



\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI*Date of Decision: 05.07.2023*

+

O.M.P. (COMM) 516/2016 & I.A. 7854/2022**UNION OF INDIA**

..... Petitioner

Through: Mr. Ruchir Mishra, Mr. Sanjiv Kr. Saxena, Mr. Mukesh Kr. Tiwari, Ms. Poonam Shukla, Ms. Reba Jena Mishra, Adv.

versus

M/S RAMACIVIL INDIA CONSTRUCTION PRIVATE LIMITED

..... Respondent

Through: Mr. Avinash K. Trivedi, Ms. Ritika Trivedi, Mr. Anurag Kaushik, Ms. Rhythem Nagpal, Mr. Jatin Arora, Adv.

CORAM:**HON'BLE MS. JUSTICE REKHA PALLI****REKHA PALLI, J (ORAL)**

1. The present petition under section 34 of the Arbitration and Conciliation Act, 1996 (the Act) seeks to assail the arbitral award dated 28.01.2016 passed by the learned Arbitrator. Under the impugned award, eight claims of the respondent/contractor have been allowed by the learned Arbitrator directing the petitioner to pay a sum of Rs. 2,90,05,308/- along with interest @11% per annum.
2. The brief facts as emerging from the record are that on the respondent submitting a bid on 08.11.2010, the petitioner/CPWD awarded in its favour a contract for construction of underground parking at Nirman Bhawan, New Delhi on 07.02.2011. As per the contract entered into



between the parties, the respondent was to commence work on 01.03.2011, with a stipulated date of completion of the work being 28.02.2012. The work was, however, completed belatedly on 30.04.2013 and the scope of the work as initially envisaged was substantially increased. Consequently, the cost of the work increased from Rs. 13.50 Crores to over Rs. 24 Crores, which amount included the cost of extra items, cost of deviation in quantities, escalation of minimum wages of the labour and market rate of the materials.

3. The respondent after accepting the payment towards the final bill under protest invoked arbitration on 07.05.2014 for adjudication of its eight claims and, consequently, in accordance with the agreement between the parties, a sole arbitrator was appointed to adjudicate these claims. These claims included a claim for the balance amount towards extra work done, which amount included the cost of extra items, substituted items and deviated items as also the amount towards escalation under Clause 10C and 10CA of the general conditions of the contract. It was the respondent's case that as the delay in completion of work was solely attributable to the petitioner, the respondent was also entitled to receive incentive bonus under Clause 2A of the agreement.
4. The respondent also claimed interest towards delayed payments and interest on the amount found due towards its various claims. Before the learned arbitrator, the petitioner also raised a counter claim of Rs.5,00,000/- by praying that the respondent ought to bear the entire cost of arbitration.



5. In support of their respective stands, both parties led evidence before the learned Arbitrator who, after considering the pleadings, evidence and submissions of the parties, passed the impugned award. The learned Arbitrator, while accepting the respondent's eight claims and rejecting the petitioner's sole counter-claim, awarded a sum of Rs.2,90,05,308/- to the respondent along with *pendente lite* interest @ 11% per annum. The learned Arbitrator further directed that in case the awarded amount was not paid within 90 days, future interest at the same rate of 11% would also be payable on the awarded amount.
6. For the sake of convenience, the claims raised by the respondent before the learned Arbitrator, as also the counter-claim raised by the petitioner may be noted hereinbelow in a tabular form.

S. No.	Claim No.	Awarded Amount
1.	Claim No. 1	Balance amount of work done including extra items, substitute items and deviation items (Civil): Rs. 6,01,10,289/- Awarded Amount: Rs 20,48,266/-, including 1% additional cost on extra/deviated/substituted items towards working in high security areas.
2.	Claim No. 2	The balance amount of work done including extra items Awarded Amount: Rs. 2,526/-
3.	Claim No. 3	Escalation under Clause 10C and 10CA (Civil work): Rs. 1,22,77,909/-



		<i>Awarded Amount: 1,05,32,289/-</i> <i>(Escalation on cement: Rs 1410520/-)</i> <i>(Escalation on TMT bars: Rs. 31,48,261/-)</i> <i>(Escalation on structural steel: Rs. 34,18,841/- (page 34 of award))</i> <i>(Escalation under clause 10C: Rs. 25,86,428/-)</i>
4.	<i>Claim No. 4</i>	<i>Incentive bonus under Clause 2A of the agreement.</i> <i>Awarded Amount: Rs. 43,22,196/- (page 41 of award) on account of early completion.</i>
5.	<i>Claim No. 5</i>	<i>Bank charges for preparing bank guarantee for the additional amount (i.e 110% instead of contract provision of 100%) of the amount of mobilization advance.</i> <i>Awarded Amount: Rs. 31,190/-</i>
6.	<i>Claim No. 6</i>	<i>Loss of profits and overhead during the extended period</i> <i>Awarded Amount: Rs. 43,23,490/-</i> <i>(Loss of profit: NIL, Loss of overhead: Rs. 43,23,490/-)</i>
7.	<i>Claim No. 7</i>	<i>Amount of compensation wrongly levied under Clause 2</i> <i>Awarded Amount: Rs. 10,13,014/-</i> <i>Held: There was no fault on the part of the contractor resulting in delayed completion and compensation imposed was totally illegal</i>



