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Executive Engineer Cd-Ii Vs. M/S J.K. Engineers

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Court : Delhi

Decided On : Dec-22-2014

Judge : Rajiv Shakdher

Appellant : Executive Engineer Cd-Ii

Respondent : M/S J.K. Engineers

Advocate for Def. : Mr. Sandeep Sharma

Advocate for Pet/Ap. : Mr. Aditya Madan

Judgement :

$~35 * IN THE HIGH COURT OF DELHI AT NEW DELHI + O.M.P. 1637/2014 EXECUTIVE ENGINEER CD-II ..... Petitioner Through: Mr. Aditya Madan, Adv. versus M/S J.K. ENGINEERS Through: ..... Respondent Mr. Sandeep Sharma, Adv. CORAM: HON'BLE MR. JUSTICE RAJIV SHAKDHER

ORDER
% 22.12.2014 IA No.25937/2014 (Exemption) Allowed, subject to just exceptions. O.M.P. 1637/2014 & IA No.25938/2014 (u/S151CPC for condonation of delay of 86 days in filing the petition) & IA No.25936/214 (u/S151CPC for stay) 1. This is a petition under Section 34 of the Arbitration & Conciliation Act, 1996 (in short the Act) accompanied by an application for condonation of delay. As per averments made in the application, there is a delay of 86 days.

2. The challenge in the petition is made with regard to the three claims. The first claim is, in fact, a sub-claim, which bears the description: No.1.04. The other claim, which is challenged, is claim No.3, and the last claim, which is under challenge, is claim No.6.

3. Insofar as sub-claim No.1.04 is concerned, it pertains to the rate to be awarded to the respondent herein, with respect to a substituted item. 3.1. As per the petitioner, payments in respect of the substituted item, i.e. item No.1, were made at the rate of Rs.8524.18 per metre. According to the petitioner, the respondent accepted 90% of the payment at that rate and, raised an objection qua the rate, only on, 18.8.2010. 3.2 It is, however, not disputed by Mr.Madan, who appears for the petitioner, that no rebuttal was issued by the petitioner with regard to the letter dated 18.8.2010. 3.3 As is evident upon a perusal of the record, the learned Arbitrator, has accepted the rate of the respondent qua the substituted item, (which is pegged at 10770.44 per metre), and accordingly, awarded a sum of Rs.9,88,486/-. 3.4 To be noted, the said amount has been arrived at by noting the difference between the rates offered by the petitioner and the one which was claimed by the respondent herein. 3.5 It is Mr. Madans contention that the Arbitrator has committed an error, as he has not disclosed, as to why the rate of Rs.8524.28 per metre, was not acceptable vis-a-vis the substituted item. He says that, a rate analysis, in respect of how, the petitioner had arrived at the rate of Rs.8524.28 per metre, was filed with the learned Arbitrator. 3.6 This aspect, however, does not come through upon reading of the award. Mr. Madan says that he will produce the relevant document, which was placed before the learned Arbitrator in this behalf.

4. Insofar as claim No.3 is concerned, the learned Arbitrator has awarded a sum of Rs.11,60,600 against a claim of Rs.16 lakhs. This claim pertains to compensation on account of staff, establishment, overhead and machinery, T&P etc. 4.1. Mr. Madan says that the said amount was not payable in view of the provisions of clause 18(ii) of the contract obtaining between the parties. It is his contention that the contractor was required to manage his labour and machinery, in such way, that it was gainfully deployed, and if, idleness occurred, the financial burden qua that, was to be borne by the respondent. 4.2 Mr. Sharma, on the other hand, contests

this position. 4.3. According to me, the learned Arbitrator has recorded findings to the effect that the site in issue was not made available, at least, not completely. The reason for the same, according to the learned Arbitrator, was that, there were, inter alia, various hindrances in execution of the work and, in particular, a religious structure, was in the way, which the petitioner herein, could not get removed. 4.4 It is also the finding of the learned Arbitrator that, it was precisely for this reason, that extension of time, had been granted by the petitioner qua a period of 395 days; albeit without levy of compensation. 4.5 The Arbitrator was thus, of the view that the respondent had not committed any breach. Based on the aforesaid finding, the learned Arbitrator came to the conclusion that clause 18(ii) invoked by the petitioner, had no applicability as deployment of labour and machinery was not akin to lighting an electric bulb. 4.6. In my view, the learned Arbitrator, who is a retired Additional Director General of the CPWD, based on his experience took a practical view of the matter. In this regard, I may only quote with profit the following observation of the Supreme Court in the case of Municipal Corporation of Delhi vs Jagan Nath Ashok Kumar & Anr. (1987) 4 SCC497 .....5. It is familiar learning but requires emphasis that Section 1 of the Evidence Act, 1872 in its rigour is not intended to apply to proceedings before an arbitrator. P.B. Mukharji, J.

as the learned Chief Justice then was, expressed the above view in Haji Ebrahim Kassam Cochinwall v. Northern Indian Oil Industries Ltd. MANU/WB/0245/1950 : AIR1951 Cal230 and we are of the opinion that this represents the correct statement of law on this aspect. Lord Goddard, C.J.

in Mediterranean & Eastern Export Co. Ltd. v. Fortress Fabrics Ltd. [1948]. 2 All E.R. 186 observed at pages 188/189 of the report as follows: A man in the trade who is selected for his experience would be likely to know and indeed to be expected to know the fluctuations of the market and would have plenty of means of informing himself or refreshing his memory on any point on which he might find it necessary so to do. In this case according to the affidavit of sellers they did take the point before the Arbitrator that the Southern African market has slumped. Whether the buyers contested that statement does not appear but an experienced Arbitrator would know or have the means of knowing whether that was so or not and to what extent and I see no reason why in principle he should be required to

have evidence on this point any more than on any other question relating to a particular trade. It must be taken I think that in fixing the amount that he has, he has acted on his own knowledge and experience. The day has long gone by when the Courts looked with jealousy on the jurisdiction of the arbitrators. The modern tendency is in my opinion more especially in commercial arbitrations, to endeavour to uphold Awards of the skilled persons that the parties themselves have selected to decide the questions at issue between them. If an Arbitrator has acted within the terms of his submission and has not violated any rules of what is so often called natural justice the Courts should be slow indeed to set aside his award.

6. This in our opinion is an appropriate attitude.....

4.7. Therefore, I am of the opinion that the conclusion drawn by the learned Arbitrators based on appreciation of the material placed before him cannot be overturned, merely, because one may have different view of the matter. This is specially so, as the learned Arbitrator, has returned a finding that the respondent had committed no breach, and that, the delay, if any, was on account of impediments, which the petitioner could not get removed. 4.8. I may also take note of the fact that the learned Arbitrator has, in fact, docked, nearly, 50% of the claim by holding that the respondent was required to mitigate its losses.

5. In these circumstances, I am of the view that the challenge to the said claim cannot be sustained.

6. This brings me to the last aspect of the matter, which is the challenge to claim No.6. 6.1 The learned Arbitrator has awarded pendete lite interest at the rate of 9% per annum and future interest at the rate of 12% per annum. 6.2. The period for which interest has been awarded is not in issue before me. Therefore, the challenge to the said claim is also rejected as the rate according to me is reasonable given the facts and circumstances of the case.

7. Insofar as sub-claim No.1.04 is concerned, the Registry will requisition the arbitral record.

8. Mr. Madan, will be at liberty to make efforts on his own and file relevant documents.

9. Renotify on 24.12.2014. RAJIV SHAKDHER, J DECEMBER22 2014 s.pal

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