

(2019) 05 DEL CK 0245

In the Delhi High Court

Case No : Original Miscellaneous Petition No. 1074 Of 2012

Engineering Projects(India) Ltd

APPELLANT

Vs

Married Accommodation Project(Dg Map)

RESPONDENT

Date of Decision : 23-05-2019

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 31(7)(a), 33, 34
Interest Act, 1978 — Section 3

Citation : (2019) 5 R.A.J. 256 : (2019) 261 DLT 561 : (2019) 10 AD(Delhi) 173

Hon'ble Judges : Navin Chawla, J

Bench : Single Bench

Advocate : J.P. Sengh, Manoj Kumar Das, Deepak Kumar, Mrigna Shekhar, Zubin Sengh, Jaswinder Singh

Final Decision : Dismissed

Judgement

Navin Chawla, J

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act") has been filed by the petitioner challenging the Arbitral Award dated 17.07.2012 alongwith order dated 18.07.2012 under Section 33 of the Act correcting certain typographical errors therein.

2. The respondent had issued a tender for construction of Dwelling Units of Majors, including allied external services at FORT WILLIAM, KOLKATA on 17.02.2006. The petitioner participated in the tender process and submitted its tender for the same.

3. The respondent, on 12.04.2006, issued a Show Cause Notice to the petitioner calling upon it to show cause why the petitioner should not be debarred from awarding of work on the ground of its failure to disclose that two earlier works awarded to the petitioner had been cancelled and certain recovery action have been taken against the petitioner.

4. In the Show Cause Notice a further reference was made to a notice for

recovery of Rs. 23.34 crores from the petitioner, for which it was stated that the respondent would be compelled to withhold the said amount till finalization of the disputes in case of any amount becoming due to the petitioner. As noted, this was only as a warning and the show cause was only as to why the petitioner be not debarred from the tender.

5. The petitioner responded to the Show Cause Notice vide its reply dated 20.04.2006. Its prime response to the Show Cause Notice was that the dispute in relation to the other contracts had arisen as a general phenomenon and therefore, they cannot be debarred from consideration on this ground. It is important to note here that the petitioner did not challenge the warning of the respondent that any amount due to the petitioner may be withheld against the recovery of Rs. 23.34 crores in the other contract.

6. The respondent by a letter dated 16.05.2006 claimed that the rates quoted by the petitioner were "freakishly high" and sought reduction of the same. The petitioner, however, by the letter dated 24.05.2006 refused to revise/reduce the rates. The respondent, therefore, by the letter dated 13.06.2006 issued the Letter of Award of Work in favour of the petitioner. The said letter stated as under:-

"3. This contract is allotted the number CA NO. DG MAP/PHASE-1/Kolkata-FW/Army/03 OF 2006-2007, which shall be quoted in all future correspondence in Connection with this contract. Any other CA No mentioned in above referred documents shall be deemed to be amended accordingly.

4. The tender enquiry, your tender, letters referred to above and this letter shall be the sole repository of the contract."

7. By a subsequent letter dated 19.06.2006, the respondent inter alia asked the petitioner to contact the Project Manager MAP who would arrange to issue the order to the petitioner to commence the work and also hand over the site to the petitioner. The respondent further asked the petitioner to deposit a sum of Rs. 79.50 lakhs as performance security within 28 days of receipt of the Letter of Acceptance as also depute its accredited representative empowered to sign the contract documents to attend the office of the respondent on 12.07.2006 to enable the respondent to deliver certified true copy of the Contract for petitioner's use.

8. By another letter dated 06.07.2006, the respondent issued a formal Work Order to the petitioner and forwarded the same for its signatures.

9. The petitioner by the letter of the same day responded to the earlier letter dated 19.06.2006 and informed the respondent that it had not received the documents mentioned in paragraph 5 of the said letter and requested the respondent to send the same at the earliest. The petitioner never raised any grievance on acceptance of the tender by the respondent or to its earlier warning of retaining amounts for the dues of the other Contract.

10. The petitioner only by a letter dated 25.08.2006 informed the respondent that it would not be carrying out the work as the respondent had made a deduction of Rs. 51.75 lakhs on 24.04.2006 and another sum of Rs. 3,08,456/- on 23.06.2006 against the projects at Secunderabad and Hyderabad for the alleged recovery of dues for the Golconda project leading to financial problems for the petitioner.