8.	Claim No. 8	<i>Pursuit, pendente lite, and future interest for delay in payment of running bills, final bill, escalation bills, refund of withheld/deducted amount and due amount not paid, etc from the respective due date of actual payment @ 11 percent per annum.</i>
		<i>Awarded Amount: Rs. 55,76,073/-</i>
9.	Counter Claim No. 1	<i>Arbitration Fee</i>
		<i>Rs. 5,00,000/-</i>

7. Being aggrieved with the award, the petitioner/CPWD has approached this Court by way of the present petition.
8. In support of the petition, Mr. Ruchir Mishra, learned counsel for the petitioner has raised four submissions; the first and foremost being that the learned Arbitrator has while allowing claim no.1, wrongly awarded 1% additional cost for working in a high security area on all the additional items i.e., extra items, deviated items and substituted items, even though there was a specific clause in the agreement which clearly prohibited grant of any such additional costs on any item used in the project on the ground of the contractor being required to work in a high security area. In support of his plea, he places reliance on the additional condition 9.3 of the agreement which reads as under:

“In event of restrictions being imposed by the security agency, or any other authority having jurisdiction, the contractor shall strictly follow such instructions and nothing extra shall be payable to them.”

9. At this stage itself, it may be noted that Mr. Trivedi, learned counsel



for the respondent, fairly does not dispute that as per Clause 9.3 of the agreement, no amount under this head could have been awarded. He, therefore, prays that insofar as the award of 1% additional costs on the derived rates of extra items, substituted items and deviated items is concerned, the same may be set aside.

10. In view of this fair stand taken by the learned counsel for the respondent, this Court need not deal with the aforesaid plea of the petitioner and accordingly, with the consent of the parties, the award in so far as it allows the petitioner's claim towards 1% additional costs on the derived rates of the extra items, substituted items and the deviated items is under Claim 1, set aside.

11. The second plea of Mr. Mishra is that the learned Arbitrator grossly erred in holding that the stipulated date for commencement of the work under the contract stood shifted to 18.11.2011. Merely because the work actually began after 22.08.2011 when a part of the site was handed over to the contractor, the stipulated date would not change. He submits that once the agreement clearly provided that the stipulated date for commencement of work under the contract was 01.03.2011, the learned Arbitrator had no jurisdiction to change this date which was sacrosanct. His plea, thus, being that even if the actual date of commencement of work could be treated as 22.08.2011, i.e., the date when possession of a part of the site was handed over to the respondent or as 18.11.2011 when the complete site was available with the respondent, the stipulated date of commencement of work remained 01.03.2011 itself which the learned Arbitrator failed to appreciate. He contends that the stipulated date for commencement of



work continued to be 01.03.2011 and therefore the respondent's claim for incentive bonus for completion of work within time was not maintainable. Similarly, the petitioner's levy of liquidated damages towards the delay in completing the work could not have been interfered with by the learned Arbitrator and that too when the respondent had been paid a sum of Rs.1.79 crores towards its running bills on 21.10.2011 itself.

12. Even though, this plea of Mr. Mishra appears to be attractive on the first blush, a bare perusal of the impugned award clearly shows that the plea is absolutely meritless and needs to be outrightly rejected. The learned Arbitrator had, after examining the evidence come to a categorical conclusion that on account of delay on the part of the petitioner in handing over the possession of the entire site to the respondent, work could not commence on the initially agreed date of 01.03.2011 and therefore, the date for commencement of work under the contract stood shifted to 18.11.2011. It may be noted that in fact it was the petitioner's own case before the learned Arbitrator that the possession of only a part of the site was handed over to the respondent on 22.08.2011. In this regard, it may be apposite to note the findings of the learned Tribunal on issue (i) as recorded in para 3.3 of the impugned award which read as under.

"Issue No.1: What should be the date commencement and completion of work respectively?

It is noticed that the site was first handed over on 22.08.2011. Permission to cut 35 trees on construction site was obtained from Forest Department on 04.07.2011 and it is matter of record that only part site measuring around 800 sqm was only handed over on 22.08.2011 The Engineer-In-Charge has



calculated delay of 252 days starting from 22.08.2011 and the SE has also acknowledged this fact and extension of time has been, decided presuming date of commencement as 22.08.2011. As such submission made by EE that won has commenced on 01.03.2011 lacks any force behind.

