

(2012) 11 BOM CK 0115
In the Bombay High Court
Case No : Arbitration Petition No. 164 of 2009

M/s. Angerlehner Structural and Civil Engineering Co.	APPELLANT
Vs	
Municipal Corporation of Brihan Mumbai, 3rd Floor, Annexe Building, Municipal Head Office, Municipal Corporation of Brihan Mumbai, Mahapalika Marg, Fort, Mumbai-400 001	RESPONDENT

Date of Decision : 01-11-2012

Acts Referred:

Arbitration Act, 1940 — Section 34
Contract Act, 1872 — Section 2(a), 2(b), 2(e), 7

Citation : (2013) 1 ABR 187

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : Zal Andhyarujina with Ms. Dohita Lewis, Mr. Javed Gaya, Ms. Vidya Choudhari and Ms. Mona Malvade instructed by Chamber of Javed Gaya, for the Appellant; Kevic Setalwad, with Ms. Daisy Dubash and Mr. Harshad Pimple instructed by y S.H. Ujjainwala, for the Respondent

Final Decision : Dismissed

Judgement

Anoop V. Mohta, J.—The Petitioner, a contracting company governed by the laws of Austria and carries out engineering works including trenchless rehabilitation of underground pipes, sewers and water construction and also sewer rehabilitation, all over the world. The Respondent is a statutory body and is in-charge and responsible for the disposal and maintenance of sewers in the city of Mumbai. The Petitioner has challenged award dated 11 July 2007 passed by the majority learned Arbitrators. The minority learned Arbitrator's award is in favour of the Petitioner.

2. The majority Arbitrators have dismissed the claim for payment of dewatering in the additional stretch and thereby rejected all other claims. The background of facts as per the Petitioner revolving around the alleged claim is relevant.

3. In the month of August 1999, bids were invited by the Mumbai Municipal

Corporation (for short, MMC). On 21 September 2000, the MMC addressed a letter to the Petitioner, awarding them the Contract that included dewatering (Item No. 3 of BOQ). On 18 February 2000, the Petitioner's representatives attended a meeting in Mumbai to give a comprehensive and exhaustive demonstration of the MCS System to the representatives of the MMC. On 2 March 2001, the contract bearing reference No. SO-CA-02 ("contract") was executed and entered into by and between the parties. The contract was initially for a period of 24 months, but was extended on justifiable grounds to nearly 29 months with the date of commencement as 11 January 2001 and the extended date of completion as 31 May 2003. Under the contract, the Petitioner was to undertake the rehabilitation of sewers at, inter alia, package No. 9 being rehabilitation of (760 x 1140 mm) ovoid brick-masonry sewer running along Keshavrao Khade Marg, which includes sewer line portion from MH No. 1 to 8 and 14 to 21 of the Keshavrao Khade Marg (package No. 9). For unknown reasons the sewer at package No. 9 intermitted sections, i.e. the portion crossing the Western Railways tracks from manhole No. 8 to No. 14 near Mahalaxmi Station were left out in the BOQ/contract. Therefore, MMC proposed to the Petitioner to take up the portion of sewer below the railway lines (177.5 mm.) in package No. 9 (Additional stretch)

4. On 14 March 2001, letter from the Engineer (MMC) to the Petitioner, informing them that M/s. TTI consultants have been appointed as the "Consultants" under the contract. On 13 December 2001, the Petitioner offered the consultant to undertake a feasibility study of Additional Stretch at package No. 9. On 21 December 2001, the Petitioner's letter to the Consultant informing them that due to the existing silt and high level of water inside the sewer line, a feasibility study was not possible unless and until there is a confirmation for desilting. On 3 January 2002, the consultant's letter to the Petitioner informing that as a result of the site visits in package No. 9 the chief engineer had approved to continue the desilting works with applicable BOQ rates in the intermediate section at the railway crossing with a total additional length of 335.4 m.

