

IN THE HIGH COURT OF DELHI AT NEW DELHI
% Judgment delivered on: 11.08.2021
+ **O.M.P. (COMM.) 324/2018**

M/S H.R. BUILDERS

..... Petitioner

versus

**DELHI STATE INDUSTRIAL & INFRASTRUCTURE
DEVELOPMENT CORPORATION LTD.** Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Avinash Kumar Trivedi, Advocate
with Mr Ayush P. Shah, Advocate.

For the Respondent : Ms Firdouse Qutb Wani, Advocate
with Mr Gajender Sharma and
Mr Satish Chandra, ARs for DSIIDC.

**CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU**

JUDGMENT

VIBHU BAKHRU, J.

1. The petitioner (hereinafter 'HRB') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter the 'A&C Act') impugning an arbitral award dated 13.04.2018 (hereinafter 'the impugned award') rendered by an Arbitral Tribunal comprising of a Sole Arbitrator.

2. The impugned award was rendered in the context of disputes that have arisen between the parties in connection with a contract awarded to HRB for refurbishment and upgradation of twenty-five

government schools. The Arbitral Tribunal has rendered a net award of ₹3,04,91,623/- along with interest in favour of HRB.

3. Briefly stated, the relevant facts that are necessary to address the controversy are as under:

4. The Government of NCT of Delhi launched a project for refurbishment and upgradation of 198 schools run by the Government of NCT of Delhi. The respondent (hereinafter 'DSI IDC') was entrusted with implementation of a part of the project covering twenty-five schools.

5. On 08.07.2009, DSI IDC invited tenders for entire works (both civil and electrical) to be executed in respect of twenty-five schools being a part of the project entrusted to DSI IDC. HRB submitted its bid for executing the aforesaid works. After negotiations, DSI IDC accepted HRB's offer to execute the said works for a total consideration of ₹35,46,00,174/-. On 18.08.2009, DSI IDC issued a Letter of Acceptance (LoA) awarding the work of "*Integrated Infrastructure Development of Delhi Govt. Schools*" under the sub-head "*Improvement and Upgradation of 25 Government Schools Buildings in North West 'A' District (Composite Work)*".

6. The work was to commence on 28.09.2009 and it was stipulated that the work would be completed on or before 27.09.2010.

7. Thereafter, on 30.09.2009, the parties entered into a formal agreement (hereinafter 'the Agreement') for execution of the works.

8. DSIIDC did not handover the work of twenty-five schools as agreed to under the Agreement but handed over work pertaining to only twenty-three schools. There were considerable delays in completion of the works contracted to HRB and, the same were finally completed on 18.01.2012; that is, after a delay of 478 days.

9. DSIIDC withheld part payments of the Final Bill and also made certain recoveries from the amount payable to HRB. According to DSIIDC, HRB had defaulted in performance of its obligations under the Agreement within the stipulated time. HRB disputed the same. According to HRB, the delay in execution of the works was due to various reasons attributable to DSIIDC and it was not responsible for any delay.

10. DSIIDC also claimed that the works executed were faulty and sought to recover damages from HRB. HRB, on the other hand, claimed that it was not only entitled to the payments withheld by DSIIDC but was also entitled to compensation on account of escalation and prolongation of works as well as profits for the works reduced from the scope of the Agreement (work relating to two schools which were not handed over to HRB).

11. In view of the aforesaid disputes, HRB invoked the Arbitration Clause to refer the disputes to arbitration and requested that an Arbitral Tribunal be constituted to adjudicate the disputes. On 24.10.2016, the Chief Engineer of DSIIDC appointed Sh. O.P. Bhatia, Former Additional DG (Works Special), CPWD as the Sole Arbitrator

to adjudicate the subject disputes.

12. HRB filed its Statement of Claims before the Arbitral Tribunal. DSIIDC filed its Statement of Defence as well as counter claims amounting to ₹20,05,00,000/-. One of the claims (Claim No.1) preferred by HRB was greater in value than as indicated by HRB in its request for arbitration, which was subsequently referred by Chief Engineer of DSIIDC to the Arbitral Tribunal. In its request for arbitration, HRB had, *inter alia*, claimed ₹53,90,498/- as payment due under the Final Bill. However, in its Statement of Claims, HRB made a claim of ₹1,40,94,470/- as due and payable under the Final Bill.

13. In addition, HRB also claimed ₹5,00,000/- as costs of arbitration (Claim No.9). The said claim was also not included in the claims that were initially made by HRB in its request for arbitration before the concerned Authorities of DSIIDC. Consequently, this claim was also not included in the disputes referred by the Chief Engineer, DSIIDC to the Arbitral Tribunal.