It is also provided under clause 5 of the contract that execution of work shall commence from such time period as mentioned in Schedule-F or from date of handing over of the site whichever is later. It, therefore, leaves no doubt that first date of commencement is to be treated as 22.08.2011 when part site was first handed over to claimant. I do not find any force in the argument advanced by respondents that work has commenced on 01.03.2011 as execution of item no. 54 has commenced on this date and 1st RA bill amounting to Rs.76.91 lac was paid on 21.10.2011 for part execution of only one item no.54. First of all the bill paid on 21.10.2011 after 22.08.2011 does not establish carrying out works at ground before 22.08.2011. The item no 54 has been provided in the contract for temporary removable earth retaining structure Detailed design/drawings for earth retaining structure including its approval from Department and IIT, details soil investigation to locate underground services mobilization of required machinery at site, and carrying out all operations to fully execute the tem at site was under the scope of item no 54. But it does not imply that contractor was barred to start some other activities like starting excavation of earth up to the depth requiring no support on vertical faces Principal approval of design for earth retaining structure was given by department on 24 06.2011 subject to condition that design and drawings shall be got vetted from IT (RD-28). The revised design was approved by IIT or 05.07.2011 (C-37/CD-2). It is also to note that all the underground services like stone water drains, sewer lines, water Ines, electrical cables and MTNL cables have been shined after 22.08.2011 only. It is recorded in hindrance register that revalidated drawings for the proposed work were received from NDMC or 05.08.2011 (page-84/RD-3A) Engineer-in-Charge vide letter dt.26.04.2012 (C- 145/CD-3) has communicated to



claimant date of completion of work as 21 08 2012 therefore, leaves no lots of doubt that first date of commencement of work was 22.08.2011

It is to note that only part site measuring 800 sqm against total area of around 6000 sqm was handed over on 22.08.2011 (RD-14) but even then hindrance free work was not possible because it required shifting of existing paring and underground services As per own admission of EE the existing parking was shifted on 30.09.2011. It is recorded in: hindrance register maintained by respondents that work was obstructed from 22.08.2011 to 30.10.2011 due to non-shifting of electrical cables, fire hydrants and electric poles Main 600 line MTNL cable noticed during excavation was finally shifted on 28.02.2012. As per claimant's letter dt. 17.12.2011 (C-73/CD-2) complete site was handed over or 15.12.2011 after removing all the hindrances from site but by that time existence of MTNL cable was not known. Therefore, was not hindrance free execution during 22.08.2011 to 28.02.2012 when fast hindrance was removed In hindrance register, 80%, 90% & 60% hindrance has been considered during the period from 22.08.2011 to 30 09 2011(because of shifting of parking 22.08.2011 to 30.10.2011 (non-shifting of electrical cables fire hydrants and electric poles) and 12.01.2012 to 28 02.2012 (shifting of MTNL cables; respectively. No work can commence unless hindrance free site is made available to contract. As per provisions of clause 5 provided in the contract date of commencement is to be considered from date of handing over the site. In total, hindrance of 88 days has been justified during the period of 22.08.2011 to 28.02.2012. Therefore, in simple terms, date of commencement needs to be shifted from 22.08.2011 to 18.11.2011 allowing 88 days from 22.08 2011 and accordingly data of completion of work gets shifted to 17.11.2012.

FAO (OS) (COMM) 77/2022

Delhi State Industrial & Infrastructure Development Corporation Ltd. Vs. H.R. Builders

In terms of Clause 2, it is clearly stipulated that the authority as specified under Schedule F of the Agreement is



empowered to calculate the compensation payable at the specified rate if the contractor fails to complete the work and clear the site as agreed. The decision of the specified Authority in regard to the computation of compensation is final and complete and is excluded from the scope of arbitration clause. However, the compensation become leviable only on account of delay. Whether HRB was responsible for delay in maintaining the required progress and completion of the works within the stipulated period was a question which is arbitrable and has been discussed by the Arbitrator in the impugned award."

13. Even before this Court, learned counsel for the petitioner has not denied that, on 22.08.2011, possession of only a part of the site was handed over to the respondent and the possession of the entire site was handed over to the respondent only on 18.11.2011. In my considered view, in the light of this admission by the petitioner, it does not lie in mouth of petitioner to urge that the date of commencement of work remained static and had to be considered as 01.03.2011, the date initially agreed between the parties. Similarly, nothing turns on the petitioner's plea that since a sum of Rs.1.79 crores towards its initial running bills had been paid to the respondent on 21.10.2011, the date of commencement of work could not be treated as 18.11.2011. The fact that petitioner made some part payment to the respondent for the work done prior to 18.11.2011 would not in any manner alter the admitted position that the possession of the entire site was handed over to the respondent only on 18.11.2011, from which date alone the petitioner became obliged to commence work on the site. I, therefore, find no infirmity with the finding of the learned Arbitrator that the date of commencement of



work ought to be treated as 18.11.2011 and accordingly, the date of completion stood shifted to 17.11.2012.

