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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 08.02.2023

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O.M.P. (COMM) 131/2016

AHLUWALIA CONTRACT (INDIA) LTD.

..... Petitioner

Through: Mr.S.K. Maniktala, Mr.Jatin
Kumar, Mr.Udit Maniktala,
Mr.Mohit Sharma & Mr.Kritik,
Advs.

versus

UNION OF INDIA

..... Respondent

Through: Ms.Pratima N. Lakra, CGSC
with Mr.Apoorv Sharma, Adv.
for UOI along with Mr.B.K.
Singh, SE, (In-Charge) AIIMS,
Patna, Mr.Rakesh Roshan,
Project Consultant AIIMS,
Patna and Mr.Sunny
Priyadarshi, Law Officer
AIIMS, Patna.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. The learned counsel for the respondent submits that the respondent has filed its written submission. The same are not on record, but the learned counsel has been heard on merit.

2. This petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') seeking setting aside of the Arbitral Award dated 20.11.2015 passed by the learned Sole Arbitrator to the limited

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extent that it rejects claim nos.3, 4, 5, 7, 12, 14 and 17 raised by the petitioner.

3. Before considering the submissions made by the learned counsels for the parties, a few dates in relation to the Contract may be relevant to be noted:-

(a) The petitioner was awarded the Contract for Package-III Electrical Services at AIIMS, Patna by the respondent on 29.08.2011;

(b) The work was to be completed within a period of 16 months commencing from 19.08.2011, therefore, the date of completion was 18.12.2012;

(c) The scope of work under the Contract comprised of Supply, Installation, Testing and Commissioning (in short, the 'SITC') of electrical equipments within a period of 16 months and, thereafter, comprehensive Operations and Maintenance (in short, 'O&M') thereof for a period of 5 years after expiry of 12 months' Defect Liability Period (in short, 'DLP') computed from the date of completion.

4. It was the case of the petitioner that the petitioner mobilized its men, material, and resources to execute and complete the work within the stipulated period of the Contract, however, there were delays on the part of the respondent at inception stages such as, delay in allocation of sites, the work fronts not being available even for the existing Sub-stations Buildings, the Sub-stations Buildings were unfinished and not completed/fitted with doors/ windows, exhaust fans and lighting etc., for which the electrical equipments could not be installed therein, and the building work at Substation nos.3, 4 and 4A

were not completed. It was further the case of the petitioner that though, the respondent granted extension of time admitting that there was no default on the part of the petitioner in the delay caused, further claims of the petitioner with respect to the delay being attributable to the respondent were not granted.

5. In the above circumstances, the petitioner invoked the Arbitration Agreement and raised as many as 17 claims before the learned Sole Arbitrator. Out of these claims, the learned Sole Arbitrator granted 9 claims, while rejecting the remaining 8 claims of the petitioner. The details of the claims that have been granted are as under:-

<i>Claim No.</i>	<i>Particulars of Claim</i>	<i>Amount Claimed (Rs.)</i>	<i>Amount Awarded (Rs.)</i>
1.	<i>On account of repeated shifting of sub-station equipments due to non-availability of sub-station building/ s.</i>	6,75,625/-	6,75,625/-
2.	<i>On account of the expenses incurred on recharging of UPS and Batteries during the period from 1.12.2012 to 02.06.2014 i.e for the extended period of contract</i>	18,880/-	18,880/-
6.	<i>On account of the expense incurred on deployment of security staff for the extended period of contract.</i>	4,15,464/-	3,61,273/-

8.	<i>On account of expenditure incurred on renewal of Performance Bank Guarantee And Security Bank Guarantee for the extended period of contract.</i>	<i>5,54,854/- + 1,26,968/-</i>	<i>6,81,822</i>
9.	<i>On account of renewal of Insurance Policies and EAR Policy for the extended period of contract.</i>	<i>9,89,690/-</i>	<i>9,89,690/-</i>
10.	<i>On account of providing vehicles with driver and fuel under clause 3(B) of Vol.II(B)/SCC for the extended period of contract.</i>	<i>5,74,540/-</i>	<i>4,99,600/-</i>
11.	<i>On account of claim under Clause 10C/GCC for increase in labor wages</i>	<i>32,81,601/-</i>	<i>32,81,601/-</i>
13.	<i>On account of processing of Extra/Deviation /Substituted Items.</i>	<i>18,58,014.25</i>	<i>18,58,014.25</i>
16.	<i>On account of interest</i>	<i>18% p.a.</i>	<i>10% p.a., w.e.f. 26.05.2014 till actual payment.</i>