5. From 12 February 2002 to 27 March 2002, the Petitioner commenced the desilting works, which could only be carried out under dewatered condition. The Petitioner requested the MMC for approval of further works for Additional Stretch at package No. 9 prior to commencement of works. Consultant completed his study of variation in quantities and confirmed that works "as per master plan" to be taken up by all contractors.

6. On 9 September 2002, in accordance with the minutes of meetings the Petitioner was to proceed with GRP lining works at the intermitted section (package No. 9) On 8 February 2003, consultant's letter to the Petitioner.

7. From September 2001 to 8 February 2003, time taken by the Consultant to conduct the scrutiny of additional works. On 17 February 2003, since the extended completion date of the contract was 31 May 2003. The Petitioner informed the Engineer that completion within the contract period was not

possible.

8. On 10 May 2004, the Consultant's letter addressed to the Petitioner that payment for providing dewatering at package No. 9 is not to be conceded. On 15 May 2004, the Petitioner's letter to the Engineer informing him that they did not agree with the opinion of the Consultant that no payments are due for dewatering. The Petitioner gave the notification of dispute to the MMC to call the Dispute Review Expert (DRE). On 31 May 2004, the Petitioner's letter addressed to the MMC informing them that they will forward the dispute regarding providing dewatering for additional works under the "master plan" at package No. 9. On 27 July 2004, MMC's reply to the issue presented by the Petitioner before the DRE. On 6 August 2004, the Petitioner's response to the reply of MMC.

9. On 23 September 2004, the recommendations of the DRE recommending the MMC to make payment for dewatering for the railway crossing portion at 80 USD per meter for the actual length involved = price adjustment payable under clause 70 corresponding to the relevant period of execution= interest at the rate provided in the contract for delayed payment from a date 42 days after date of claim of the Petitioner i.e. 25 November 2003.

10. On 5 October 2004, notice of Arbitration given by the Petitioner to the MMC nominated Dr. Harold Wagner as its Arbitrator. On 19 October 2004, the MMC's letter proposing Mr. Sharad Upasni to be their Arbitrator in relation to this dispute. On 15 December 2004, reference made to President of institute of Engineers (India) to appoint a third and presiding arbitrator. On 26 April 2005, the president of Institute of Engineers (India) appointing Mr. S.L. Garg to be the third and presiding arbitrator. On 7th July 2005, the president of Institute of Engineers (India) reappointing Mr. S.L. Garg to be the third and presiding arbitrator. On 27 June 2007, the Arbitral Award of Dr. Harold Wagner in favour of the Petitioner. On 11 July 2007, the majority Arbitral Award of Mr. S.P. Upasani and Mr. S.L. Garg rejecting the Petitioner's claim entirely.

11. The learned Arbitrator, after hearing both the parties and considering the nature/concluded contract, terms and conditions and the material placed on record rightly rejected the claims. Both the learned Counsel read and referred the documents and material placed on record including the reasons given by the Arbitrators, the majority, as well as, the minority. The relevant factors in the present matter as considered by the majority Arbitrators are in the following words.

22 We have carefully considered the facts on record, information filed as per the direction of the Arbitral Tribunal, legal arguments advanced by both the sides and clarifications/explanations given by both the parties on points mentioned during the hearing and all written as well as oral submissions of both the parties. Following are the admitted facts in this dispute.

a) The length between MH No. 8 to MH 14 of the sewer along the Keshavrao Khade Marg was not part of the contract No. SO-CA-02 or package 9.