11. The respondent on 26.08.2006 invoked the earnest money guarantee deposited by the petitioner with its tender document and further by the letter dated 28.08.2006 called upon the petitioner to immediately commence the work failing which the respondent would cancel the Contract at the risk and cost of the petitioner under Condition 48(a) of the General Conditions of Contract (GCC).

12. The petitioner, on the other hand, by the letter dated 14.09.2006 stated that in view of the deduction of amount made in the other contracts, the petitioner did not accept the work order and therefore, Clause 48(a) of the GCC could not be invoked.

13. The respondent, by the letter dated 05.10.2006 again called upon the petitioner to commence the work failing which the respondent would cancel the work and get it executed from another agency at the risk and cost of the petitioner, this time invoking Clause 48(c) of the GCC.

14. Finally on the petitioner's failure to commence the work, the respondent terminated the Contract by the letter dated 30.11.2006 and by a subsequent letter dated 21.06.2007 claimed an amount of Rs. 4,95,20,214.30/- as the risk and cost amount to be recovered from the petitioner under Clause 48 of the GCC. This gave rise to the disputes between the parties, which has been adjudicated by means of the Impugned Award.

15. The learned senior counsel for the petitioner submits that the petitioner was justified in refusing to accept the award of Work. He submits that upon issuance of the Show Cause Notice and reply thereto, no response was received from the respondent on any decision taken on the Show Cause Notice till the respondent finally issued the Letter of Award on 13.06.2006. Without taking a formal decision on the Show Cause Notice and conveying it to the petitioner, the respondent could not have been accepted as the Contractor of the petitioner and bind the petitioner with the same. He submits that in view of the Show Cause Notice, the acceptance of the tender by the respondent can be termed as unqualified and therefore, cannot result in a concluded contract between the parties.

16. The Arbitrator has rejected this contention primarily relying upon the letter dated 16.05.2006 issued by the respondent calling upon the petitioner to reduce the rates offered and the petitioner's response by the letter dated 24.05.2006 by which it refused such reduction. In the opinion of the Arbitrator, this exchange of letters clearly showed that the respondent had decided to withdraw the Show Cause Notice and proceed to consider the tender submitted by the petitioner. I

do not find the approach of the Arbitrator to be incorrect in any manner.

17. The petitioner in its letter dated 24.05.2006, while refusing to reduce the rate, did not enquire about the decision taken on the Show Cause Notice. The very fact that after issuance of the Show Cause Notice and receiving the reply thereto, the respondent had proceeded to call upon the petitioner to offer reduction in the rates work showed that the respondent did not proceed further with the Show Cause Notice, which infact, had threatened to debar the petitioner from all future Contracts.

18. Further correspondence exchanged between the parties also demonstrate that this plea had been taken by the petitioner only as an afterthought. As noted hereinabove, after the issuance of the Letter of Award dated 13.06.2006 and the communication dated 19.06.2006, wherein the petitioner had been called upon to approach the Project Manager MAP for taking over the site of work, the respondent had issued another letter dated 06.07.2006 calling upon the petitioner to sign the formal work order. The petitioner also by its letter of 06.07.2006 without raising any grievance as to how its tender had been accepted by the respondent or that such acceptance amounts to a conditional offer/ acceptance not resulting in a concluded Contract informed the respondent that it had not received the documents mentioned in paragraph 5 of the letter dated 19.06.2006. Therefore, both parties proceeded on a clear understanding that the tender had been validly accepted by the respondent without any conditions. It was only two months after the Letter of Award that by a letter dated 25.08.2006, the petitioner finally declined to execute the work. I therefore, do not find any reason to interfere with this finding of the Arbitrator.

19. It is further contended by the learned senior counsel for the petitioner that as the petitioner had failed to submit the Performance Bank Guarantee required under Clause 19 of the GCC, the only consequence that could be faced by the petitioner was the cancellation of the award of work and forfeiture of the earnest money as provided under Clause 19.2 of the GCC. He submits that Clause 48(a) of the GCC, which provides for cancellation of the Contract for failure of the Contractor to commence the work within reasonable time from the date of handing over of the site has no application to the facts of the present case as the site of work was never handed over to the petitioner.

