(2018) 04 DEL CK 0376

In the Delhi High Court

Case No : Original Miscellaneous Petition (COMM) No. 286 Of 2016, 181, 182 Of 2017, Miscellaneous Application No. 6836 Of 2016, 4244, 4245, 7724, 7726 Of 2017

Mahanagar Telephone Nigam Ltd APPELLANT

Vs

Gaurav Enterprises RESPONDENT

Date of Decision : 09-04-2018

Acts Referred:
Arbitration And Conciliation Act, 1996 — Section 34

Citation : (2018) 04 DEL CK 0376

Hon'ble Judges : Vibhu Bakhru, J

Bench : Single Bench

Advocate : Saket Sikri, Junaid Nahvi, Niyati Patwardhan, Dr Anurag Kumar Agarwal, Chelina Chelina

Final Decision : Disposed Of

Judgement

Vibhu Bakhru, J

Introduction

1. The petitioner (hereafter "MTNL") has filed the present petitions under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter "the Act") impugning three arbitral awards (award dated 30.12.2015 in O.M.P.(COMM) 286/2016 and two separate awards dated 15.12.2016 in O.M.P.(COMM) 181/2017 and O.M.P.(COMM) 182/2017) delivered by the Arbitral Tribunal constituted by a sole arbitrator, Mr Ashok Sharma, former CGM (Law), MMTC (hereafter "the Arbitral Tribunal"). The said arbitral awards were rendered in the context of disputes that had arisen between MTNL and the respective respondents in respect of the agreements entered into for laying of cables through trenchless technology.

2. The disputes between MTNL and the respective parties arise from the agreements entered into pursuant to the bids submitted by the respondents in response to the Notice Inviting Tender (NIT) dated 25.11.2002. The controversy

involved in the above matters is similar and the arbitral awards challenged in these petitions are also similar. In view of the above, the petitions are taken up together.

3. For the purposes of addressing the controversy involved in these petitions, this Court would refer only to the facts as relevant to OMP (COMM) 286/2016. The learned counsel appearing for the parties also agree that the decision in the said matter would be determinative of other petitions as well. The arbitral award dated 30.12.2015 impugned in the said matter is hereafter referred to as "the impugned award".

4. The impugned award has been rendered in respect of claims raised by Gaurav Enterprises (hereafter "the respondent") in respect of the work done in performance of the "Agreement for Rehabilitation of Outdoor Plant of GM (N-II) Area" dated 25.02.2003 entered into between MTNL and the respondent (hereafter "the Agreement").

5. The dispute between the parties related to the price payable by MTNL for the work of laying of cables through Trenchless Technology. Whilst, the respondent claims that MTNL was liable to pay for the said work at the rate of Rs. 412/- per meter as agreed under the Agreement, MTNL disputes the same. According to MTNL, the Agreement stood novated in so far as the rates payable for the work is concerned and MTNL was only liable to pay for the same at the rate of Rs. 230/- per meter. By the impugned award, the Arbitral Tribunal has accepted the respondent"s claim that the Agreement was not novated and the respondent would be entitled to recover the differential amount (being the difference between the amount paid at the rate of Rs. 230/- per meter and as computed on the basis of Rs. 412/- per meter). Accordingly, the Arbitral Tribunal has awarded a sum of Rs. 92,58,465/- on account of the balance differential amount for the work done and the security amount. The Arbitral Tribunal has also awarded a sum of Rs. 82,38,765.57/- as pendente lite interest at the rate of 10% per annum from 07.02.2007 till the date of the impugned award. The Arbitral Tribunal has also awarded post award interest at the rate of 12% per annum on the awarded amount from the date of the award till the payment.

6. The controversy involved in the present petition relates to the respondent"s claim for the balance differential amount in respect of the downward revised rates from Rs. 412/- to Rs. 230/- per meter for the work of laying of cables through Trenchless Technology.

7. Briefly stated, the relevant facts necessary to address the aforesaid controversy are as under:-

7.1 MTNL issued a Notice Inviting Tender (NIT) on 25.11.2002 for "rehabilitation of outdoor plant at Saraswati Vihar, Rohini, Badli and Narela, Delhi which included the work of laying of cables through Trenchless Technology". The NIT specifically provided that MTNL reserved its right to award the work to three contracts in the specified ratio of 50:30:20.

