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

\+ **Date of Decision: 25.04.2023**

% FAO(OS) (COMM) 57/2022 & CM APPL. 11469/2022

RITES LTD. THROUGH ITS CMD ..... Appellant

Through: Mr. G.S. Chaturvedi, Adv.

versus

B. L. KASHYAP AND SONS LTD. AND ORS ..... Respondents

Through: Mr. S. K. Maniktala, Mr. Jatin Kumar, Mr. Udit, Mr. Mohit Sharma, Mr. Samaksh Sharma, Mr. Kritik, Advocates for R-1

Mr. Dhanesh Relan, Mr. Anuj Shrotriya, Advocates for Respondent No.2

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

SATISH CHANDRA SHARMA, CJ. (ORAL)

1. The present appeal arises out of an order dated 14.12.2021 passed by the learned Single Judge in O.M.P.(I) (COMM) 350/2018.

2. The facts of the case reveal that a contractual dispute arose between B.L. Kashyap & Sons Ltd. (Claimant) and EMAAR MGF Land Ltd. (Respondent) pursuant to which an Arbitral Tribunal was constituted and Hon’ble Mr. Justice Ajit Prakash Shah (Retd.) was appointed as the Sole Arbitrator (Delhi International Arbitration Centre) *vide* order dated 06.09.2018. Through the same order, the CMD of Appellant-RITES Ltd. was issued directions to constitute and depute a team for assessing the status

of work done at the subject site, and to measure the unexecuted balance work. The directions contained in the order dated 06.09.2019 read as under:

> *"(ii) RITES Limited having its office at Rites Bhawan, 1, Sector 29, Gurgaon-122001 via its Chairman and Managing Director will constitute and depute a team for carrying out the mandate of this Court by visiting the subject site and discharging its function in accordance with what is stated hereafter. The team so constituted will, hereon, be referred as the Local Commissioner(s).*
>
> *(iii) The Local Commissioner(s) shall measure the work already carried out by the respondent, the work in progress, and the unexecuted (balance) work at the subject site, having regard to the scope of the contract in issue.*
>
> *(iv) The Local Commissioner(s) shall prepare an inventory of the building and construction materials which will include mechanical, electrical and plumbing materials available on the project site and in the stores, the plant & machineries, tools and equipments lying at the project site."*

3. The aforementioned order passed by this Court in sub-para (xii) makes it very clear that fees payable to Local Commissioners shall be payable to M/s Rites Ltd. and the same shall be fixed in consultation with the CMD, Rites or its nominee.

4. The Appellant herein upon examining the Project site, and in consultation with the representatives of the parties, fixed the fees at Rs. 80 Lakhs plus 18% GST *vide* letter dated 25.09.2018.

5. That the fees so fixed was to be borne equally by the parties. While 50% was payable upfront, the remaining 50% was payable upon submission of final report by M/s Rites.

6. It is also an undisputed fact that the claimant and the Respondent paid their respective shares of 50% *i.e.* Rs. 23,60,000/- each (inclusive of GST).

7. That the Appellant M/s. Rites, later on filed I.A No. 15004/2018 before this Court for grant of extension of time to complete the Commission and for enhancement of its fee. This Court by an order dated 31.10.2018 permitted M/s. Rites to place its additional bill before the parties. The relevant portion of the order dated 31.10.2018 is reproduced as under:

> *"(iv) RITES is given liberty to place their additional bill of costs before the parties. Parties will, accordingly, make payments by sharing the burden equally."*

8. The record of the case further reveals that on 12.11.2018, the Appellant M/s. Rites enhanced the fees to Rs. 4 Crores Plus GST and the Respondent EMAAR MGF Land Ltd, out of this sum, tendered a payment of Rs. 1.3 crores plus GST on 16.11.2018.