20. I am unable to agree with the submissions made by the learned senior counsel for the petitioner. Clause 19.2 of the GCC no doubt stipulates that incase of failure of the successful Contractor to submit the performance security within 28 days of receipt of Letter of Acceptance, the respondent may cancel the award of work and forfeit the earnest money, however, at the same time, it does not exclude the application of Clause 48 of the GCC for failure of the Contractor to comply with the orders issued by the respondent and with the other terms and conditions of the Contract. Clause 48 of the GCC is reproduced hereinunder:-

"48. Cancellation of Contract in part or in full for Contractor's Default. If the

Contractor-

(a) makes default in commencing the Works within a reasonable time from the date of the handing over the Site, and continues in that state after a reasonable notice from P.M.; or

(b) in the opinion of P.M. at any time, whether before or after the date or extended date for completion, makes default in proceeding with the Works, with due diligence and continues in that state after a reasonable notice from P.M.; or

(c) fails to comply with any of the terms and conditions of the Contract or after reasonable notice in writing with orders properly issued there under; or

(d) fails to complete the Works, Work order and items of Works, with individual dates for completion and clear the Site on or before the date of completion.

The Accepting Officer may, without prejudice to any other right or remedy which shall have accrued or shall accrue thereafter to Government, cancel the Contract as a whole or only such Work Order(s) or items of work in default from the Contract. Whenever the Accepting Officer exercises his authority to cancel the contract as a whole or in part under this condition he may complete the Work by any means at Contractor's risk and cost provided always that in the event of cost of completion or after alternative arrangements have been finalized by the Government to get the Works completed, estimated cost of completion (as certified by P.M.) being less than the Contract cost the advantage shall accrue to the Government. If the cost of completion or after alternative arrangements have been finalized by the Government to get the Works completed, estimated cost of completion (as certified by P.M.) exceeds the moneys due to Contractor under this Contract, the Contractor shall either pay the excess amount ordered by P.M. or the same shall be recovered from the Contractor by other means. The Government shall also be at liberty to hold and retain in their hands materials, tackle, machinery and stores of all kinds on Site, as they may think proper and may at any time sell any of the said materials, tackle, machinery and stores and apply the proceeds of sale in or towards the satisfaction of any loss which may arise from the cancellation of the Contract as aforesaid.

The Government shall also be at liberty to use the materials, tackle, machinery and other stores on Site of the Contractor as they think proper in completing the work and the Contractors will be allowed the necessary credit. The value of the materials and stores and the amount of credit to be allowed for tackle and machinery belonging to the Contractor and used by the Government in completing the work shall be assessed by the P.M. and the amount so assessed shall be final and binding.

In case the Government completes or decides to complete the Works or any part thereof under the provision of the Condition, the cost of such completion to be taken into account in determining the excess cost to be charged to the Contractor under this Condition shall consist of the cost or estimated cost (as

certified by P.M.) of materials purchased or required to be purchased and / or the labour provided or required to be provided by the Government as also the cost of the Contractor's materials used with an addition of such percentage to cover superintendence and establishment charges as may be decided by the P.M., whose decision shall be final and binding."

21. The Arbitrator, in the Impugned Award has also held that Clause 48(c) of the GCC empowers the respondent to terminate the Contract on failure of the petitioner to comply with the terms and condition of the Contract and thereafter proceed to get the work done and make a claim of risk and cost on the petitioner. This being a matter of interpretation of Contract is not found to be unreasonable and perverse, and cannot be interfered with by this Court.

22. The learned senior counsel for the petitioner further submits that Clause 48 of GCC provides that the decision of the Project Manager for making recovery of damages as risk and cost is final and binding. He submits that in terms of Clause 60 of the GCC, which is the Arbitration Agreement between the parties, any decision of the DG MAP/CCE MAP which is provided to be final and binding between the parties is a dispute which cannot be referred to arbitration. He submits that therefore, the claim of the respondent, being an excepted matter, could not have been referred to arbitration.