6. The Claims which have been rejected by the learned Sole Arbitrator are as under :-

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Claim No.	Particulars of Claim	Amount Claimed (Rs.)	Amount Awarded (Rs.)
3.	On account of expenditure incurred on establishment of site office.	9,70,460/-	Nil
4.	On account of expense incurred on pay and allowance of the Site and Head Office Staff for extended period of contract.	97,96,460/-	Nil
5.	On account of expense incurred on conveyance and other services for extended period of contract.	11,76,252/-	Nil
7.	On account of the expense incurred on Labour Welfare for extended period of contract	2,57,582/-	Nil
12.	On account of loss of Profits during the extended period of contract.	4,80,03,560/-	Nil
14.	Claim under Clause 2A/GCC Bonus for early completion	2,13,00,360/-	Nil
15.	On account of additional expense incurred on tour and travels of the respondents officials for testing of material at the factory premise	1,01,735/-	Nil

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17.	For the cost of proceeding	To be assessed	Nil
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7. The petitioner does not challenge the finding of the learned Sole Arbitrator as far as claim no.15 is concerned.

8. Before I consider the challenge to the Award on merit, I shall remind myself of the limited scope of challenge to the Arbitral Award under Section 34 of the Act and as delineated by the Supreme Court in ***Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India (NHAI)***, (2019) 15 SCC 131, wherein it has been *inter alia* held as under:

“34. What is clear, therefore, is that the expression “public policy of India”, whether contained in Section 34 or in Section 48, would now mean the “fundamental policy of Indian law” as explained in paras 18 and 27 of Associate i.e. the fundamental policy of Indian law would be relegated to “Renusagar” understanding of this expression. This would necessarily mean that Western Geco expansion has been done away with. In short, Western Geco, as explained in paras 28 and 29 of Associate Builders, would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in para 30 of Associate Builders.

35. It is important to notice that the ground for interference insofar as it concerns “interest of India” has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is

now to be understood as a conflict with the “most basic notions of morality or justice”. This again would be in line with paras 36 to 39 of Associate Builders , as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.

36. *Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paras 18 and 27 of Associate Builders , or secondly, that such award is against basic notions of justice or morality as understood in paras 36 to 39 of Associate Builders. Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco , as understood in Associate Builders , and paras 28 and 29 in particular, is now done away with.*

37. *Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within “the fundamental policy of Indian law”, namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.*

38. *Secondly, it is also made clear that reappreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.*

39. *To elucidate, para 42.1 of Associate Builders , namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Para 42.2 of Associate Builders, however, would remain, for if an arbitrator gives no reasons for an award and*

contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in Associate Builders , namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2-A).

41. What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of Associate Builders , while no longer being a ground for challenge under “public policy of India”, would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.

9. In *State of Chhattisgarh & Anr. v. SAL Udyog Private Ltd.*, (2022) 2 SCC 275, the Supreme Court has reiterated that:

“26.We are, therefore, of the view that failure on the part of the learned sole arbitrator to decide in accordance with the terms of the contract governing the parties, would certainly attract the “patent illegality ground”, as the said oversight amounts to gross contravention of Section 28(3) of the

1996 Act, that enjoins the Arbitral Tribunal to take into account the terms of the contract while making the award.”

10. Having noted the above, I shall now consider the challenge laid to the Arbitral Award by the petitioner.

11. As far as claim nos. 3, 4, 5 and 7 are concerned, the learned Sole Arbitrator has rejected the said claims stating that the Contract provides for add-on of Contractor's element of 15% on cost of material and labour to cover all overheads and profits in terms of item 2(x) of Schedule F of the Special Conditions of Contract. As the work continued beyond the stipulated period, all justified expenses on materials and labour during the prolongation of the Contract for which claims have been filed by the petitioner would be eligible for this addition of 15% thus taking care of all overheads during the prolongation of the Contract, including the claims contained in claim nos.3, 4, 5 and 7.