9. That M/s. Rites filed another application i.e. I.A. No. 3736/2019 before this Court seeking further extension of time to execute the commission and also seeking directions against the Claimant (BL Kashyap & Sons), to pay the enhanced fees. This Court *vide* order dated 08.04.2019, while allowing the application of the Local Commissioner, observed that the payment of the additional fees shall be examined by the learned Arbitrator. The relevant portion of the order dated 08.04.2019 reads as under:

> *"7. In these circumstances, I am of the view that BLK should be directed to pay the fee as sought for by RITES Limited. The payment of fee will be subject to the learned Arbitrator examining tenability of the same, once the additional bill is submitted by RITES Limited.*

8. In case it is a case of over payment, the learned Arbitrator will make appropriate observation and if necessary, BLK will, then, approach this Court for necessary directions. BLK will, thus, make the payment as sought by RITES Limited in terms of prayer clause (a) within a period of three weeks from today"

10. That the Appellant herein, in those circumstances filed a detailed chart presenting a break-up of the amount claimed as of 22.05.2019. Objections were filed to the bill submitted by the present Appellant before the learned Arbitrator. The learned Arbitrator has finally passed a final order on 11.09.2021 and paragraphs 22 to 48 of the order passed by the learned Arbitrator is reproduced as under:

"Arguments

22. The Parties (Claimant and Respondent) have argued that M/s Rites has refused to give any proper details whatsoever of its alleged costs. Thus, the Parties have argued that the Bill is a highly inflated one and not backed by any supporting material.

23. It is also submitted that the loading on the bill is as much as 85.14% under various heads.

24. It is submitted that the Bill of Costs of M/s Rites is completely arbitrary and M/s Rites has failed to substantiate it.

25. Therefore, the Parties state that as per the calculations and tables provided by them, the costs cannot be more than 1.25 Crores and hence the Parties are liable to receive refund from M/s Rites.

26. On the other hand, M/s Rites stated that normally it charges about 1% of the contract value for carrying out such works, but in the present case the amount of Rs. 4 Crores is even less than 1% of the contract value, which was arrived at by an estimation assuming that the work would last for 5 months. Rites has also placed on record three agreements to *show that it normally charges 1% of the contract value for such works.*

27. Rites has also stated that these are internal calculations and therefore not liable to be disclosed. It is also stated by M/s Rites that for raising any Bill of Costs, they were not required to have any "consultation" with the Parties.

28. M/s Rites contended that due to the dispute between the parties, the work kept on increasing. In fact, they have only put up a conservative estimate for the actual work carried out.

29. Further, M/s Rites contended that since the Respondent has paid its share of such enhanced bill without any prior objection, therefore the Parties are now stopped from raising any objections to payment of the enhanced Bill.

<u>Findings</u>

30. In its affidavit, M/s Rites has contended that "as per norms, the cost of measurement in a project all inclusive is @ 1% of the contract value" However, M/s Rites has neither bothered to specify that what these "norms" are nor any documents have been filed to show the prevalence of any such "norms"

31. Further, M/s Rites has referred to three Agreements to show that it has charged for works at similar rates in certain projects. However, as rightly pointed out by the Parties, these agreements are very different in nature to the present task assigned to M/s Rites. For instance, the first agreement dated 01.04.2017, relied upon by M/s Rites is one where it was appointed as a Consultant and not as a Local Commissioner. Even the scope of work therein was quite vast and was not confined to simply recording of the measurements of the work done. The said agreement required the Consultant – M/s Rites to undertake the job of Third Party Quality checking, measurement checking/ certification, undertake "quality surveillance of the work, collect and test the samples of the work being carried out, checking the workmanship as the *relevant statutory specifications, ensuring proper quality and workmanship by the construction agencies etc.*

32. It is also important to note that the tenure of the said Agreement dated 01.04.2017 was 30 months, and it was to continue till further notice.

33. The Tribunal also finds that the other two agreements dated 06.09.2016 and 26.03.2021 are of similar nature. Therefore, there is no parity of work between the said agreements and the present scope of work. Hence, the reliance placed by M/s Rites on these agreements is wholly misplaced.

