

(2023) 05 DEL CK 0172

In the Delhi High Court

Case No : First Appeal From Order (OS) No. 162 Of 2019, Civil Miscellaneous
No. 37511, 37514 Of 2019

Engineering Projects (India) Limited

APPELLANT

Vs

Married Accommodation Project

RESPONDENT

Date of Decision : 22-05-2023

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34, 37(1)(b)
Indian Contract Act, 1872 — Section 2(a), 2(b)

Citation : (2023) 05 DEL CK 0172

Hon'ble Judges : Vibhu Bakhru, J; Amit Mahajan, J

Bench : Division Bench

Advocate : Sumit Bansal, Aditya Bakshi, Tulna Rampal, Utsav Garg, Bhagvan Swarup Shukla, Sarvan Kumar, Saksham Sethi, Sunita Shukla

Final Decision : Dismissed

Judgement

Vibhu Bakhru, J

1. The appellant has filed the present appeal under Section 37(1)(b) of the Arbitration and Conciliation Act, 1996 (hereafter 'the A&C Act') impugning an order dated 23.05.2019 (hereafter 'the impugned order') passed by the learned Single Judge, whereby the appellant's application under Section 34 of the A&C Act was rejected.

2. The appellant had preferred the said application impugning an arbitral award dated 17.07.2012 (hereafter 'the impugned award') rendered by an Arbitral Tribunal comprising of a Sole Arbitrator (hereafter 'the Arbitral Tribunal'). The impugned award was rendered in the context of the disputes that have arisen between the parties in connection with a contract for the construction of dwelling units including Allied External Services at Fort William, Kolkata.

3. The respondent (Director General of Married Accommodation Project – DG, MAP) had issued a notice dated 23.08.2005 inviting bids (hereafter 'the NIT') for

construction of dwelling units including Allied External Services at Fort William, Kolkata (hereafter 'the Project').

4. The appellant submitted its bid on 27.03.2006 in response to the NIT. The appellant offered to execute the project at a consideration of Rs. 15,87,65,665/-.

5. The aforesaid bid was accepted by the DG, MAP by a letter of award dated 13.06.2006. Paragraph 2 of the said letter is relevant and reads as under:

"2. On behalf of the President of India, I hereby accept your tender for the lump Sum of Rs.15,87,65,665.65 (RUPEES FIFTEEN CRORE EIGHTY SEVEN LAKH SIXTY FIVE THOUSAND SIX HUNDRED SIXTY FIVE & PAISE SIXTY FIVE ONLY)."

6. The appellant did not deposit the performance security for a sum of Rs. 79,50,000/- (Rupees seventy nine lacs fifty thousand only) as required under the terms and conditions, as per Article 9 of the General Conditions of the Contract (hereafter 'GCC') as applicable to the contract in question.

7. Thereafter, the DG, MAP sent another letter dated 19.06.2006, inter alia, calling upon the appellant to deposit a sum of Rs. 79,50,000/- (Rupees seventy nine lacs fifty thousand only) as performance security within a period of twenty eight days from the receipt of the letter of acceptance (that is, letter dated 13.06.2006). The appellant responded to the said letter, inter alia, stating that it had not received other documents as mentioned in the letter dated 19.06.2006. DG, MAP thereafter issued a formal work order dated 06.07.2006 and called upon the appellant to sign the same.

8. On 25.08.2006, the appellant sent a letter stating that it would not execute the project.

9. The appellant's grievance relates to steps taken by the DG, MAP in regard to other contracts. Apparently, the DG, MAP had issued a Show Cause Notice calling upon the appellant to show cause why a sum of Rs. 23.34 crores not be recovered in connection with the execution of the works for construction of married accommodation for twenty-eight Majors, twelve Captains, and sixty-four ORS at Golconda, Secunderabad. The appellant was also aggrieved at the material time, as sums of Rs. 51,75,000/- and Rs. 3,08,456/- had been unilaterally deducted by the DG, MAP from the amounts as payable to the appellant in respect of the aforementioned works at Golconda, Secunderabad.

10. It is contended on behalf of the appellant that it declined to accept the execution of works for the project as the DG, MAP had unilaterally deducted amounts payable in respect of Golconda Project, which according to the appellant were unjustified.

11. Thereafter, on 26.08.2006, the DG, MAP invoked the Clause of the tender conditions for forfeiture of earnest money furnished by the appellant along with its tender. This was followed by another letter dated 28.08.2006, whereby the DG, MAP called upon the appellant to commence the works failing which it would

terminate the contract and get the same executed at the risk and cost of the appellant under Clause 48 of the GCC.

12. The appellant did not commence the works. The DG, MAP claimed that the appellant was liable to pay compensated damages for breach in performance of the contract. The aforesaid disputes were referred to the Arbitral Tribunal.

13. Before the Arbitral Tribunal, the DG, MAP filed a statement of claim raising the following four claims:

"Claim No.1 : Rs. 4,95,20,214/- towards expenditure incurred for completing the balance work at risk and cost of EPI.

Claim No 2 : Rs. 2,09,110/- Expenditure incurred on preparation of risk and cost contract.