12. The relevant findings of the learned Arbitrator are reproduced hereinunder: -

“14. **CLAIM No.3-Rs 9,70,460 & CLAIM No.4-Rs 97,96,460**

xxxxx

14.3 *The scheme of the Contract envisages that such expenses are to be met out of the provision of Contractor's element of 15% on cost of materials and labour meant to cover all overheads and profits. As observed above in Para. 11(ii), all justified expenses on materials and labour during the period of prolongation of contract - for which claims have been filed by the Claimant -would be eligible for this 15% add-on thus taking care of all overheads during the period of prolongation of contract. For this reason, consideration of this claim for expenses on staff is not called for. In fact, if we were to consider such claims, it would imply double consideration of compensation which in the scheme of contract is to be given by way of add-on of Contractor's element of 15% on*

cost of materials and labour to cover all overheads and profits.

xxxxx

15. **CLAIM No.5- Rs 11,76,252.**

xxxxx

15.3 As discussed above in Claims 3 & 4, such expenses are part of overheads. The scheme of contract envisages meeting overheads out of add-on of 15% on cost of materials and labour. As the Contactor's element of 15% on justified additional expenditure on materials and labour during the period of prolongation of contract will also be admissible [as observed above in Para.11(ii)], such claims cannot be considered separately; for otherwise, as observed above in respect of Claims No.3 & 4, it would amount to double counting of the claimed amount.

xxxxx

17. **CLAIM No.7- Rs 2,57,582.**

xxxxx

17.3 The expenditure incurred on labour welfare is of the nature which makes it part of 'overheads' for which contract envisages an add-on of Contractor's element of 15% on cost of materials and labour (to cover all overheads and profits) which is also admissible in the prolongation period. Showing this expense as a separate stand-alone item for reimbursement is, therefore, not justified."

13. The learned counsel for the petitioner submits that the reliance of the learned Sole Arbitrator on Clause 2(x) of Schedule F is incorrect inasmuch as the same is applicable only to the extra items of work. In the present case, the claims of the petitioner were not in relation to extra items of work. Even if they are considered to be so, once the learned Sole Arbitrator rejects the entire claim of the petitioner, the petitioner would not get paid at all on these accounts. In this regard, he places reliance on Clause 12.2 of the General Conditions of Contract (in short 'GCC') and Clause 2(x) of Schedule F read with

Clause 2(x) of the definition. The same are reproduced hereinunder:-

“CLAUSE 12 *Deviations/Variations Extent and Pricing*

xxxxx

12.2. *Deviation, Extra Items and Pricing*

In the case of extra item(s), the contractor may within fifteen days of receipt of order or occurrence of the item(s) claim rates, supported by proper analysis, for the work and the Engineer-in-Charge shall within one month of the receipt of the claims supported by analysis, after giving consideration to the analysis of the rates submitted by the contractor, determine the rates on the basis of the market rates and the contractor shall be paid in accordance with the rates so determined.

xxxxx

SCHEDULE 'F'

GENERAL RULES & DIRECTIONS:

2(x) *Percentage on Cost of Materials and labour to cover all overheads and profits.* 15%

xxxxx

Section-1

CONDITIONS OF CONTRACT

2. *In the contract the following expressions shall, unless the context otherwise requires, have the meanings, thereby respectively assigned to them:-*

xxxxx

(x) *Market rate shall be the rate as decided by Engineer-in-charge on the basis of the cost of materials and labour at the site where the work is to be executed plus the percentage mentioned in Schedule 'F' to cover, all overheads and profits.”*

14. He submits that the learned Sole Arbitrator has, while rejecting the claims of the petitioner, incorrectly placed reliance on Schedule 'F' of the GCC.

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15. On the other hand, the learned counsel for the respondent submits that in terms of Clause 2(xi) of Schedule 'F' to the GCC, the Standard Schedule of Rates was to apply, over and above which the petitioner was entitled to 15% to cover all overheads and profits. She submits that, therefore, the learned Sole Arbitrator has rightly rejected the claim of the petitioner inasmuch as the petitioner has been allowed the 15% margin to cover the overheads and profits. Clause 2(xi) of Schedule 'F' to the GCC reads as under:

"SCHEDULE 'F'
GENERAL RULES & DIRECTIONS:

*2(xi) Standard Schedule of Rates DSR 2007 with
correction slip
issued upto date
of receipt of bid."*