34. The Claimant has also rightly contended that the contract value of the work would have not relevance to the fee payable to Local Commissioner. For this, the Claimant also relies upon the decision of the Hon'ble Madras High Court dated 29.08.1989 in Ashok Kumar Kedia v. Balaji Builders & Anr., wherein it has been held that :

> *7. Therefore, while fixing remuneration, it is the nature and the extent of work involved, and the risk factor, if any, and whether there is any need to take any independent decision involving application of mind, etc., etc., will have to be taken into account, and not on some percentage basis, it could be worked out as an universal rule. Remuneration means "to pay for services rendered." The services so rendered will have to be assessed, depending upon the facts and circumstances of the case, and Order should contain reasons as to how and in what manner, the quantum has been arrived at. particularly when monumental amounts are directed to be paid.*
>
> *9………… What is of paramount consideration is the interests of the parties to the proceedings, and not that of the Advocate Commissioner or the Auctioneer or Receiver;*

35. The Claimant also relied upon the decision of the Delhi High Court in Manish Kumar Single vs. Jolibee Foods Corporation, reported as (2017) 244 DLT 644, wherein it was held:

> *11……..In my opinion, these charges are astronomical to say the least and in fact such orders convey wrong impressions to the litigants as also the lawyers. This Court obviously will not issue any directions as to what should be the fees of the Local Commissioners, however, surely it is seen that exorbitant fees are being paid to the Local Commissioners by the trial courts and which have no co-relation to the amount and type of work which is required to be done by the Local Commissioners. This undesirable practice of directing payments of huge fees, in the opinion of this Court, must forthwith stop.*

36. In fact, at the time of accepting the Commision, M/s Rites had neither informed the High Court, nor the parties that normally its charges are 1% of the contract value. Rather, this submission is being made now as an afterthought.

37. Therefore, in the considered view of the Tribunal, the case of M/s Rites, based on percentile basis in support of its exorbitant bill is liable to be rejected.

38. In this light, it is thus important to consider the individual factors listed by the Local Commissioner in the table as extracted above.

39. The Tribunal notices various glaring discrepancies in the table of the Local Commissioner. For instance, as regards the staff costs, it is difficult to understand what is the role of the Group General Manager, General Manager, Senior Deputy Manager, Senior Deputy General (Civil) in this work of taking measurements. It is nowhere made clear that what were such high ranking officials doing in execution of a Commission of this nature.

40. It is also noticed that even the monthly salaries of its officials given on M/s Rites own website is completely different from what has been claimed before the Tribunal.

In view of the fact that no evidence has been provided towards the staff costs, the Tribunal is only inclined to grant 75% of Factor 'A' i.e. which is put at Rs. 28,95,425/-. The same comes to Rs. 21,71,568/- per month. The Tribunal is prepared to accept the case of M/s Rites that the Commission has exceeded 5 months and gone on for 7 months. Therefore, the amount needs to be multiplied by 7 months, which comes to a total of Rs. 1,52,00,976/-

41. Again, as regards the travel expenses and the incidental charges such as hotel, local DA/TA etc. there is neither a shred of evidence placed on record nor is M/s Rites willing to placc on record any evidence towards the same. In such circumstances, the Tribunal deems it appropriate to grant 50% towards Factor 'B' (Travel Expenses) i.e. 50% of Rs. 8,76,000/- per month, which comes to Rs. 4,38,000/- per month. After multiplying the same by 7 months, the total amount comes to Rs. 30,66,000/-

42. As regards Factor 'C' i.e. other expenditures, again neither any justification nor any documents have been placed on record. In fact, it is an admitted position that computers and printers were provided by the Respondent all throughout. In such circumstances, the Tribunal deems it appropriate to quantify the expenditure under Factor 'B' at 75% of the amount claimed, which is Rs.5,59,400/- per month, thus coming to Rs. 4,19,550/- per month. The same needs to be multiplied by 7 months, thereby totaling to Rs. 29,36,850/-.

