to that extent, it is fully secured. Thus, the counter claim for the delay in execution of the contract, cannot be a ground to withhold the admitted amount due under the bill.

10. Moreover, UOI's plea of dependency on NBRC for release of funds is also devoid of merit. Liability under the contract is that of UOI and it cannot be avoided merely on account of delay on the part of NBRC in releasing funds. The work was completed/foreclosed on 31st March 2013, and the dispute regarding measurements for raising the bills stood settled on 10th February, 2015, hence, there was ample time for release of funds, if so required. There is thus no reasonable justification for not making payments against the said bill.

11. In view of the foregoing, the Court does not find any merit in the present petition. Accordingly, the same is dismissed along with pending application.

SANJEEV NARULA, J

JULY 16, 2021

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(corrected and released on 9th August, 2021)