14. Now, coming to the next submission of Mr. Mishra that once the Superintending Engineer had, in accordance with the terms of the agreement levied liquidated damages on the respondent for delay in completion of the work beyond the stipulated date for completion of the work i.e., 28.02.2012, the learned Arbitrator could not have interfered with this decision which lay solely within the domain of the Superintending Engineer. By placing reliance on the decision of the Apex Court in *Mitra Guha Builders (India) Company vs. Oil and Natural Gas Corporation Limited*, (2020)3 SCC 222, he seeks to contend that the aspect of the levy of liquidated damages was clearly a non-arbitral issue and therefore the learned Arbitrator had no jurisdiction to even examine this aspect. He, therefore, prays that the award under Claims nos. 4 & 7 be set aside.

15. In response, learned counsel for respondent, by placing reliance on the decision of this Court in *Delhi State Industrial & Infrastructure Development Corpn. Ltd. v. HR Builders*, AIR 2022 Delhi 165, submits that while the determination of the quantum of liquidated damages was within the jurisdiction of the Superintending Engineer, it was first required to be considered whether any liquidated damages were leviable. He submits that only if it was found that there was delay in completion of the work, could liquidated damages be levied. The question regarding determination of the quantum of the liquidated damages which falls within the exclusive domain of superintending engineer would arise only if it were to be found that there was delay



on the part of the contractor in completing the work. In the present case, once the learned Arbitrator, after appreciation of evidence found that there was absolutely no delay on the part of the respondent in completing the work as the same was completed within the initially agreed period of 12 months, there was no question of levy of any liquidated damages.

16. Having given my thoughtful consideration to the rival submissions of the parties, I am inclined to agree with the learned counsel for the respondent on this issue. In my considered opinion, the question as to whether there was any delay in completing the work on the part of the contractor lies within the domain of the learned Arbitrator who is required to determine the same after examining the evidence led by the parties. In this regard, reference may be made to the observations of the Division Bench as contained in para 24 of its decision in ***Delhi State Industrial & Infrastructure Development Ltd. (Supra)***. The same read as under:

“In terms of Clause 2, it is clearly stipulated that the authority as specified under Schedule F of the agreement is empowered to calculate the compensation payable at the specified rate if the contractor fails to complete the work and clear the site as agreed. The decision of the specified authority in regard to the computation of compensation is final and complete and is excluded from the scope of arbitration clause. However, the compensation becomes leviable only on account of delay. Whether HRB was responsible for delay in maintaining the required progress and completion of the works within the stipulated period was a question which is arbitrable and has been discussed by the arbitrator in the impugned award.”



17.I have also considered the decision in *Mitra Guha Builders (India) Company (Supra)*, relied upon by the learned counsel for the petitioner but find that the same is not applicable to the facts of the present case. In the said decision, the Apex Court was dealing with the aspect of the determination of the quantum of liquidated damages which was found to be a non-arbitrable issue. This is not the question in the present case as it is not the quantum of liquidated damages on which the parties are at variance. It is the respondent's case that there was no delay at all so as to warrant levy of liquidated damages. This question as to whether there was any delay or not in completion of the work could be decided only by the learned Arbitrator and not by the Superintending Engineer who could only fix the quantum of liquidated damages once delay was found. I, therefore, find no merit in the petitioner's plea that the learned Arbitrator has erred in arriving at a conclusion that there was no delay on the part of the respondent in completing the work and, therefore, no liquidated damages at all were leviable.

18.I may now deal with the last submission of Mr. Mishra, who has with reference to claim no.3 urged that no amount towards escalation was payable on the structural steel used in the project as the said steel was removed from site after being temporarily used during the construction. Regrettably, I do not find any merit even in this plea of the learned counsel for the petitioner. Once it is an admitted position that the petitioner had, in accordance with the terms of the agreement borne the charges towards the use of the structural steel despite the



same having been used only temporarily, there was no reason as to why the petitioner should not pay the due escalation on this amount.

19.Despite the extremely narrow scope under Section 34 of the Act and there being an absolute bar on the Court in re-appreciating the evidence or minutely examining the record of the Arbitration proceedings like an Appellate Court, I have on the insistence of the learned counsel for the petitioner considered the award in depth. However, except for the claim in respect of 1% additional cost towards the derived rates for extra items, substituted items and deviated items under the claim no.1, which is being set aside with the consent of the respondent, I have found no reason to interfere with the impugned award.

20.The petition is, accordingly, disposed of by setting aside the award of 1% additional cost towards the derived rates for extra items, substituted items and deviated items as awarded under claim no.1 of the impugned award and clarifying that there is no merit in the other objections of the petitioner.

REKHA PALLI, J

JULY 5, 2023

al