- b) By letter dated 13-12-2001 the Claimant proposed to undertake the work in the length not covered earlier subject to feasibility study and arranging permit from the Railway authority by the Respondent.
- c) In the remarks on retransmitted letter of 13-12-2001 the Respondent informed the Claimant that under the circumstances explained, you are requested to undertake the preliminary surveys so as to add the said Railway Crossing in between the Contract Lengths and give feasibility report (survey at your cost).
- d) By letter dated 21st December 2001 in reply the Claimant informed that the feasibility study can only be carried out subject to condition of confirmation for desilting.
- e) By letter dated 3-1-2002 the Engineer approved desilting with applicable BOQ rates in the intermittent section.
- f) By the letter dated 15th April 2002 the Claimant submitted feasibility report without asking any payment for dewatering.
- g) By letter dated 9th September 2002, completion of package 9 was declared without claiming for dewatering.
- h) Till handing over the work of package-9, on 24-6-2003, the Claimant did not issue any notice of claim for dewatering.
- i) Payment for desilting was claimed in IPC of June 2002.
- j) Claim for dewatering is made on 25-11-2003.

23. The Arbitral Tribunal has also noted that there is no variation order given for work in the Additional Stretch under the Contract SO-CA-02 in respect of feasibility report. However there are certain letters exchanged between the parties which constitute proposal, acceptance and agreement for conduct of feasibility study. The Arbitral tribunal has also carefully considered the Clauses 2.2 and 2.3 of the Contract between the parties under which the Engineer and Consultant have powers to delegate work to the Contractor. The Tribunal has taken into consideration the provisions relating to "Interpretation clause" given in the sections 2(a) on "proposal", 2(b) "acceptance of proposal", and 2(e) "agreement" in the India Contract Act, 1872 and provisions of section 7 which provides "in order to convert a proposal into a promise, the acceptance must be absolute and unqualified.

24. Based on the documents and facts placed before the Arbitral tribunal and the provisions of the Indian Contract Act the Tribunal had no hesitation to come to conclusion that taking into consideration the proposal made by the Claimant on 13-12-2001 to the Consultant for conducting feasibility study, the acceptance remarks of the Consultant on the retransmitted letter of 13-12-2001 that the survey to be conducted at the cost of the Claimant and subsequent letter dated 21st December 2001 by claimant to the Consultant regarding desilting and reply

dated 3-1-2002 from consultant informing the approval of the Chief Engineer (SO) for desilting with applicable BOQ rates in the intermittent section all prove that the Claimant had agreed to conduct feasibility study on payment for desilting. It is also on record that by letter dated 15th April 2002 the Claimant submitted feasibility report without asking any payment for dewatering. Even in the letter dated 9th September 2002 from the Claimant declaring completion of the work of Package 9, the Claimant had not raised the question of payment for dewatering. No notice of any claim was issued till the work of package 9 was handed over on 24-6-2003. Thus both on the basis of documents before us and subsequent conduct of the party the Arbitral Tribunal has no hesitation to conclude that the Claimant has failed to establish his claim for payment for dewatering in the Additional Stretch and hence it is rejected. Therefore the question in looking into claim on account of adjustment clause and interest also does not arise.

12. The reasonings so given above, and also the reasons given by the learned Dissenter, I am inclined to observe that there is no case made out by the Petitioner to interfere with the majority award. It is well within the framework of law and the record. There is no perversity. The view so expressed is plausible and possible based upon the nature and the terms and conditions of the contract. The Petitioner in no way entitled for payment of dewatering at the additional Stretch, as there was no contract whatsoever. The Petitioner failed to prove the contract, specifically for the claim so raised. The learned Arbitrators rightly considered the nature of contract and the work so permitted to be carried out by the Petitioner. The scope and purpose of Section 34 of the Arbitration Act is quite restrictive. The admitted facts, as recorded above based upon the material, destroys even the case and the claims so raised. These admitted documents have been rightly considered by the learned Arbitrators. The Petitioner failed to destroy the Respondent's case and/or unable to bring on record further contra material, in their support. Admittedly the feasibility report was submitted. No such demand was raised at the appropriate time. The party who raises the demand, must prove the same by leading and supporting the documents including the validity and the supporting binding contract. In the present case, as recorded rightly by the learned Arbitrators, that there exists none. The rejection of other connected claims, therefore, also need no interference, except the costs so awarded. Resultantly, the Petition is dismissed. No order as to costs.