7.2 The respondent submitted its bid pursuant to the aforesaid NIT. The said bid was not the lowest bid. The lowest bid was submitted by M/s Carrycon India Ltd. (hereafter "Carrycon?). However, as per the MTNL"s policy, the respondent was also provided the option to carry out portion of the works albeit at the rate fixed in the case of the L-1 bidder (Carrycon).

7.3 On 25.02.2003, the respondent agreed to undertake the work awarded to him at the rate of Rs. 412/- per meter, which was the rate agreed between MTNL and the L-1 Bidder (Carrycon). The parties entered into an agreement dated 25.02.2003 ("the Agreement"). The respondent also furnished a Performance Security of Rs. 1,00,000/-.The Agreement was valid for a period of one year from the date of signing the same.

7.4 Material Management Cell (MM Cell), a division of MTNL issued another Notice Inviting Tender (NIT) on 30.12.2002 for new network creation through Trenchless Technology for the same work of laying of cables through Trenchless Technology. The rates for the said work were discovered to be lower than the rates for the work awarded pursuant to the NIT dated 25.11.2002.

7.5 On 13.05.2003, a meeting was held between MTNL and Carrycon - the L1 bidder - regarding reduction of rates in the new tender for similar work of laying of cables through Trenchless Technology.

7.6 MTNL, by a letter dated 03.07.2003, informed Carrycon that the base rate of Rs. 230/- per meter was approved by the Competent Authority for the work of laying of cables through Trenchless Technology and the said rate would also be applicable for the agreement with Carrycon. A copy of the said letter was also sent to all the contractors. However, the respondent disputes the receipt of the said letter.

7.7 The respondent submitted its first bill dated 09.09.2003 for execution of the part of the work contracted at the agreed rate of Rs. 412/- per meter. However, MTNL cleared the said bill by unilaterally reducing the rate to Rs. 230/- per meter.

7.8 The respondent sent various letters dated 23.08.2003, 29.09.2003, 24.07.2004, 13.08.2004 and 01.09.2004 protesting against the conduct of MTNL in not adhering to the terms of the Agreement and effective payments for the work done at the reduced rate of Rs. 230/-per meter. None of the aforesaid letters were responded to by MTNL. Although, MTNL had disputed the receipt of the aforesaid letters, the Arbitral Tribunal - on the basis of the information disclosed pursuant to the respondent in response to an application filed under the Right to Information Act, 2005 - accepted that the said letters were received by MTNL.

7.9 The respondent, by its letter dated 30.03.2004, requested MTNL to extend the validity period of the contract by a further period of six months. Respondent consented to carry out trenchless digging work at the MM prevailing rate during the extended period. MTNL extended the validity of the contract upto 26.07.2004.

7.10 On 26.07.2004, the work awarded to the respondent was completed.

7.11 On 01.09.2004, the respondent issued a letter to MTNL contending that it had been forced to receive payments at the rate of Rs. 230/- per meter for laying of cables. The respondent issued a notice dated 10.11.2006 for payment of balance amount at the rate of Rs. 412/-per meter but MTNL did not respond to the aforesaid notice.

7.12 Thereafter, the respondent issued a notice dated 14.12.2006 to CGM, MTNL invoking the arbitration clause.

8. Similar dispute was raised before a Coordinate Bench of this Court in OMP 268/2003 captioned "Vichitra Const. v. MTNL" and by an order dated 25.08.2004, it was held that MTNL cannot unilaterally deduct the amount and was directed to release the differential amount of Rs. 182/- per meter on submission of bank guarantee. The respondent sought to rely on the said order.

The Impugned Award

9. Before the Arbitral Tribunal, the respondent filed the statement of claim, inter alia, claiming Rs. 91,58,465/- on account of the difference in the amount payable at the rate of Rs. 412/- per meter (as claimed by the respondent) and Rs. 230/- per meter as paid by MTNL. The claims made by the respondent in its statement of claim are set out below:-

"(a) Amount of Bills

Rs.91,58,465.00

(b) Interest on the above amount @ 18% p.a. from 01.01.2004 to 31.12.2006

Rs.49,45,536.00

(c) Amount of Security withheld and not paid.

Rs.100,000.00

(d) Interest on the above amount @18% p.a. from 01.01.2004 to 31.12.2006

Rs.54,000.00

(e) Litigation Expenses

Rs.1,50,000.00

Total:

Rs.1,44,08,001.00

10. The Arbitral Tribunal framed the following issues:

"(i) whether the respondent is entitled to the amount of Rs. 92,58,465/- including the balance differential amount and the security amount.