43. Thus, as against Factors 'A' 'B' and 'C' the Local Commissioner M/s Rites is entitled to Rs. 1,52,00,976/- + Rs. 30,66,000/-+ Rs. 29,36,850/- Rs. 2,12,03,826/-

44. In the considered view of the Tribunal, the ends of justice would be met if the Local Commissioner, in addition to factors A+B+C, is allowed a further amount of 20% of Rs.

2,12,03,826/- i.e. Rs. 42,40,765/- towards profits and overheads.

45. Thus, the total amount payable by the Parties comes to Rs. 2,12,03,826/- + Rs. 42,40,765/- Rs. 2,54,44,59/- rounded off at Rs. 2,54,45,000/-

46. The other heads shown by the Local Commissioner are once again without any basis, justification or supporting documents and are accordingly rejected.

47. Lastly, M/s Rites also claims that since the Respondent has already made the payments according to its revised bill without any prior objection, there is now an estoppels and the parties cannot be permitted to object to the same now. This is entirely wrong, as the Claimant had expressly objected to the revised bill before making the payment. The Respondent also objected to the same later. In any event, the Hon'ble High Court has asked the Tribunal to assess this revised bill. Therefore, the argument of estoppels raised by the Local Commissioner deserves to be rejected.

48. It is ordered accordingly. "

11. Subsequently, the present Appellant approached this Court by filing I.A. No. 15714/2021, whereby the Appellant sought to quash the order of the Ld. Arbitrator dated 11.09.2021 and also for issuance of directions to Respondents in the arbitral proceedings (EMAAR MGF) for payment of balance fees of the Local Commissioners. On the one hand, the learned Single Judge has dismissed the application preferred by the present Appellant, while on the other hand, I.A. No. 12740/2021 filed by B.L. Kashyap & Sons Ltd. has been allowed, meaning thereby, M/s Rites has been directed to refund the excess payment received by them. The order dated 14.12.2021 is reproduced as under:

"[VIA HYBRID MODE] I.A. 12740/2021 (on behalf of Petitioner seeking directions against the Local Commissioner - M/s Rites Ltd. - in terms of the order dated 08.04.2019 of this Court) & I.A. No. 15714/2021 (on behalf of the Local Commissioner - M/s Rites Ltd. – seeking quashing of the order dated 11.09.2021 of the Arbitrator and consequent directions to Respondents to pay the balance fees of the Applicant/Local Commissioner amounting to Rs.50 Lacs each plus GST, with interest w.e.f. 02.07.2020 till payment)

1. M/s Rites Ltd. was appointed as a Local Commissioner vide order dated 6 th September, 2018. Subsequently , vide order dated 31st October, 2018, passed in I.A. No. 15004/2018, they were given liberty to file additional bill of cost which was directed to be shared equally between the parties. Later I.A. No. 3736/2019 came to be filed seeking extension of time and for directing the Petitioner to make further payment. On this application, on 8th April 2019, the Court inter alia passed the following directions:

> *"7. In these circumstances, I am of the view that BLK should be directed to pay the fee as sought for by RITES Limited. The payment of fee will be subject to the learned Arbitrator examining tenability of the same, once the additional bill is submitted by RITES Limited. 8. In case it is a case of over payment, the learned Arbitrator will make appropriate observation and if necessary, BLK will, then, approach this Court for necessary directions. BLK will, thus, make the payment as sought by RITES Limited in terms of prayer clause (a) within a period of three weeks from today."*

2. In terms of the afore-noted directions, the learned Arbitrator has examined the issue Arbitral Order dated 11th September, 2021. The present applications arise therefrom.

3. Both the Petitioner and the Respondent rely upon the afore-noted order of the Arbitrator to argue that since Rites Ltd. has been found to have received excess payment, it is liable to *refund the same to them. On the other hand, Rites Ltd. seeks quashing of the said Arbitral Order and prays for direction for payment of additional fee.*

4. The counsel for Rites Ltd. states that the Arbitrator has not examined the issue in the correct perspective and further payments are due to Rites Ltd.