14. In view of the above, on 29.03.2017, HRB sent a letter to the Chief Engineer, DSIIDC requesting it to modify the amount of Claim No.1 from ₹53,90,498/- to ₹1,40,94,470/- and, to also refer the claim relating to costs of the arbitral proceedings quantified at ₹5,00,000/-, to the Arbitral Tribunal.

15. In response to the aforesaid request, the Chief Engineer, DSIIDC sent a letter dated 27.06.2017 to the Arbitral Tribunal forwarding HRB's communication requesting that its claim for the

enhanced value and its claim for costs be referred to the Arbitral Tribunal, and requested the Arbitral Tribunal to peruse the same and give its “decision/observations”.

16. The Arbitral Tribunal responded to the said communication by an e-mail dated 28.06.2017. The contents of the said e-mail are reproduced below:

“Reference: Respondent’s letter no. 1712 dtd. 27.6.2017

With reference to the above, I am to mention here that either party can include its claim in the S.F./C.S.F. regarding cost of arbitration even if it has not been referred by the Chief Engineer as this claim can be awarded by the A.T. under section 31 A (1) of the A & C Act.

Making a reference to modify amount of any claim is prerogative of the appointing authority for which cannot give any decision or observations. However, I am to make it clear that my award in respect of any claim will not exceed the amount of claim referred to me.”

17. In view of the above, on 26.08.2017, HRB filed an application under Section 23(3) of the A&C Act praying that it may be permitted to amend Claim No.1 and also claim costs for the arbitration proceedings. On 05.09.2017, DSIIDC filed a reply to the said application opposing the same.

18. The said application was disposed of by the Arbitral Tribunal by an order dated 27.09.2017 allowing HRB to pursue its claim for costs but denying its prayer for considering its Claim No.1 at the enhanced value.

19. Aggrieved by the same, HRB preferred a petition before this Court under Article 227 of the Constitution of India [being *CM(M) No.1458/2017 captioned 'M/s HR Builders vs. DSIIDC'*]. While the said petition was pending, the Arbitral Tribunal rendered the impugned award. Consequently, on 10.07.2018, HRB withdrew its said petition [CM(M) No.1458/2017] with liberty to agitate its grievance by filing a petition under Section 34 of the A&C Act.

20. Thereafter, HRB filed the present petition.

21. At this stage, it is relevant to examine the impugned award. The tabular statement indicating the award made against the respective claims/counter-claims as summarized by the Arbitral Tribunal in the impugned award is re-produced below:

Claim No.	Claim in brief	Amount referred by the C.E.	Amount as per S.O.C.	Amount awarded	Remarks
1.	Payment of F/bill	53,90,498	1,40,94,470	42,87,422	
2.	Release of withheld amounts and amount of illegal recoveries	1,28,71,710	1,27,96,042	1,12,37,900	
3.	On a/c of D.VAT (W.C.T.) and labor cess	3,69,490	3,69,490	2,77,117	
4.	On a/c of escalations in the extended	5,10,02,733	3,04,86,958	91,38,560	

	period of contract				
5.	Damages due to keeping staff, estt; and machinery in the extended period	3,32,43,766	3,32,43,766	48,45,700	
6.	Loss of profit due to reduction in scope of work	67,02,683	67,02,683	NIL	
7.	Revalidation charges of B.G.s due to prolongation of contract.	7,97,850	7,97,850	NIL	
8.	Interest on delayed payments of RA & F/bills, withheld amounts as well as above amounts	Amount not specified	Intt. On withheld amounts Rs.1,61,94,821 + intt. On other claims @ 15%	(i) Intt. On delayed payment of RA bills=2,27,424 (ii) Intt. @ 8.5% p.a. on amounts awarded under claim nos.1,2&3 as per details	
9.	Cost of arbitration		5,00,000+A.T.'s fee	2,00,000+2,77,500 (under section 38(2) of the A&C Act-1996)	
	Total	11,03,78,730 + Intt.	11,51,86,080 + intt.	Rs.3,04,91,623 + intt. On amounts awarded under claim nos.1,2,&3 as per details	

Counter Claims:

1.	Loss of	20,00,00,000/-	20,00,00,000/-	NIL	
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	name, reputation of DSIIDC and loss of work of the DSIIDC				
2.	Cost of arbitration	5,00,000/- + fee and expenses	5,00,000/- + fee	NIL	
	Total	20,05,00,000/-	20,05,00,000/-	NIL	

