(2015) 01 DEL CK 0264

In the Delhi High Court

Case No : Arb. P. 483/2013

Wadia Techno-Engineering Services Ltd. APPELLANT

Vs

Commissioner, North Delhi Municipal Corporation and Others RESPONDENT

Date of Decision : 29-01-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(6)
Delhi Municipal Corporation Act, 1957 — Section 478(2)

Citation : (2015) 01 DEL CK 0264

Hon'ble Judges : S. Muralidhar, J.

Bench : Single Bench

Advocate : Meenakshi Arora, Senior Advocate and Shambo Nandy, for the Appellant; Sunil Goel, Advocates for the Respondent

Final Decision : Disposed off

Judgement

Dr. S. Muralidhar, J.—This petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (''Act'') seeks appointment of an Arbitrator to adjudicate the disputes between the Petitioner Wadia Techno- Engineering Services Ltd. (''WTSL'') [formerly known as Gherzi Eastern Ltd. (''GEL'')] and the North Delhi Municipal Corporation (''NDMC''), the successor entity to the Municipal Corporation of Delhi (''MCD'').

2. The background to the petition is that on 16th August 2004, an Advisory Services Agreement (ASA) was executed between the GEL and MCD for rendering consultancy services in connection with a Civic Centre at Jawaharlal Nehru Marg, Minto Road, New Delhi. GEL was to render Project Management Consultancy (''PMC'') for the construction of the aforementioned Civic Centre. The Petitioner submitted a bid for Rs. 4.77 crores which was accepted by the MCD. The value of the PMC was quantified as a percentage of the total project cost of Rs. 376 crores. The project cost later increased to Rs. 545 crores.

3. The project was scheduled to be completed within 36 months from the effective date of the construction, i.e. on or before 5th May 2008. WTSL states

that the project was not completed within the stipulated period for various reasons, none of which was attributable to it. However, it continued to render its services even beyond the scheduled date of completion. Even on 19th April 2007, anticipating the likely extension of the time period for completion of the contract, GEL wrote to MCD stating that it was being put to tremendous financial pressure due to slow progress work; that it had received only 19% of the total fees although 67% of the construction period was over; it had already deployed 318-manmonths against 272- manmonths of key personnel as per the manning schedule. Consequently, GEL requested MCD to release the balance fee due to it and also enhance its fee for the period beyond 1st May 2008 at 50% over the salary stated in the ASA as per actual manpower deployed, including other services like transport etc. Several reminders were sent in this regard thereafter. After the contractor was given extension of time up to 31st December 2008, GEL again wrote to MCD on 9th May 2008 claiming for extra wages for the period beyond 5th May 2008.

4. It appears that the question regarding payment of compensation to be paid to GEL for the extended period was discussed at the 43rd Meeting of the Project Implementation Committee (''PIC'') held on 21st May 2011. The minutes of this meeting was circulated two months later on 21st July 2011. Para 5 of the said minutes recorded as under:

"5. Compensation of fees for extended period to M/s. Gherzi Eastern Limited i.e. PMC for Civil Centre Project. As proposed by Steering committee, the matter of Compensation of fees for extended period to M/s. Gherzi Eastern Limited i.e. PMC for MCD Civil Centre Project was put up in PIC and discussed in detail. It was decided that the PMC may be compensated as per Case IV upto June 2011 only as No extra payment for the work of Council Hall, Meeting halls, "C" Block finishing work and any other extra items executed by contractor shall be admissible to PMC. Further, PMC assured that they will not claim any further compensation of fee for any extended period beyond June 2011."

5. In terms of the aforementioned minutes, the compensation amount for the extended period up to June 2011 was Rs.135.89 lakhs. According to GEL it was coerced into accepting the said sum as it was in dire need of finances to carry on its day-to-day activities. GEL states that the minutes of the 43rd Meeting was not recorded properly. As soon it received the aforementioned minutes circulated on 21st July 2011, it wrote a letter to the MCD on 29th July 2011 as under:

"As desired, we want to reiterate that as already communicated vide our letter dated 28th Feb.11, we once again assure that we will not claim further compensation for extended period June, 11. However, we request you to release the fees for extended period immediately, since we are extremely short of fund and finding acute difficulty in releasing salary to our staff. This was also brought out in PIC meeting with E-inc. Further we would request you to consider post construction period w.e.f. 01st July, 11, so that we can adjust fee of post construction period for paying further salaries to our staff deployed after June,

2011. Further any services, if required beyond June, 2012 we may be reimbursed on same rate i.e. Rs.10.6 lakhs p.m., as agreed for extended period beyond April, 2008. We will make best coordinated efforts to ensure that work is completed in time bound manner.

In view of above, we would once again request you to release Rs.135.9 Lakhs (agreed for additional compensation upto June, 11) immediately.

Thanking you and assuring you of our best services at all times."

6. GEL states that even after the aforementioned letter, the entire sum of Rs.135.89 lakhs was not paid in one go but staggered over a period of time. It states that, it received till October 2012 in several instalments, a total sum of Rs. 135.89 lakhs. By letters dated 24th January 2013 and 5th February 2013, WTSL (which earlier was known as GEL) requested the NDMC (earlier the MCD) for settlement of its claims towards the costs overrun etc. which it estimated at Rs. 16.88 crores till July 2012 together with interest at 15% per annum till the date of realisation of the claim amount.

7. By a letter dated 28th June 2013 addressed to NDMC, WTSL invoked the arbitration clause under the contract and requested the Commissioner, NDMC to appoint an Arbitrator. Another reminder was sent on 29th July 2013.

