



\$~21

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

+ **O.M.P. (COMM) 35/2020, I.A. 856/2020, I.A. 15872/2021**

UNION OF INDIA

..... Petitioner

Through: Ms. Nidhi Raman, CGSC with Mr.
Zubin Singh, Mr. Debcharande, Advs.
with Mr. Chain Singh, AGE(C).

versus

KTECH ENGINEER BUILDERS CO.PVT. LTD. Respondent

Through: Mr. Vikas Mishra, Mr. Nikhil
Chawla, Advs.

CORAM:

HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

ORDER

15.01.2024

%

1. The present petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 challenging the arbitral award dated 25.08.2019 and the corrigendum dated 21-09-2019 passed by Ld. Sole Arbitrator Shri R.P. Singhal in the arbitration case titled "M/s KTech Engineer Building Co. Pvt. Ltd. vs. Union of India".
2. Briefly, the relevant facts of the case are that the petitioner/Union of India floated a tender for 'Provision of Key Location Plant ('hereinafter referred as KLP') for Rashtrapati Bhawan Bn at Delhi Cantt' and invited contractors for inspection of the site plan and to take part in the bidding process for the same. Respondent/ K Tech Engineer Builders Co. Pvt. Ltd. being the lowest bidder was granted the contract for



construction of KLP for Rashtrapati Bhavan Bn and the Petitioner entered into a contract with the Respondent/ K Tech Engineer Builders Co. Pvt. Ltd. for an amount of Rs. 19,48,04,116.67/- (Nineteen Crore Forty-Eight Lakh Four Thousand One Hundred Sixteen Rupees and Sixty-Seven Paisa) and therefore, work order No. – 01 (F) was issued to the respondent to execute the work in two phases commencing from 10.03.2011 and the work was to be completed within 18 months which also included services for Sewerage Treatment Plant's demolition and dismantlement. However, the work got delayed on account of lack of technical supervision which led to defective work and unaccounted delays and furthermore, the progress of the work was slow.

3. Pursuantly the reimbursement for the increase in percentage rates imposition of 'taxes directly related to Contract Value' was to be made only if the contractor necessarily and properly paid additional 'taxes directly related to Contract Value' to the Government without getting the same refunded from the concerned government authority.
4. The respondent was supposed to complete the work of the 1st Phase by 9th March 2012 and 2nd phase by 9th September 2012 which could not be duly achieved and the 1st phase was completed on 30.04.2012 and the 2nd phase got completed by 30.09.2013 and in reference to the same the petitioner issued a completion certificate dated 03.10.2013 and pursuantly, the respondent submitted its final bill vide letter No. KKK/DZ/01/RB/2014/THU, however due to the dispute having arisen between the parties the Respondent vide its letter dated 24.11.2017 invoked the arbitration clause and Ld Sole Arbitrator was appointed in terms of condition No 70 of IAFW – 2249 of GCC. Subsequently, the



impugned award was passed by the Learned Sole Arbitrator in favour of the Respondent which was corrected by the Ld Sole Arbitrator *vide* corrigendum dated 21.09.2019.

5. Learned counsel for the Petitioner submits that the Learned Arbitrator has committed patent illegality and jurisdictional error in going beyond the scope and terms of the contract in awarding the claim amount to the Respondent and therefore, the impugned award suffers from patent illegality and is against the public policy.
6. Learned counsel submits that the entire site was not handed over to the Petitioner at one time which had resulted in the delay regarding the completion of the work and furthermore, the learned arbitrator has expressly ignored the terms of the contract while attributing delay on account of clearance of trees, phased handing of the site and buildings for demolition to the Petitioner and in lieu of the same the respondent should have anticipated the rates after seeing the conditions having effect on the cost of the work.
7. Learned counsel submits that the learned Arbitrator has gone beyond his jurisdiction by observing that instead of extension of time without granting the compensation which was granted to the Respondent, the work should have been suspended by the Petitioner.
8. Learned counsel further submits that despite clear site for work being made available to the Respondent, his progress regarding the work was slow as the Respondent neither had the sources nor the capability to execute the work as agreed under two phases which has duly resulted in delay of handing over the work by the Respondent. Furthermore, it is submitted that though the site for the Sewage treatment plan was made



available, the Respondent did not start work for the next 6 months and on account of this delay, the authorities decided to locate the STP at a different site across the road for a better performance and the delay on this account was clearly attributable to the Respondent.