(ii) whether the respondent petition is signed, verified and instituted by a duly authorized person. If not whether is liable to be rejected?

(iii) whether the payments made by MTNL at the renegotiated rate of Rs. 230/- per meter were accepted by the respondent and therefore binding on it.

(iv) whether the renegotiation of the rate of Rs. 230/- per meter done with L1 party M/s Carrycon is ipso facto binding on the respondent.

(v) whether the agreement dated 25.02.2003 between the parties made within validity period of one year can be altered unilaterally, without the consent of the respondent, by MTNL."

11. The Arbitral Tribunal held that the parties had entered into a binding agreement and the rates so agreed could not be changed unilaterally. The Arbitral Tribunal also found that after entering upon the Agreement, MTNL had not entered into any negotiations with the respondent.

12. The Arbitral Tribunal also rejected the contention that the respondent had accepted the new reduced rates by its conduct, as the Arbitral Tribunal observed that the respondent had sent letters dated 23.08.2003, 29.09.2003, 24.07.2004, 13.08.2004 and 01.09.2004 protesting against MTNL"s unilateral reduction in the rates with effect from the date of the Agreement. MTNL had disputed the receipt of the letters of protest. However, this was rejected by the Arbitral Tribunal as the respondent had produced copies of certain letters obtained from MTNL pursuant to an application made under Right to Information Act, 2005, which established that MTNL had received the protest letters sent by the respondent.

13. MTNL"s contention, that the invoices raised by the respondent at the rate of Rs. 230/- per meter indicated its acceptance of the reduced rates, was also rejected as the Arbitral Tribunal noted that the first invoice was raised at the rate of Rs. 412/- per meter; however, MTNL had not paid the same. The Arbitral Tribunal accepted the contention that the respondent had raised invoices at reduced rates to avoid any tax complications and the same did not indicate respondent"s acceptance of those rates. The Arbitral Tribunal also observed that the Performance Security was submitted by the respondent taking into account the contractual rate of Rs. 412/- per meter and MTNL had not reduced the value of the Performance Security required to be furnished under the Agreement. The Arbitral Tribunal reasoned that this was perhaps because MTNL was aware of the disputes and desired to hold on to the higher security.

14. It was MTNL?s case before the Arbitral Tribunal that it was not required to enter any negotiations with the respondent as the tender conditions expressly provided that all the negotiations would be held with the L-1 bidder (Carrycon). The Arbitral Tribunal also rejected this contention, as it held that the negotiations with the L-1 bidder referred to in the tender documents were negotiations prior to entering into a binding agreement. Thus, any negotiations with the L-1 bidder after the parties had entered into the Agreement would not bind the parties.

15. In view of the above, the issues struck by the Arbitral Tribunal were decided in favour of the respondent and the Arbitral Tribunal decided the impugned award in favour of the respondent. The Arbitral Tribunal awarded (i) a sum of Rs. 92,58,465/- on account of the balance differential amount for work done and the security amount, and (ii) a sum of Rs. 82,38,765.57/- as pendente lite interest at the rate of 10% per annum from 07.02.2007 till the date of the impugned award, and (iii) post award interest at the rate of 12% per annum on the awarded amount from the date of the award till the payment.

Submissions

16. Mr Sikri, learned counsel appearing for MTNL contended that the Arbitral Tribunal had grossly erred in ignoring the terms of the tender conditions, which formed an integral part of the contract between the parties. He submitted that in terms of Clause 17 of the NIT, the post tender negotiations were restricted to L-1 bidder only. Therefore, the respondent was bound by the agreement negotiated with Carrycon. He submitted that by a letter dated 03.07.2003, MTNL had communicated the decision of the Competent Authority that the base rate for laying of cables through trenchless method would be Rs. 230/- per meter instead of Rs. 412/- per meter. Although, the said letter was addressed to Carrycon, it was also marked to all the other contractors.

17. He further drew the attention of this Court to a letter dated 30.03.2004 communicating the respondent"s acceptance for carrying out trenchless work at the prevailing MM rates. He submitted that the Arbitral Tribunal had erred in not accepting that the same also constituted a novation of the Agreement.

