(2019) 03 DEL CK 0016

In the Delhi High Court

Case No : Original Miscellaneous Petition (COMM) 264 Of 2016

M/S National Buildings Construction Corporation — APPELLANT

Vs

Raj Kishan & Co & Anr — RESPONDENT

Date of Decision : 06-03-2019

Acts Referred:

Code of Civil Procedure, 1908 — Order 5 Rule 20
Arbitration and Conciliation Act, 1996 — Section 34

Citation : (2019) 03 DEL CK 0016

Hon'ble Judges : Prathiba M. Singh, J

Bench : Single Bench

Advocate : Sanjeev Mahajan

Final Decision : Disposed Off

Judgement

Prathiba M. Singh, J

1. The Petitioner - M/s. National Buildings Construction Corporation (hereinafter 'NBCC') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter, 'Act'), challenging award dated 10th July, 2014 passed by the Ld. Sole Arbitrator. NBCC had awarded a contract in relation to General Civil Works - 1 GCW pertaining to main plant area in respect of NTPC's Rh STPP, Stage II (2 x 500 MW) P.O. Bizpur District Sonebhadra U.P. vide letter dated 23rd August, 2002. Various bills were raised during the course of execution of the work which were paid. The Contractor disputed some short payments and raised various claims against NBCC. NBCC filed its counter claims seeking liquidated damages as also compensation for getting the contract executed at the risk and cost of the Contractor. The Ld. Arbitrator has examined the documents and evidence in detail and awarded some of the claims of the Contractor and some counter claims of NBCC.

2. Notice was issued on 15th May, 2015 in this petition. Repeated attempts were made to serve the Respondents, however, the same were futile. An application

under Order V Rule 20 CPC was moved by NBCC and the Respondents were served by way of publication.

3. Matter has been taken up for arguments today. Mr. Sanjeev Mahajan, Ld. counsel for Petitioner - NBCC has addressed his arguments. None has appeared for the Respondents. The Respondents are, accordingly, proceeded ex-parte.

4. The grievance raised by the Ld. counsel for NBCC is in respect of Claim Nos.1, 2, 6 & counter claim no.2. Each of the said objections are dealt with below.

A. Claim No.1 - A sum of Rs.6,83,068/- being the balance payment for work done not measured/not paid, short measured/short paid for work allowed to be done.

5. On this claim, the Ld. Arbitrator has awarded a sum of Rs.6,83,068/-in favour of the Contractor. The grievance of NBCC is that the said claim is related to work, which was not measured, however, the Ld. Arbitrator has misinterpreted the same. Reference is made to the claim petition to submit that nowhere were the details of various short payments, as awarded by the Ld. Arbitrator, been given in the claim petition. Ld. Arbitrator has wrongly awarded the sum claimed by NBCC.

6. A perusal of the award shows that the Ld. Arbitrator has gone by the written arguments filed by the parties. Short payments in the various RA bills are covered in claim no.1. The written arguments by the Contractor show the manner in which there were short payments in the 5th RA bill, 6th RA bill and 7th RA bill. In the written submissions filed by NBCC, it is stated that the Contractor never came for the joint measurements and hence the measurements were carried out by NBCC and bills were paid. However, the Contractor itself had valued the work carried out as being Rs.54,66,093/-and the amount of Rs.52,69,684/- stood paid to the Contractor. Thus, the difference between the admitted work executed and actual payment made was only Rs.1,96,409.77/-. Since these figures are based on the measurements taken by the Contractor itself, the amount of Rs.6,83,068/-could not have been awarded. Difference between the admitted work executed and the payment made is all that the Contractor is entitled to. Accordingly, this claim is restricted to Rs.1,96,409.77/-.

B. Claim No.2 - A sum of Rs.2,50,831/- being the escalation as per contractual provisions for the work executed

7. This claim deals with payment of escalation. The Contractor claimed escalation on the basis of various indices, which were applicable to the contract. A perusal of the written submissions before the Ld. Arbitrator shows that the Contractor argued as under:

"Claim No.2:

A sum of Rs. 2,50,831/- being the escalation as per contractual provision for the work executed.