9. Learned counsel further submits that the extension of time under the contract was granted under clause 11 of the GCC which accounts for delays on account of the Contractor/Respondent and it also provides that no compensation will be granted for the same and learned Arbitrator has deviated from Clause 11 which expressly provides provision regarding the extension of time and has wrongly relied on Clause 7 and Clause 9 of the GCC while awarding compensation to the Respondent.
10. Learned counsel for the petitioner has further submitted that the learned Arbitrator has awarded escalation going beyond the scope of the contract with respect to the material and labour in terms of Clause 30.1 and Clause 63 and this escalation has been provided despite observing that the material had already been procured and had been shifted to another site and then also the Learned Arbitrator has granted escalation on steel and other material which as per the Contract, had to be procured during the contract.
11. Learned counsel further submits that the loss of working hours of the manpower employed on account of security check was not brought to the notice of the Petitioner during the work was going on and therefore the claim on account of loss of working hours because of the new location of the STP in restricted area is in violation of Clause 4 of the SCC is wrongly held and the claim of the Respondent was allowed



without allowing any account of the numbers of labourers or their working hours or any evidence of actual loss suffered on this account. It is further submitted that this fact cannot be ignored that the tender was floated for the project was named as '*Provision of KLP for Rashtrapati Bhawan Bn at Delhi Cantt*' which it itself suggests that the sites, area and scope of the work could be restricted for security reasons.

12. Learned counsel for the petitioner further submitted that the loss of overheads, establishment expenses and loss of profit on account of idling of plant and machinery should not have been granted in accordance with the Emden formula and should have been granted according to the actual loss suffered by the Contractor. Reliance has been placed upon *The Brathwaite Burn & Jessop Construction Company Ltd. vs Rail Vikas Nigam Ltd* 259 (2019) DLT 781 wherein it was *inter-alia* held as under:

“In the absence of proof of loss of profit the Respondent could not have claimed compensation merely on the strength of Emden’s formula”

13. Learned counsel also submits that the learned arbitrator has allowed the duplication of claims with respect to the claims made for escalation, idling of plant and machinery and loss of profit as it is a settled law that once the loss of profit is allowed, an additional amount for idling of plant and Machinery and escalation with interest is only duplication of claims. It is further submitted that the learned Arbitrator has wrongly held that the rate of the material adopted by the Respondent was on the lower side.



14. Learned counsel further submitted that the claims in the Arbitral award have been allowed without strength of any documentary evidence and therefore, the award suffers from perversity.
15. Learned counsel for the Respondent has vehemently opposed the contentions raised by the counsel for the Petitioner and submits that the scope of the interference u/s 34 is very limited and the court does not sit in appeal over the arbitral award and the award can only be interfered on the grounds provided u/s 34(2) (b) (ii) and the legislative mandate to further reduce the cope of the interference is evident from insertion of sub section (2A) which provides that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappréciation of evidence.
16. Learned counsel further submits that as per Section 28(3) of the A&C Act, the tribunal shall decide the dispute by taking into account the contract as opposed to in accordance with the contract and the amendment was brought into place to overrule decisions of courts to the effect that any contravention of the contract would be opposed to public policy. It is further submitted that the learned Arbitrator is the ultimate master of facts and quality of the evidence.
17. Learned counsel for the Respondent has further submitted that the primary grounds raised by the petitioner before the Learned Arbitrator was that the extensions were not granted as per condition 11 C of the GCC and were passed in accordance with Clause 7 and 9 of the GCC, however it is pertinent to mention that the petitioner has taken no ground under this head and without prejudice the same was being answered on merits and furthermore, the extension on 05.10.2012



under condition 11 of the GCC till 31.05.2013 was signed by the Respondent due to the protest. It is further submitted that condition 11 C is void in the light of Section 55 and 73 of the Contract Act and therefore the same is binding on the arbitrator.

18. Learned counsel for the Respondent submits that the learned arbitrator has passed a well-reasoned award on an interpretation of the contract which has found that the correct condition of the GCC for extension is condition 7 and 9 and does not come under condition 11 of the GCC.
19. Learned counsel for the respondent further submits that Clause 27 on the face of it does not apply as the MT section work carried out was more than 1 km from the main site while the STP work was carried out more than 3 km from the main site and furthermore, Clause 27 only applies when there are changes in location (layout plan) and to suit the local condition and /or departmental requirement. It is submitted that none of the two conditions are applied to the claims raised by the petitioner.
20. Learned counsel has further submitted that it is well settled that claims for escalation are permissible for the extended period of the contract and furthermore, there is no bar in the contract with regard to the escalation and even condition 63 of the GCC has been considered and the same has found no bar in this respect.
21. Learned counsel for the respondent further submitted that the contention regarding the procurement of *substantial material* in the initial period of the contract has not been raised before the Learned Arbitrator and it is quite evident from the Statement of claim that the material purchased was approximately 10% of the material required for



the contract and the amount used for purchasing the said material was substantial and therefore it was recorded in such a manner. It was further submitted that the phrase *substantial* had no relation to the total amount of material in the contract.