18. The learned counsel appearing for the respondent contested the aforesaid submissions and supported the reasoning as articulated in the impugned award. It is, however, important to note that he readily conceded that the expression "prevailing MM rates" in the respondent"s letter dated 30.03.2004, referred to the rate of Rs. 230/- per meter.

Reasons and Conclusion

19. The Agreement between the parties clearly specifies that the work for laying of cables through trenchless method would be paid at Rs. 412/- per meter. It is also important to note that it is the stated position that MTNL did not enter into any negotiations with the respondent for reducing the rates as set out in the Agreement. MTNL rested its case on Clause 17 of the NIT, which expressly provides that "post tender negotiations are restricted to L-1 bidder only".

20. This Court is of the view that the said clause would be of little assistance to MTNL, as the same must be read in the context of the NIT. The import of Clause 17 of the NIT is to restrict post tender negotiations with the L-1 bidder for firming up the prices and terms at which the offers are to be accepted. The said clause exhausts itself when the parties entered into a definite agreement. The NIT does not contemplate any negotiations after the Agreement is entered into.

The NIT by its very nature is an invitation to submit offers. The bids submitted by the various bidders would result in a binding contract. Since, it is contemplated that after the offers are tendered there may be some negotiations with the respective parties, the NIT expressly provides that the negotiations after receipt of offers would be entered into only with the L-1 bidder. The said negotiations are clearly towards entering into a binding agreement. Once the negotiations crystallize into final terms, all other specified bidders (L-2 and L-3 bidders) may also be awarded works at those rates/terms. Such award would clearly amount to a counter offer, which if accepted, results in a binding contract.

21. In the aforesaid circumstances, once MTNL had quoted the negotiations and made a counter offer to the respondent and other bidders, a binding contract would come into existence with the said counter offers being accepted. The contention, that the bidders would be also bound by any novation of the contract, if any, that may be agreed thereafter between MTNL and L-1 bidder, is unmerited. The Arbitral Tribunal had rejected the said contention and in the opinion of this Court, is rightly so. Clearly, no interference is called for with the decision of the Arbitral Tribunal in this regard. Thus, as far as the work executed during the term of the contract is concerned, MTNL would be liable to pay for the work done at the rates as agreed under the Agreement.

22. Having stated the above, this Court is also of the view that the Arbitral Tribunal had erred in ignoring the effect of the letter dated 30.03.2004. The said letter reads as under:-

"The General Manager (N-II)

MTNL,

Sector-3, Rohini,

Delhi-110085

SUB: REQUEST FOR EXTENSION OF

CONTRACT FOR REHABILITATION WORKS IN NORTH - II AREA.

Dear Sir,

This is with reference to the above-mentioned Contract for Rehabilitation works in North-II Area. We request you to kindly extend the contract again for a further period of 6 months.

We hereby give our consent to carry out the works at the same rates, terms and conditions of the existing agreement and also carry out trenchless digging works at the prevailing MM rates without any enhancement for all the work orders issued during the extended period.

Thanking you,

Yours faithfully,

For Gaurav Enterprises?

23. As noticed above, it was readily accepted that the expression "prevailing MM rates" as referred to by the respondent in the aforesaid letter referred to the rate of Rs. 230/- per meter. Thus, the respondent had requested for an extension in the term of the Agreement and had consented to carry out the trenchless bidding work at Rs. 230/- per meter during the extended period. Concededly, this request was acceded to by MTNL and MTNL had extended the term of the contract. In this view, it was not open for the respondent to now claim that it is entitled to be paid at Rs. 412/- per meter for the work executed pursuant to the work order issued during the extended period (that is, from 30.03.2004 to 26.07.2004).

24. Accordingly, the impugned award, to the extent that it holds that the respondent is entitled to be paid at the rate of Rs. 412/- per meter for the work done during the extended period, that is, from 30.03.2004 to 26.07.2006, is unsustainable and set aside.

25. The amount and the interest awarded to the respondent, consequently, be reduced to the aforesaid extent.

26. It is not disputed that the other contractors (respondents in OMP 181/2017 and 182/2017) had also sent similar letters conveying their consent to execute the works during the extended period at prevailing MM rates, that is, Rs. 230/- per meter. Thus, the arbitral awards in the said cases are also set aside to the extent that the same entitles the said contractors to receive consideration at a higher rate of Rs. 412/- per meter due in the extended period.

27. The petitions are disposed of in the above terms. All the pending applications are also disposed of. The parties are left to bear their own costs.