Submissions

22. Mr Trivedi, learned counsel appearing for HRB, assailed the impugned award on two grounds. First, he submits that the Arbitral Tribunal has grossly erred in not considering HRB's claim for payment of the Final Bill over and above the amount that it had initially claimed and, which was included along with a letter referring the disputes to arbitration. He submitted that initially HRB had quantified its claim for payment of Final Bill (Claim No.1) at ₹53,90,498/-. The claims as intimated to the concerned authorities of DSIIDC were annexed to the letter dated 24.10.2016 issued by the Chief Engineer (CE), DSIIDC appointing the learned Sole Arbitrator to adjudicate the said disputes. He submitted that the said amount was found to be erroneous, and therefore, HRB had enhanced the amount under Claim No. 1 to ₹1,40,94,470/-. It had also sent a letter to the CE, DSIIDC to refer the same to the learned Arbitrator. DSIIDC also sent a communication to the learned Arbitrator seeking his decision, however, the Arbitral Tribunal had confirmed that it would not award any amount in excess of the amount initially claimed. He submitted that this approach was erroneous as the Arbitral Tribunal was required

to adjudicate the disputes and a variation in the amount of claim(s) referred to the Arbitral Tribunal would not affect its jurisdiction to adjudicate the same.

23. Next, Mr Trivedi submitted that the Arbitral Tribunal's decision to reject HRB's claim for loss of profits on the unexecuted work (Claim no.6) as well as its claim for bank charges for keeping the Bank Guarantee alive (Claim No.7) is patently erroneous, illegal and is liable to be set aside.

Reasons and Conclusion

24. The Arbitral Tribunal had restricted HRB's claim for payment of the Final Bill to ₹53,90,498/- on the ground that it was the amount of claim as referred to the Arbitral Tribunal. HRB had filed an application under Section 23(3) of the A&C Act praying that it's claim for payment of the Final Bill to the amount of ₹1,40,94,470/- be considered as it has already applied to the Competent Authority requesting it to modify the amount. However, the Arbitral Tribunal rejected the same on the assumption that it was beyond its jurisdiction.

25. It is not disputed that HRB had applied to the Competent Authority to refer the claim for the enhanced amount by a letter dated 29.03.2017. Prior to the said date, HRB had already filed a Statement of Claims claiming a sum of ₹1,40,94,470/- as Claim No.1. HRB did not receive any response to its letter, and therefore, sent a reminder on 29.05.2017. In response to the same, the CE, DSIIDC addressed a letter dated 27.06.2017 and forwarded HRB's request to the Arbitral

Tribunal and sought its “decision/observation”. There is no procedure for DSIIDC to have sought for any opinion of the Arbitral Tribunal in this regard as HRB’s request was merely to enhance the value of the claim in respect of a subject matter of a claim (the payment of the Final Bill) that had already been referred to the Arbitral Tribunal. Plainly, it was not open for DSIIDC to restrict the right of HRB to refer any dispute to arbitration. However, the Arbitral Tribunal responded to the letter dated 27.06.2017 vide an e-mail dated 28.06.2017 clarifying that any award in respect of any claim would not exceed the value of the claim. The import of the Arbitral Tribunal was effectively to pre-empt HRB from pursuing its claim for the amount as stated in the Statement of Claims.

26. Clause 25 of the Agreement requires all disputes that have not been settled by the Superintendent Engineer or the Chief Engineer to be referred to arbitration. In the present case, the dispute relating to the payment of Final Bill remained unresolved and therefore, was referred to arbitration.

27. At this stage it is also relevant to set out Claim No.1 as articulated by HRB. The same is set out below:

“CLAIM No.1. A Sum of Rs.5390498/- on a/c of final bill

The claimants rely on the submission made under the head delay in payment in brief history of the case and further submit that they submitted the final bill vide their letter dated 25.04.12(C-26) amounting to Rs.325 lac read

with C-27, C-28, C-29 dated 21.08.12, 01.10.12, 03.12.12 respectively, but the payment of the same has not been released except some ad-hoc payment of Rs.1,61,01,314/-. Now after perusal of the final bill as prepared by the respondents having filed, (The copy of the said bills filed herewith as Annexure-B (Colly) for civil as well for electrical) and the claimants are only confining to the amount further due to them which has been computed as under:-

The net amount payable worked out by the respondents for both component

As per their final bill annexed as annexure-B
Rs.4287422/

a) Add for the amount recovered against item No.152a to 242 =Rs.2000074/- (Detail as per Annexure-B-1)

b) Add amount less paid due to part qty of BOQ item paid at

Less than quoted rates (Civil) detail as annexure-B2 = Rs.354719/

c) do do ... (electrical) do B3
= Rs.638185/-

d) Add for the excess security recovered for SI/WS/water

Proofing etc. [Detail as per Annexure-C (Colly)]
= 3153423/-

e) Add for refund of security deposit of electrical component=1660573/-
(Amount same as shown recovered in final bill)

f) Add credit amount claimed against part (a) above = Rs.2000074/-

Total amount = 1,40,94,470/-

Brief Description of each part:-

Part- a):-

No amount can be recovered against item No .152 (a) to 242 because the nomenclature of these items starts with credit which means that the amount should be added. Further the special condition on page 169 of the contract stipulates that the Serviceable materials is the property of the respondents, hence also no recovery can be made. Instead credit is required to be given for cleaning and making it usable for the respondents which has been done the materials was stacked properly at a place so desired by the respondents. As a matter of fact Rs.20,00,074 is further required to be added as credit to claimants for the services rendered. Which has been added at (f)

Part-(b) & (c):- Since there is no notice under clause 12.3, therefore the quoted rates cannot be reduced and that there is no notice under clause 12.3.