22. Learned counsel for the respondent also submits that the claim for damages is substantiated with relevant underlying materials and the respondent has placed and furnished all evidence regarding the calculation before the learned arbitrator and use of Emden formula has been approved by the Hon'ble Apex court.
23. Learned Arbitrator after reviewing the entire record and the evidence had concluded and held that the Petitioner was in blatant violation of their commitments because there were several trees on the site that had to be cut down before the work could begin again.
24. Learned Arbitrator also held that since part of the site was under the control of Air Force and needed to be altered, the Petitioner was in default for failing to make the site available to the Respondent. It was further held by the Learned Arbitrator that the Petitioner required 22 months to select the STP's final location which resulted in a delay and the location of the STP was also altered three kilometres from the original location.
25. Learned Arbitrator has further held that the works for the MT section was carried out on a site more than 1 km away from the original site and the petitioner had asked for belated damages which led to the delay in the execution of the project and furthermore, the petitioner has not proposed any changes in the calculations of claims, or the quantum of damages sought.



26. During the course of submission, learned counsel for the petitioner-initiated arguments on the basis of Clauses- 7, 9 and 11 of the general conditions of the contract. However, learned counsel for the respondent submits that these grounds were not taken in the petition filed under Section 34 of the Arbitration and Conciliation Act by the petitioner. Learned standing counsel has fairly submitted that these grounds were inadvertently left to be taken in the petition.
27. Learned standing counsel has further raised the arguments on the applicability of Emden's formula and the award on the grounds of escalation of cost. However, perusal of paragraph No. 52.1 shows that the arbitrator has not merely gone on Emden's formula vide a detailed order. The findings of the Learned Arbitrator have been reproduced as under:
28. Learned counsel for the respondent has submitted that even before the learned arbitrator, the petitioner had not disputed the quantification of the damages.
29. Learned counsel submits that even the documents regarding the expenses have also been filed before this court.
30. The Hon'ble Apex court in **MMTC Ltd vs M/S Vedanta Ltd.** (2019) 4 SCC 163 inter alia held as under:

"11. As far as Section 34 is concerned, the position is well settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii), i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the



fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award.”

31. The coordinate bench of this court in ***Ircon International Ltd vs Afcons Infrastructure Ltd*** 2023 SCC OnLine Del 2350 while discussing the scope of the Hon'ble court under Section 34 of the Arbitration and conciliation Act, 1996 *inter alia* held as under:

The law which has been settled by the Hon'ble Supreme Court is that the scope of interference with an Arbitral Award under Section 34 of the Act, 1996 is fairly limited and narrow. The Courts shall not sit in an appeal while adjudicating a challenge to an Award which is passed by an Arbitrator, the master of evidence, after due consideration of facts, circumstances, evidence, and material before him.

32. This court of the view that the Learned Arbitrator while passing the Impugned award dated 25.08.2019 and corrigendum dated 21.09.2019 has gone through the terms of the contract and has taken a plausible view and this court cannot interfere into the findings of the award and the interpretation of the terms of the contract. Reliance can be placed upon ***State of U.P. VS Allied Constructions*** (2003 7 SCC 396) wherein it was held that the interpretation of a contract, is trite, and the same is the matter of arbitrator to determine. The arbitrator is a judge chosen by the parties and if decision is final. The court is precluded from reappraisal the evidence. In a case where the award contains reasons, the interference there with would still not be available within the jurisdiction of the court unless, of course, the reasons are totally perverse all the judgement is based on a wrong proposition of law. An error apparent on the face of the record would not imply closer scrutiny



of the merits of documents. Once it is found that the view of the arbitrator is a plausible one. The court will refrain itself from interfering.

33. In view of the discussion made, there is no ground to interfere in the award. Hence, the present petition along with pending application stands dismissed.

DINESH KUMAR SHARMA, J

JANUARY 15, 2024/AR..