5. Considering the scope of the provision invoked in the present petition, which has been already disposed of, this Court is of the opinion that the question of adjudication of dues of the parties cannot be entertained. The observations made in the order dated 8th April 2019 binds all the parties. The Court had made clear that any question regarding the tenability of the expenses incurred by the Local Commissioner in execution of the orders of the Court, would be subject to verification by the Arbitrator. The Arbitrator after holding several hearings and considering the contentions of the parties, come to the conclusion that Rites Ltd.'s bills were not justified. This brings finality to the issue. There can be no further adjudication. Moreover, the reasons for rejecting the contentions are apparent from the order, relevant portions whereof reads as follows:

> *"30. In its affidavit. M/s Rites has contended that "as per norms, the cost of measurement in a project all inclusive is @1% of the contract value". However, M/s Rites has neither bothered to specify that what these "norms are nor any documents have been filed to show the prevalence of any such "norms".*
>
> *31. Further, M/s Rites has referred to three Agreements to show that it has charged for works at similar rates in certain projects. However, as rightly pointed out by the Parties, these agreements are very different in nature to the present task assigned to M/s Rites. For instance,*

the first agreement dated 01.04.2017, relied upon by M/s Rites is one where it was appointed as a Consultant and not as a Local Commissioner. Even the scope of work therein was quite vast and was not confined to simply recording of the measurements of the work done. The said agreement required the Consultant M/s Kites to undertake the job of Third Party Quality Checking measurement checking/certification. undertake "quality surveillance of the work, collect and test the samples of the work being carried out, checking the workmanship as the relevant statutory specifications, ensuring proper quality and workmanship by the construction agencies etc.

32. It is also important to note that the tenure of the said Agreement dated 01.04.2017 was 30 months and was to continue till further notice.

33. The Tribunal also finds that the other two agreements dated 06.09.2016 and 26.03.2021 are of similar nature. Therefore, there is no parity of work between the said agreement and the present scope of work. Hence, the reliance placed by M/s Rites on these agreements is wholly misplaced.

36. In fact, at the time of accepting the Commission, M/s Rites had neither informed the High Court, nor the Parties, that normally its charges are 1% of the contract value. Rather, this submission is being made now as an afterthought.

37. Therefore, in the considered view of the Tribunal, the case of M/s Rites based on percentile basis in support of its exorbitant bill is liable to be rejected.

39. The Tribunal notices various glaring discrepancies in the table of the Local Commissioner. For instance, as regards the staff *costs; it is difficult to understand what is the role of the Group General Manager, General Manager Senior Deputy Manager, Senior Deputy General (Civil) in this work of taking measurements. It is nowhere made clear that what were such high ranking officials doing in execution of a Commission of this nature.*

40. It is also noticed that even the monthly salaries of its officials given on M/s Rites' own website is completely different from what has been claimed before the Tribunal.

In view of the fact that no evidence has been provided towards the staff costs, the Tribunal is only inclined to grant 75% of Factor 'A', i.e. which is put at Rs. 28,95,425/-. The same comes to Rs. 21,71,568/- per month. The Tribunal is prepared to accept the case of M/s Rites that the Commission has exceeded 5 months and gone on for 7 months. Therefore, the amount needs to be multiplied by 7 months, which comes to a total of Rs. 1,52,00,976/-.

41. Again, as regards the travel expenses and the incidental charges such as hotel, local DA/TA etc., there is neither a shred of evidence placed on record nor is M/o Rites willing to place on record any evidence towards the same. In such circumstances, the Tribunal deems it appropriate to grant 50% towards Factor 13' (Travel Expenses), i.e. 50% of Rs. 8,76,000/- per month, which comes to Rs. 4,38,000/- per month. After multiplying the same by 7 months, the total amount comes to Rs. 30.66,000/-.