Part d):- As per S. No.7 on page 136 of the contract under the heading BIDDERS TO ENSURE THAT:-

Security deposit @. 5% of the actual cost of work done for various specialized works under the sub-head such as water proofing works, water supply and sanitary installation etc. shall be retained in addition to guarantee bond at the time of release of security deposit, for 10 years & 5 years to be reckoned from the date after the expiry of maintenance period.

Therefore from the above it is clear that the rate of deduction is 5% and on the item mentioned in the condition and not on tiles or stone work.

Secondly the amount is to be retained from the amount of security deposit at the time of release and not from the bills. Therefore deduction from the bill itself is wrong.

Apart from the above the respondents have deducted excess amount of security deposit which is matter of claim and for other amount deducted from the bills as well from the final bill, the interest will also be claimed.

Part e):- The security deposit of civil work have been released and there is no reason for not refunding the same for electrical component because there is no notice of any defect during the maintenance period and that the maintenance period is over.

Therefore the Ld. Arbitrator is requested to please award the amount in favour of the claimants.”

28. It is apparent from the above that HRB's claim not only included the amount of the Final Bill that remained unpaid (that is, ₹42,87,422/-) but also other claims, which according to HRB were due and payable and were required to be included in its final Bill. The same included a claim for a sum of ₹20,00,074/- for amounts recovered against certain items (detailed as set out in Annexure B-1 to the Statement of Claims); claim of ₹3,54,719/- and ₹ 6,38,185/- on account of difference in the rates at which certain payments for work was calculated; excess security recovered for SI/WS/Water Proofing as detailed in Annexure-C, quantified at ₹31,53,423/-; refund of security deposit for the electrical component quantified at ₹16,65,573/-; and a credit for ₹20,00,074/-.

29. Although HRB had sought to include the above claims as a part of its Claim No.1 (payment of Final Bill), it is apparent that the controversy was not limited to the payments which were admittedly due against the Final Bill and were withheld by DSIIDC.

30. Having stated the above, it is also relevant to note that it is not disputed that the claims made by HRB arise from the Agreement and thus, clearly fall within the scope of Arbitration Clause. The concerned officials of DSIIDC could have addressed the said claims and in case of a dispute, referred the same to the Arbitral Tribunal. Considering that an Arbitral Tribunal had already been constituted and HRB had requested that its claim for the payment under the Final Bill not to be restricted to ₹53,90,498/- but be considered for the enhanced amount, there was no reason for CE, DSIIDC to have not considered the same or referred it to arbitration.

31. However, the Arbitral Tribunal has taken a strict view and restricted HRB's claim to an amount of ₹42,87,422/-, which was admittedly payable but had been withheld by DSIIDC. The Arbitral Tribunal did not consider the other disputes, which HRB had subsumed under its Claim No.1 for an aggregate sum of ₹1,40,94,470/-

32. Admittedly, the said disputes were not referred to the Arbitral Tribunal and its decision not to consider the same, cannot be faulted.

33. HRB's contention that it is left remediless is erroneous and it is not precluded from seeking reference of the said disputes/claims aggregating ₹98,07,048/- (₹1,40,94,470/- minus ₹42,87,422/-), which

were not considered by the Arbitral Tribunal. As noticed above, HRB has already raised the said claims and has also requested CE, DSIIDC to refer the same to arbitration.

34. In view of the aforesaid clarification, no interference with the impugned award is warranted on the ground that the Arbitral Tribunal had confirmed itself to the claim referred to it.

35. Insofar as the Arbitral Tribunal's decision regarding HRB's Claim Nos. 6 and 7 is concerned, this Court finds no infirmity with the said decision. The Arbitral Tribunal had noted that DSIIDC was within its right to vary the quantity as well as the schools and therefore, loss of profit in respect of the work relating to two schools that were not handed over to HRB could not be allowed. The said view is a plausible one and given the limited grounds on which the arbitral award can be interfered with, the impugned award warrants no interference by this Court.

36. Similarly, this Court finds that the Arbitral Tribunal has not committed any patent error in rejecting HRB's claim for bank charges for extending the Bank Guarantee on the ground that the same would be subsumed under Overhead Charges, which also include financial costs.

37. The petition, is accordingly, dismissed.

VIBHU BAKHRU, J

AUGUST 11, 2021nn/RK