23. I do not find merit in the above submission of the learned senior counsel for the petitioner. Clause 48 of the GCC has been reproduced hereinabove. It can be divided into two parts. The first part is the decision of the Accepting Authority to cancel the Contract and make a claim for damages at the Contractor's risk and expense. The second is the quantification thereof which is based on the assessment of the Project Manager, which in turn is stated to be final and binding. It is indeed strange that the Contractor is submitting that even the decision of the Accepting Authority to cancel the Contract and make a claim at the Contractor's risk and cost would be an excepted matter and would be something which is binding on the Contractor and cannot be assailed upon the Contractor. In my opinion, the only decision which is made final and binding between the parties is the assessment made by the Project Manager of the quantification of such damages at Contractor's risk and cost and not the decision of the Accepting Authority to cancel the Contract and make a claim for such damages.

24. Reference in this regard can be made to J.G. Engineers Pvt. Ltd. vs Union Of India And Anr., (2011) 5 SCC 758.

25. In the present case, the petitioner did not even raise this objection of maintainability of the claim before the Arbitral Tribunal.

26. The learned senior counsel for the petitioner further submits that the respondent did not lead any evidence in support of its claim for damages. He submits that the respondent did not place evidence of any payment that had been made to any other Contractor or for the work and therefore, such damages

have been awarded in favour of the respondent without any proof of the same.

27. I am unable to agree with the submission made by the learned senior counsel for the petitioner. The Arbitrator in his Award has recorded that upon cancellation of the Contract, the respondent had issued fresh tender and the claim of damages was made on the basis of the rate that was accepted in this re-tender process. The Arbitrator, infact, thereafter did not award the full claim of the respondent for such damages. The Arbitrator, taking into account that the tender submitted by the petitioner being below the cost and the petitioner being entitled to price preference of 10% being a Government of India Enterprise, awarded only 75% of the cost differential in favour of the respondent. Such award of damages cannot be said to unreasonable or perverse so as to warrant any interference from this Court.

28. Learned senior counsel for the petitioner further submits that the respondent never gave notice to the petitioner before going for risk purchase.

29. I am unable to agree to the submission of the learned senior counsel for the petitioner. As noted hereinabove, the respondent had warned the petitioner of its intent to cancel the contract and go for risk purchase by the letters dated 28.08.2006 and 05.10.2006. The letter dated 30.11.2006 terminating the contract made specific reference to the Condition 48 of the GCC. As noted hereinabove, the respondent thereafter issued a fresh tender and therefore, it was within the knowledge of the petitioner that the respondent had proceeded to make risk purchase at the cost and risk of the petitioner.

30. The learned senior counsel for the petitioner further submits that the Arbitral Tribunal has erred in awarding interest in favour of the respondent from a date prior to the assessment of the damages, that is, prior to the Final Award. He submits that the interest can be awarded on damages only from the date of the assessment of such damages and not a date prior thereto.

31. In *State of Rajasthan and Anr. vs. Ferro Concrete Construction Pvt. Ltd.* 2009 (3) Arb. LR 140(SC), the Supreme Court has rejected a similar argument and held that where there is no express bar in the Contract and where there is also no provision for payment of interest, then the principles of Section 3 of the Interest Act, 1978 will apply in regard to pre-suit or pre-reference period and therefore, where the proceedings are for recovery of damages then from the date mentioned in a written notice given by the person making a claim to the person liable for the claim that interest will be claimed, such interest would become payable. Interest would also be payable in accordance with the provisions of the law governing arbitration.

32. Learned senior counsel for the petitioner submits that there is no provision in the contract providing for payment of interest by the petitioner and the respondent also did not issue any notice claiming interest from the petitioner on such damages prior to the institution of its claim, no pre-award interest was payable.

33. I am unable to agree with the submission of the learned senior counsel for the petitioner. Section 31(7)(a) of the Act empowers the Arbitrator to award interest at such rate as it deems reasonable, for the whole or any part of the period between the date on which the cause of action arose and the date on which the Award is made. Therefore, the Arbitrator was within his jurisdiction to award interest from the date that the cause of action arose, that is, in terms of the Arbitral Award, after the period of one month from the acceptance of the re-tendered process.

34. Learned senior counsel for the petitioner has further held that the rate of interest awarded in the Impugned Award is highly excessive. He submits that the petitioner being a Government of India Enterprise, cannot be saddled with such excessive rate of interest.

35. In my opinion, the Arbitrator has awarded a reasonable rate of interest in the Award and therefore, it does not warrant any interference from this.

36. In view of the above, I do not find any merit in the present petition and the same is dismissed, with no order as to costs.