42. As regards Factor 'C', i.e. other expenditures, again neither any justification nor any documents have been placed on record. In fact, it is an admitted position that computers and printers were

> *provided by the Respondent all throughout. In such circumstances, the Tribunal deems it appropriate to quantify the expenditure under Factor 'B' at 75% of the amount clairged, which is Rs. 5,59.400 per month, thus coming to Rs. 4.19550/ per month. The same needs to be multiplied by 7 months, thereby totaling to Rs. 29.36.850/-."*

6. Having perused the aforesaid observations, the Court finds the same to be reasonable and justified, and accordingly the same are accepted. The challenge thereto cannot be entertained. In view of the above, Rites Ltd. is directed to refund the excess payment received by them in terms of the order of the learned Arbitrator, to both Petitioner as well as the Respondent.

7. With the above directions, the present applications are disposed of."

12. The present appeal is arising out of order dated 14.12.2021 and the following reliefs are sought:

"(a) quash order dated 14.12.2021 passed by the Ld. Single Judge in I.A. No. 12740 of 2021 and 15714 of 2021 as also order dated 11.09.2021 passed by the Ld. Arbitrator Hon'ble Mr. Justice Ajit Prakash Shah (Retd) and may kindly direct Respondents to make the balance payment of Rs. 50.00 Lakh each with interest w.e.f. 02.07.2020, taxes and costs throughout;

(b) pass any other or further order(s) as this Hon'ble Court may deem fit and proper on the facts and circumstances of the case."

13. Heard learned Counsel for the parties and perused the record.

14. This Court has carefully gone through the order dated 14.12.2021, passed by the learned Single Judge in O.M.P.(I) (COMM) 350/2018. The

learned Single Judge has upheld the order passed by the Arbitral Tribunal dated 11.09.2021, thereby denying the claim of additional fees to the Appellant M/s. Rites Limited.

15. The undisputed facts of the case makes it further clear that an Arbitral Tribunal was constituted *vide* order dated 06.09.2018 and this Court appointed M/s Rites as the Local Commissioner to carry out the commission in relation to measurement of certain works already carried out and unexecuted balance work on the subject construction site.

16. The Appellant subsequently filed an application before the Arbitrator claiming additional amount and the application has been rejected by an order dated 11.09.2021. The order passed by the learned Arbitrator makes it very clear that M/s Rites contended before the Ld. Arbitrator, that as per norms, the cost of measurement in a project all inclusive is @ 1% of the contract value. However, M/s Rites have neither bothered to specify what these norms are, nor have any documents been filed to demonstrate the importance of any such norm. In these very circumstances, the learned Arbitrator has declined the claim of M/s Rites in respect of the aforesaid issue.

17. The order further reveals that three other agreements related to other parties were brought to the notice of the learned Arbitrator stating that in respect of similar works, similar rates have been charged. However, the learned Arbitrator, after going through the agreements has arrived at a conclusion that M/s Rites was a consultant, and not a Local Commissioner, for the purpose of measurement of recording the work done, and therefore

the claim based upon such similar agreements has been turned down rightly.

18. A claim was also made by the Appellant which included staff cost. The Tribunal has observed that it fails to understand the role of *the* Group General Manager, General Manager, Senior Deputy Manager, Senior Deputy General (Civil) in this work of taking measurements. Not only this, the monthly salaries of its officials given by M/s Rites on its own website was completely different from what has been claimed before the Tribunal.

19. The Tribunal, after minutely scanning the bill claiming additional amount has rejected the same and the learned Single Judge has affirmed the order passed by the Tribunal.

20. In the considered opinion of this Court, the findings arrived at by the Arbitral Tribunal and affirmed by the learned Single Judge does not warrant any interference by this Court. The learned Arbitrator was justified in rejecting the claim in respect of additional amount claimed by the Appellant and directing refund of the additional amount received by the Appellant. This Court also does not find any reason to interfere with the order passed by the Arbitral Tribunal and the learned Single Judge. Resultantly, the appeal is dismissed.

SATISH CHANDRA SHARMA, CJ

SUBRAMONIUM PRASAD, J.

APRIL 25, 2023
N.Khanna