16. I am unable to agree with the submissions made by the learned counsel for the respondent. A bare reading of Clause 12.2 read with Clause 2(x) of Schedule 'F' and Clause 2(x) of the Definition Clauses, as reproduced hereinabove, would show that the 15% margin is for the 'extra item of work' that may be awarded to the petitioner during the course of the execution of the work. In the present case, the claim of the petitioner was based on the delay caused by the respondent in the execution of the work and, therefore, was in the nature of the damages/prolongation cost. It is not shown before this Court, and it is not a finding of the learned Sole Arbitrator that for this period of delay, the petitioner was otherwise compensated in form of the additional cost. The above finding of the learned Sole Arbitrator is, in fact, contradictory to his own findings in

paragraph 9.2 to 9.4 of the Impugned Award, reproduced herein below:-

“9.2 Looking to the facts of the case, it is clear that award of the contract was with focus on speedy and time bound completion of the project within stipulated period of 16 months. It was, therefore, natural for the Claimant to suitably mobilize resources and have all preparedness for delivery on time. It is also unquestionable that installation of electrical equipment depended on availability of sites and work fronts. That the delay involved due to non-availability of some sites was not attributable to the Claimant is proved by the fact of grant of regular EOT upto 25.05.2014. That Respondent is aware of the fact that one substation site is still to be made available, and that implementation of the project is desired to be continued till its completion, are evident from the fact that provisional EOT has been given upto 31.12.2015. Continued implementation of the prolonged contract would obviously involve additional costs, over and above the costs estimated and budgeted for implementation within the contract stipulated period of 16 months.

9.3 Respondent has argued that Contract provides under Clause 5.2(v) of GCC only for grant of EOT. Clause 5.2(V)/GCC is intended to cover cases in which delay is caused on the part of other contractor; in such cases the contracting party (in this case the Claimant) will not be penalized and EOT will be granted. However, it does not mean to rule against payment of justified costs incurred during the prolongation of contract during EOT given for delays not attributable to the contracting party (in this case the Claimant). In fact in any contract, it would be unfair to expect a contractor to keep working without compensation of additional costs for any length of prolongation even when reason for prolongation is not attributable to him. Clause 5.2 does not per se restrict consideration of such claims arising in the course of implementation of contract during EOT. On the other hand, principle of natural justice

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demands that none should be allowed to suffer for reason of default not attributable to him.

9.4 I, therefore, reach the conclusion that contention of the Respondent that the relief admissible in such cases of delays (as covered under Clause 5.2. (v) of GCC) is only by way of granting EOT is misplaced. I hold that Claimant has right to all justified Claims arising out of additional costs incurred during the period of EOT granted for reason not attributable to Claimant.”

17. The learned Sole Arbitrator having held that the petitioner was entitled to all justified claims arising out of additional costs incurred during the period of the Extension of Time, clearly erred in not granting such claims placing reliance on the above-mentioned Clauses of the GCC, which had no application to the facts of the case. The learned Sole Arbitrator has not interpreted the above terms of the Contract but has merely applied the same without giving any finding on how they shall be attracted or applied in the facts of the present case. In my view, the Impugned Award, therefore, to the above extent is unreasoned in nature; the same is perverse and cannot be sustained.

18. As far as claim no.12, which was for loss of profit, is concerned, the learned Sole Arbitrator again rejects the same observing as under:-

“22.3 Admittedly, there has been delay for reason not attributable to Claimant. It is also a fact that Claimant is incurring additional expenses on this account for which he has filed several claims which are subject matter of this Arbitration. Reimbursement of such additional expenses, along with add-on of Contractor's element of 15% on cost of materials and labour- to meet all overheads and profit- would constitute the compensation for additional expenditure during EOT.”

22.4 Claimant has put his claim on the premise that he was entitled to per- month - average profit of the order of Rs 24 lacs. No such commitment for this order of profit entitlement to Claimant is seen in the Contract. The hypothesis based on entitlement of per month profit of about Rs 24 lacs that should be accruing to Claimant, is flawed and not backed by any provision of the contractual obligation existing between Claimant and the Respondent. As such the claim for loss of profit based on this calculation is hypothetical and unreal. Claimant is only entitled to compensation of additional expenses incurred on account of prolongation of contract along with add-on of Contractor's element of 15%, wherever applicable, which covers both overheads and profits."