Claim No 3 : Pendentelite interest from 21.6.2007 till the date of award and future interest till payment @18 % pa.

Claim No 4 : Cost of arbitration."

14. The arbitral proceedings culminated in the impugned award whereby the Arbitral Tribunal has awarded a sum of Rs. 3,69,33,760/- in favour of DGMAP against its claim for execution of the Project at the risk and costs of the appellant (Claim no.1), along with interest at the rate of 10% per annum with effect from 06.05.2008 till 17.07.2012. The Arbitral Tribunal has also awarded future interest at the rate of 10% per annum on the awarded amount (Rs. 3,69,33,760/- plus pre-award interest) from 07.07.2012 (the date of the award) till payment. In addition, the Arbitral Tribunal has also awarded a sum of Rs. 30,000/- as compensation for the expenditure incurred on preparation of the contract for re-tender.

15. The appellant has challenged the impugned award, essentially, on two fronts. First, it claims that no concluded contract for execution of the Project came into existence between the appellant and the DG, MAP and therefore, any claim of damages for breach of the contract was unsustainable.

16. The appellant relies upon Clause 19 of the GCC. The relevant extract of which reads as under:

"19.1. Within 28 days of receipt of the Letters of Acceptance, the successful Contractor shall deliver to the Accepting Officer a Performance Security in any of the forms given below for an amount equivalent to 5% of the contract sum.

xx xx xx

Failure of the successful Contractor to comply with the requirements of sub-clause 19.1 shall constitute sufficient grounds for cancellation of the award of work and forfeiture of the Earnest Money."

17. The appellant contends that it did not submit the performance security as

required under the GCC. This was a condition precedent and since the appellant had not performed the condition precedent, the contract did not come into existence. It is also contended on the strength of Clause 19 of GCC that the failure to comply with the requirements of sub-clause 19.1 of GCC – that is, failure to furnish the performance security – would constitute sufficient ground for cancellation of the award of works and forfeiture of earnest money. Since Clause 19.1 of the GCC provided for such consequences for non-furnishing of the performance security, the DG MAP was precluded from claiming any further amount. It is contended that the Arbitral Tribunal erred in not appreciating that the DG, MAP's claim could not exceed the amount of earnest money furnished by the appellant.

18. Second, it is contended that the DG, MAP had failed to prove the actual damages suffered by it and therefore, the award of compensation for breach in performance of the contract was liable to be set aside.

19. We find no merit in the contention advanced by the appellant. The contention that the contract did not come into existence between the parties is plainly erroneous. The DG, MAP had issued the NIT, which was in substance was an invitation to submit offer. The appellant had furnished its bid, which was required to be considered as a proposal (or an offer) in terms of Section 2(a) of the Indian Contract Act, 1872. By the letter dated 13.06.2006, DG MAP unequivocally accepted the appellant's bid (proposal or an offer). With this acceptance, the appellant's proposal became a promise under Section 2(b) of the Indian Contract Act, 1872.

20. The unconditional acceptance of the appellant's bid constituted a binding agreement between the parties. The failure to furnish performance security within the stipulated period, also constituted a breach of performance in the said contract.

21. We find no merit in the contention, that notwithstanding that the appellant's bid was unconditionally accepted, a binding agreement did not come into existence because the appellant had not furnished the performance security.

22. We are unable to find any infirmity in the impugned award or the impugned order rejecting the appellant's contention that the consequences provided under Clause 19.1 of the GCC are the only consequences that would follow from the breach of the obligations to furnish the performance security. Undisputedly, failure to furnish the performance security would entitle the DG, MAP to forfeit the earnest money. However, it is difficult to accept that the DG, MAP's recourse for breach of performance of contract was limited to just that.

23. DG, MAP had re-tendered the aforesaid works and had computed its claim of damages on the basis of the difference in the contract value with the appellant and the lowest tender received pursuant to termination of the contract with the appellant.

24. Clearly, the additional amount required to be paid by the DG, MAP for execution of the project would be an appropriate quantification of the damages suffered. We find no infirmity in the impugned award awarding such compensation to the DG, MAP. The Arbitral Tribunal also granted further allowance of 10% to the appellant on it being a public sector enterprise and had, accordingly, reduced the quantum of damages claimed by 10%.

25. In view of the above, we also find little merit in the contention that the DG, MAP had not proved the actual damages suffered by it. As stated above, the damages were quantified on the basis of the difference between the bid submitted by the appellant, which was accepted, and the bids received on re-tender for the works after the agreement with the appellant was terminated. The DG, MAP had also placed a letter indicating the same amount. Thus, we are unable to accept that the impugned award was rendered without any material on record.

26. It is trite law that the scope of examination under Section 34 of the A&C Act does not entail re-adjudication of the disputes. Unless an arbitral award falls foul of the public policy of India or is vitiated by patent illegality, no interference in the award is warranted. In the present case, we are unable to accept that any of the grounds as set out in Section 34 of the A&C Act are established.

27. The appeal is unmerited and is, accordingly, dismissed. All pending applications are also disposed of.