

rajshree

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
ARBITRATION PETITION NO.7 OF 2020

Sukoon Manekia Sethi,	]		
Director of Merint Industrial Infrastructure	]		
Pvt. Ltd.	]	..	Petitioner
vs.			
Project Engineer (SK) Government of India]			
& Ors.	]	..	Respondents

Mr.Ashok Tajane a/w H.M. Khupsare and Yogesh Thorat for the Petitioner.

Mr.Kedar Dighe, Addl. GP for Respondent Nos.1 to 3 – UOI.

CORAM : BHARATI DANGRE, J

DATE : 4th April, 2024.

P.C.

1] Heard Mr.Ashok Tajane, the learned counsel for the Petitioner and Mr.Kedar Dighe, the learned counsel for Union of India.

The Petitioner seek appointment of Sole Arbitrator in the wake of Clause 25(ii) of the Contract entered between the Parties on 06.02.2008, as the disputes have arisen between the Parties, as the Petitioner is denied the escalation claimed by him.

The prayer is strongly opposed by the Government of India, by filing Affidavit in Reply of Mr. K. Sudhakar, Administrative Officer-III, working in the Office of Respondent No.3.

2] On hearing the respective counsel, the sequence of events which has been unfolded before me, would reveal that, on 06.02.2008, the work contract was executed between the Parties, which comprised of distinct clauses and even provided Arbitration as a mode for settlement of disputes.

The Petitioner was awarded a Contract for construction of Medical Cyclotron and its ancillary buildings including public health and internal electric works at Mouza, Chakagaria for Directorate of Construction, Services and Estate Management DAE, Kolkata on 06.02.2008.

The Contract set out the scope of the work, which was accompanied with a detail phasewise programme including supply of material, in order to adhere to the completion timelines and the work was to be completed on or before 19.06.2009.

3] Since the work could not be completed within the period stipulated, upon the request of the Contractor, the period was extended on 20.12.2010, however, the work under the Contract could be completed only on 31.12.2014.

4] The Petitioner, on 29.02.2016, raised its final bill, which included claim for escalation.

On 30.06.2016, the final bill was verified and a Certificate of Contractor was signed by the Petitioner, certifying his accord and satisfaction on the amount in the bill and in this Certificate, the Petitioner accepted all the recoveries, proposed in the final bill and also gave a declaration that there are no other claims from the department including any overheads and it is declared that there shall be no dispute and claim of any measurements at any future rate nor

shall there be any external claim, at a later date.

Accordingly, on 19.12.2016, the first installment was released by the Department in favour of the Petitioner, which was acknowledged, with a request to release the balance payment. This receipt is construed by the Department to be an intimation that the amount under the bill was ready for payment and in fact the first tranche of payment was also released.

On 14.03.2017, the second and the final installment of the payment against the final bill, was also made over to the Petitioner.

On 27.07.2017, the Petitioner disputed the bill amount and it is in respect of this amount, he seek reference to Arbitration.

5] Mr. Dighe, has raised his objection about the claim not being maintainable, firstly as according to him there is no arbitration agreement between the Parties, which argument in my considered opinion, do not lie in the mouth of the Respondent, since the entire work was executed under the Work Contract dated 06.02.2008 and it comprised of an Arbitration clause in form of Clause 25, which contemplated reference of disputes arising out of or relating to contract, designs, drawings, specifications, estimates etc. to be referred to arbitration.

The clause, no doubt is widely worded as it provide that the disputes which arise during the progress of the work or after its cancellation, termination, completion or abandonment, shall be resolved through Arbitration.

Therefore, I am not convinced with the arguments of Mr. Dighe that there do not exist an arbitration agreement between the parties.

6] There is, however, substance in the submission of Mr. Dighe that the arbitration clause which provided remedy of arbitration, is not absolute one and it is hedged by a further requirement provided in the same clause, which read as under :-

“It is also a term of this contract that if the contractor does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the intimation from the Engineer-in-charge that the final bill is ready for payment, the claim of the contractor shall be deemed to have been waived and absolutely barred and the Government shall be discharged and released of all liabilities under the contract in respect of these claims.”

7] It is thus, evident that if the demand for appointment of Arbitrator is not made within a period of 120 days from receipt of the intimation from the Engineer In-Charge that the final bill is ready for payment, then the claim of the Contractor is deemed to have been waived and absolutely barred and the clause even provide that the Government shall then be discharged and released of its liabilities in the contract in respect of the disputes.

8] It is on this ground, the reference to Arbitration is opposed by the Government, by submitting that the first installment was received by the Petitioner on 19.12.2016 and he acknowledged the same, and raised a demand for second installment.

Therefore, it can be readily inferred that the Petitioner had intimation about the payment being ready to be disbursed and computing from this date, admittedly the Petitioner has raised the claim of additional amount in form of escalation after 218 days, necessarily attracting the aforesaid clause and debarring the claim of the Contractor, as it stand waived, not being raised within a period of 120 days.

9] Another reason, for which I do not find the claim raised to be sustainable, is the accord and satisfaction recorded by the Petitioner in the Certificate by the Contractor, when it is categorically stated by him to the following effect :

“Accepted the final bill as full and final settlement of all claims after detail verification and scrutiny of the bill to our complete satisfaction.”

On the accord and satisfaction being expressed, it is not open to the Petitioner to raise the claim for escalation.

10] Apart from this, it is to be noted that the Agreement which was entered between the Parties, in Clause 10 (cc) clearly prohibited any payment of escalation, if the work is executed in the extended contract period. The general principal, which has been pressed into service and particularly the claim of the Petitioner based upon the principle that escalation should be a normal affair in modern inflationary age and reliance upon the decision in case of Food Corporation of India vs. A.M. Ahmed & Co. (2006) 13 SCC 779, is not of any assistance in the present scenario, as the contract between the parties shall be ultimately given primacy. When a clause in the Contract clearly stipulate that there shall be no escalation in a situation, where the period for contract is extended, without establishing that it was at the fault of the employer, the escalation claim cannot be granted.

11] In the wake of above, the accord and satisfaction once having been reached and since there is bar in claiming escalation and particularly when appointment of Arbitrator was not sought, within the period prescribed in the Contract, I do not think that the remedy of

arbitration is available for the Petitioner for resolving the disputes, particularly a belated claim of escalation.

Needless to state that, if other remedies are available to the Petitioner, it can be availed of, barring the remedy of arbitration, under the relevant clause in the Contract.

For the above reasons, the Application seeking the appointment of Arbitrator, stand dismissed.

[BHARATI DANGRE, J]