The statement of fact of this claim is available at page 14 of book No.1, the counter statement of facts of the Respondent is available at page.12 of vol. No. IV & the rejoinder of the claim is available at page 16 of vol. No.V. Similarly the justification/annexure of the claim is available at page 50 of Claimant's submission i.e. Book No.I.

The contract provides for escalation clause No.16 of Special Condition of Contract and accordingly claimant is entitled for escalation in the terms of contract agreement from the date of start of the project. However, Claimant agrees that the calculation done by the Respondent is acceptable to the Claimant and Claimant is entitled to get a sum of Rs.1,26,343.96 and same be awarded in favour of the Claimant."

8. In the written arguments of NBCC also, NBCC states as under:

"It would be relevant to point out that the escalation, which is payable has already been provided/paid by the Respondent. The same is evident from the Page 1 of the Measurement Book No.II filed by the Respondent before this Tribunal."

9. Award of the Ld. Arbitrator merely grants the admitted amount in the following terms.

"28. Claim No.2 - The claimant has claimed Rs.2,50,831/- as escalation amount. The respondent on the other hand admitted that the claimant is entitled to Rs.1,26,343.96 in this claim the claimant in written arguments accepted this amount. So, I allow this amount."

10. Since the Ld. Arbitrator has only awarded the admitted amount of Rs.1,26,343.96/-, the award on this claim does not warrant any interference.

C. Claim No.6 - A sum of Rs.6,15,516/- being the cost of aggregate handed over to the department

11. This claim relates to the value of the aggregate handed over by the Contractor, which was utilised by NBCC. In the reply by NBCC to the claim petition, it is not disputed that the aggregate was present at the site and utilized by the subsequent Contractor. However, the exact amounts are disputed on the ground that due credit was given to the Contractor. Ld. Arbitrator, on this claim, has held as under:

"32. Claim No.6 - Rs.6,15,516/- are claimed as cost of aggregate taken over by the respondent. The respondent has admitted that aggregate belonging to the claimant lying in the batching plant was taken over by the respondent. The respondent pleaded that the value of the said material has been credited to the account of the claimant but the respondent has not disclosed as to what was the value of such material. In R-48, dt.23rd March, 2004, the respondent admitted that the aggregate belonging to the claimant was handed over to M/s. Shanker Brothers. Thus, I accept the claim of the claimant in this regard amounting to Rs.6,15,516/-."

12. A perusal of the above shows that though the plea of NBCC was that the credit was given for the value of material, however the exact amount for which credit was given was not disclosed. Since it is admitted that the aggregate belonging to the Contractor was handed over to M/s. Shankar Brothers, i.e., the subsequent Contractor, Ld. Arbitrator took the value as given by the Contractor as credit and awarded the same. In the absence of any proof by NBCC, as to in what manner the aggregate was valued for, and what was the amount of credit given to the Contractor, the award on this claim is upheld.

Counter Claim No.2 -

13. NBCC by way of this counter claim sought to impose liquidated damages on the Contractor for delays in the execution of work. The Ld. Arbitrator rejected this counter claim with the following observations.

"Counter - Claim No.2 - Rs.34.50 lacs are claimed as liquidated damages on account of delay which occurred in execution of the work. According to the claimant, 38 weeks delay had occurred in executing the contract on the part of the claimant. The respondent has been already awarded damages while allowing counter claim No.1. The question of awarding any liquidated damages thus does not arise. The respondent has not shown that due to delay in executing of the contract the owner NTPC had levied any liquidated damaged. Thus, this counter claim is rejected."

14. It is relevant to point out that counter claim no.1, which was awarded by the Ld. Arbitrator to NBCC, was a sum of Rs.38,56,000/- for getting the work executed at the risk and cost of the Contractor by a third party Contractor - M/s. Shankar Brothers. Since this amount was already awarded to NBCC, the Ld. Arbitrator came to the conclusion that liquidated damages are not liable to be awarded.

15. NBCC cannot seek double benefit for the delays. Considering the delays, NBCC's act, of getting the remaining work executed through a third party Contractor, was recognized by the Ld. Arbitrator and compensation towards the same was awarded to NBCC. Over and above the same, further liquidated damages would, therefore, not be liable to be awarded to NBCC. The view of the Ld. Arbitrator is correct and is, accordingly, upheld.

16. OMP is disposed of in the above terms.