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

% *Date of Decision: 06.03.2024*

+ **FAO(OS) (COMM) 272/2022**

ARMTECH (INDIA) LIMITED

..... Appellant

Through: Mr Rajesh Gupta with Mr Harpreet Singh, Advs.

versus

GAIL (INDIA) LIMITED

..... Respondent

Through: Mr Vikas Mehta, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

HON'BLE MR. JUSTICE AMIT BANSAL

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J. (ORAL):

1. This appeal is directed against the judgment dated 04.07.2022 passed by the learned Single Judge in O.M.P. (COMM) 20/2020 and O.M.P. (COMM) 33/2020.

2. Mr Rajesh Gupta, who appears on behalf of the appellant, says that the instant appeal is confined to claim no. 3 lodged by the appellant before the learned Arbitrator.

2.1 According to Mr Gupta, claim no.3 concerned the deductions made of amount(s) equivalent to 5% of the value of the electric material supplied by the appellant to the respondent in terms Clause 15A iv(ii) d of the Special Conditions of Contract [in short, "SCC"].



2.2 As per Mr Gupta, electrical materials worth Rs.6,17,00,447/- were supplied by the appellant to the respondent, against which the respondent had retained Rs.30,85,022/-.

3. Mr Gupta submits that since the appellant had restricted its claim before the learned Arbitrator to Rs.30,00,000/-, it was this amount, which was considered while rendering the subject award.

4. Via the arbitral award dated 24.09.2019, the learned Arbitrator had awarded Rs. 30,00,000/- to the appellant towards claim no.3.

5. However, via the impugned judgment, the learned Single Judge set aside the arbitral award to the extent it awarded the aforesaid amount to the appellant against claim no.3.

6. The appellant, being aggrieved, has instituted the appeal to assail the impugned judgment to that extent.

7. Mr Gupta contends that the respondent did, in fact, deduct 5% of the value of the electric material supplied to it, i.e., Rs.30,85,022/-. As noted above, Mr Gupta's argument is pivoted on Clause 15A iv(ii)d of the SCC.

7.1 According to Mr Gupta against bills concerning electric material, the respondent was required to make payments in stages as prescribed in Clause 15A iv(ii)d of the SCC. In this context, Mr Gupta contends that the last 5% of the value of the final bill was to be paid by the respondent after *"obtaining statutory approvals, issue of completion certificate and handling [sic...handing] over to GAIL on furnishing necessary Bank guarantee for defects liability/guarantee/warranty period."*

5. Mr Vikas Mehta, who appears on behalf of the respondent, contends to the contrary.

5.1 Mr Mehta says that the respondent had not deducted any amount in



the final bill in terms of the aforementioned clause i.e., Clause 15A iv(ii)d of the SCC obtaining between the parties.

6. For convenience, the said clause is extracted hereafter:

“15.0 TERMS OF PAYMENT:

A. RUNNING ACCOUNT BILL PAYMENT PROCEDURE

xxx xxx xxx

iv. PAYMENT OF RUNNING ACCOUNT BILLS:

xxx xxx xxx

(ii.) *For items involving supply and erection of equipments. Like DG Set, Transformer, High mask, Internal/External electrification equipment and cables etc., Fire Fighting System etc. terms of payment shall be as under*

xxx xxx xxx

d. *5% of quoted rate of all the items(s) In final bill after obtaining statutory approvals, issue of completion certificate and handling [sic handing] over to GAIL on furnishing necessary bank guarantee for defects liability/guarantee/warranty period...”*

5.2 According to Mr Mehta, the only amount that the respondent had retained was towards Price reduction schedule (PRS) in terms of Clause 27 of the General Conditions of Contract [in short, “GCC”].

6. To be noted, claim no.4 concerns PRS, which concededly, even according to the disputants, concerns liquidated damages. Against claim no.4, the learned Arbitrator has awarded Rs.73,55,229/- to the appellant.