(Emphasis supplied)

19. The above finding of the Arbitrator is premised on the fact that the petitioner has been granted reimbursement of additional expenses along with add-on Contractor's element of 15% of cost of material and labour to meet all overheads and profits. It is the case of the petitioner that such claims in form of claim nos.3, 4, 5 and 7 have been rejected by the Arbitrator.

20. I find merit in the submissions made. Apart from stating that the petitioner has been adequately compensated in form of reimbursement of additional expenses along with add-on element of 15% cost of material and labour, the learned Sole Arbitrator has not given the amounts so awarded to the petitioner. In absence, therefore, this is merely an empty statement and not an Award on the said claim. As rightly contended by the learned counsel for the petitioner, in fact, claim nos.3, 4, 5 and 7 which would, in fact, be in nature of reimbursement of additional expenses, have been rejected by

the learned Sole Arbitrator. The Award insofar as claim no.12 is concerned, therefore, cannot be sustained.

21. Claim no.14 of the petitioner was for grant of the incentives and bonus for early completion in terms of Clause 2A of Schedule 'F' read with Clause 2A of the GCC. The said Clauses of the GCC are reproduced hereinbelow:-

"CLAUSE 2A Incentive for early completion

In case, the Contractor completes the work ahead of scheduled completion time, a bonus @ 1% (one per cent) of the tendered value per month computed on per day basis, shall be payable to the Contractor, subject to a maximum limit of 5% (five per cent) of the tendered value. The amount of bonus, if payable, shall be paid along with final bill after completion of work. Provided always that provision of the Clause 2A shall be applicable only when so provided in 'Scheduled F'.

xxxxxx

Clause 2A

*Whether Clause 2A shall be applicable **Yes***

22. The learned Sole Arbitrator has rejected the above claim of the petitioner observing as under:-

24.2 It is true that the contract is under prolongation for reason of delay not attributable to Claimant. It is also a fact that Clause 2A of GCC provides the incentive for early completion of the contract. However, this Clause would have become operative only if the contract were to complete early. The fact is that the contract is still on and yet to complete- albeit for no default on the part of Claimant. There has definitely been a loss of opportunity to the Claimant for trying for possible gain of bonus, but it is hypothetical to assume that Claimant would have certainly been successful in completing the contract before time if there would have been no delay in availability of sub-station buildings. Also, there is no provision in the Contract which would entitle Claimant to make any claim for loss of the opportunity to earn bonus."

23. The learned counsel for the petitioner submits that once it is accepted that the delay was not attributable to the petitioner, but to the respondent, it was for the Arbitrator to have determined, on facts, if the petitioner could have completed the work within the stipulated period and, therefore, would have been entitled to incentive. He submits that the respondent having failed to perform its obligations in time, could not defeat the claim of the petitioner for timely completion incentive.

24. While I find merit in the submission made, I also find that Clause 2A of the GCC provides that the claim of incentives/bonus for early completion is payable '*along with final bill after completion of the work.*' Admittedly, the work was not complete when the claims were raised by the petitioner. The claim was, therefore, premature in nature and should have been rejected even otherwise.

25. In view of the above, the Impugned Award on claim no.14 is set aside only with respect to the reasons that have been given for rejecting the same and holding that the Claim was prematurely raised by the petitioner before the learned Sole Arbitrator.

26. The petitioner also challenges the Award on Claim no.17, which is the cost of the arbitration proceedings. The learned Sole Arbitrator has directed as under:-

"27.2 Taking into account all aspects of the case, it is deemed proper not to award any costs; both the parties will accordingly bear their own costs."

27. As noted hereinabove, out of 16 substantial claims of the petitioner, 7 claims have been rejected by the learned Sole Arbitrator. The learned Sole Arbitrator, taking into account this

fact, has held that the costs of arbitration are not to be awarded and the parties are to bear their own costs. In my view, no fault can be found with the learned Sole Arbitrator on this account.

28. In view of the above, the Award so far as it rejects claim nos.3, 4, 5, 7 and 12 of the petitioner is set aside.

29. As far as claim no.14 is concerned, the rejection of this Claim is upheld for different reasons that are given hereinabove.

30. The petition is disposed of in the above terms.

31. There shall be no order as to costs.

NAVIN CHAWLA, J

FEBRUARY 8, 2023/rv