6.1 Claim no.4 has been sustained by the learned Single Judge *via* the impugned judgment.

7. In the course of arguments advanced before us, we examined both the Statement of Claim (SOC) lodged by the appellant as well as the Statement of Defence (SOD) submitted by the respondent.

8. Interestingly, a perusal of the SOC discloses that the amount claimed by the appellant, against Claim no.3 and Claim no.4 are identical i.e.,



Rs.79,17,534/-.

9. Furthermore, the appellant, for reason best known to it, did not advert to the aforementioned clause i.e., Clause 15A iv(ii) d of the SCC while making averments *qua* claim no.3 in the SOC.

10. We also examined the SOD. In the SOD, the respondent made the following assertions vis à vis claim no.3.

“3. **CLAIM ON ACCOUNT OF PENDING RETENTION MONEY – RS.79,17,534.00:**

3.1 *That the contents of para no.3.1 of the Statement of Claim are false, fabricated and misconceived and hence, denied. It is emphatically denied that according to the contract, the respondent was to deduct the cash security deposit @ 5% from each bill. It is further denied that the same was being deducted by the Respondent from each of the running bills of the Claimant and kept in deposit with it.*

xxx xxx xxx

*As regards the contention raised by the Claimant through aforementioned para nos. 3.1 to 3.6, it is submitted that there is no such clause in the Agreement to deduct the cash security deposit @ 5 % from each bill. **The same has not being deducted by the Respondent from any running bills of the Claimant. The perusal of the payment calculation sheet of last paid bill makes it amply clear that no such security deposit was ever deducted.***

However, it is once again reiterated that the time extension granted by the Respondent to the Claimant on each occasion was subject to its right to impose PRS as per Clause 27 of the GCC (General Conditions of contract), which clearly stipulate that in case the Contractor fails to complete the work within the time period as prescribed under the Contract, the Total Contract Price shall be reduced by ½% of the Total Contract Price per complete work of delay or part thereof subject to maximum of 5% of the Total Contract Price by way of reduction in price for delay and not as penalty. Thus, on account of the above provision, the PRS of Rs.73,55,206/- (Rupees Seventy Three Lac Fifty Five Thousand Two Hundred Six Only) was retained, till last paid bill for the delay in execution of work as a reduction in total Contract price for delay and not as penalty. Further, submissions made in this regard in the afore-mentioned Preliminary Submissions, Preliminary Objections and para wise reply may kindly be read as



part and parcel of reply to this para also and contents of the same, are being not repeated here for the sake of brevity.”

[Emphasis is ours’]

11. A perusal of the aforementioned extract from the SOD shows that the stand taken by the respondent was that it had not deducted any amount towards cash security deposit at the rate of 5% from the bills submitted by the appellant.

12. Mr Gupta, however, asserts to the contrary. Mr Gupta says that since the aforementioned clause was in place, *ipso facto* such deductions would have been made as the last 5% of the bill amount was to be released only after the conditions stipulated therein were fulfilled. It was emphasized that even after statutory approvals and completion certificate were obtained, and handing over was done, the balance amount was to be paid against a bank guarantee to secure the respondent’s interest during the defects liability/guarantee/warranty period.

13. In our opinion, the onus was on the appellant to demonstrate that amounts had been deducted, once the respondent had taken the stand that no such deduction was made. It is one thing to have a right under the contract, it is another thing to exercise that right. There is nothing on record that would establish that the respondent had exercised its right under Clause 15 A iv (ii)d.

14. Notably, the learned Single has concluded that although the finding returned by the learned Arbitrator *qua* claim no.3 was not based on material, the parties would be at liberty to reagitate the issue in a fresh arbitration.



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14. Thus, given the foregoing discussion, we are not inclined to interfere with the impugned judgment.

15. The appeal is, accordingly, dismissed.

RAJIV SHAKDHER, J

AMIT BANSAL, J

MARCH 6, 2024/pmc

Signature Not Verified

Digitally Signed By: PREM
MOHAN CHOUDHARY

Signing Date: 12/03/2024
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