8. The response of the NDMC to the above request is reflected in the minutes of the 45th PIC Meeting held on 1st October 2013. Para 8 of the said minutes reads as under:

"8. Consultancy fee of PMC-Project Management Consultant i.e. M/s. Wadia Techno-Engineering Services Ltd. (The then M/s. Gherzi Eastern Ltd.) vide so many letters represented for enhancement of consultancy fee for time over run. The matter was deliberated at length in Project Implementation Committee and it was considered view of the committee that while considering their previous request enough consideration has been incorporated in the revision of their fees for consultancy services for the time not claim any further compensation of fee for any extended period beyond June 2011. At that time it was also made clear to PMC that no extra payment for the work of Council hall, meeting halls, "C" block finishing work and any other extra items executed by contractor shall be admissible to PMC.

Hence, the claims made by PMC for compensation of fee on account of time over run etc. does not seem justified and is also against their written assurance."

9. In response to the present petition, the stand of the NDMC is that as recorded in the minutes of the 43rd PIC Meeting, attended by GEL on 21st May 2011, GEL had agreed that it would not claim any compensation "for any extended period beyond June 2011". It is accordingly contended that there is no arbitral dispute as such. The other contention, as noted in the order dated 23rd May 2014, is that under Section 478(2) of the Delhi Municipal Corporation Act (DMC Act), WTSL ought to have invoked the arbitration clause within six months of the

cause of action having arisen.

10. Ms. Meenakshi Arora, learned Senior counsel appearing for WTSL, submitted that notwithstanding the minutes of the PIC Meeting held on 21st May 2011, it could not be said that there was ''accord and satisfaction'' as regards WTSL''s claims. Reliance was placed on the decision in National Insurance Co. Ltd. Vs. Boghara Polyfab Pvt. Ltd., and Union of India (UOI) and Others Vs. Master Construction Co., . She further submitted that Section 478(2) DMC Act was totally inapplicable.

11. Mr. Sunil Goel, learned counsel appearing for the NDMC, reiterated the above stand of the NDMC. He too relied upon the decisions in National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd. (supra) and Union of India v. Master Construction Company (supra). He also relied upon the decisions in Nathani Steels Ltd. v. Associated Constructions 1995 Supp (3) SCC 324 and Gayatri Project Ltd. Vs. Sai Krishna Construction, .

12. At the outset the Court would like to observe that there are three stages of the work in terms of the ASA between the parties. The first stage is the period up to the stipulated date of construction, i.e., 5th May 2008. The second stage is the period beyond 5th May 2008 and up to the end of June 2011. The third is from 1st July 2011 onwards till the actual date of completion or up to the date when WTSL''s involvement ended.

13. From the letter dated 28th June 2013, written by WTSL, it appears that it has raised claims with reference to all the three stages. A careful reading of the minutes of the 43rd Meeting of the PIC held on 21st October 2011 shows that what was agreed between the parties was the compensation for the extended period beyond 5th May 2008 "up to June 11 only". The minutes record an assurance of GEL that it would not claim further compensation ''for any extended period beyond June 2011''.

14. The answer to the question whether GEL understood this to mean a waiver of all claims to compensation for the period beyond June 2001, is to be found in a letter written by it to MCD on 29th July 2011, the relevant portion of which has been extracted hereinbefore. GEL no doubt assured MCD that it would not claim ''further compensation for extended period beyond June 2011''. However, in the same letter, GEL requested the NDMC to consider "post construction period w.e.f. 01st July, 11" and specifically requested it to be reimbursed for the period beyond April 2008 at Rs. 10.6 lakhs per month. The response of NDMC to the above letter on 10th August 2011 reads as under:

"Subject: Compensation for extended period upto June 2011.

Dear Sir,

This has reference to your various correspondences on the above subject matter. As per the decision taken in the 43rd PIC Meeting held on 21/05/2011, you will be compensated by an amount of Rs.135.89 lacs for the extended period upto

June 2011 and no further claim beyond June 2011 will be admissible in respect of above subject matter."

15. The above correspondence shows, prima facie, that both parties were ad idem as regards the compensation for the extended period up to 30th June 2011. In light of the letter dated 29th July 2011 written by the GEL it cannot be categorically concluded at this stage that GEL had also agreed to give up all its claims for compensation for the extended period beyond 30th June 2011. Even NDMC''s letter dated 10th August 2011 has its ''subject'' as payment of compensation for the period ''up to June 11''. Going by the law explained by the Supreme Court in Boghara Polyfab (P) Ltd., and Master Construction, the Court is satisfied that GEL has not been able to demonstrate, even prima facie, that it was subject to coercion when it agreed to receive Rs. 135.89 lakhs as compensation for the extended period after 5th May 2008 up to 30th June 2011. Its claim for compensation in the aforementioned extended period could be only to the extent of the balance sum due from the said amount and interest if any on the sums to the extent paid in instalments. However, as regards the other two stages, i.e. prior to 5th May 2008 and after 30th June 2011, it does appear, again prima facie, that there was no waiver of its claims by DEL (and therefore WTSL) on account of the minutes of the 43rd PIC meeting held on 21st May 2011.

16. The Court does not find any merit in the second objection raised by NDMC with reference to Section 478(2) of the DMC Act. The said provision envisages the filing of a suit against the NDMC by a claimant. However, in the present case the ASA between the parties contains an arbitration clause. The said clause specifically states that the arbitration will be governed by the provisions of the Act. Further, in terms of Section 43 of the Act, the Limitation Act would apply to all arbitrations. With the parties having agreed that the Act would apply to the arbitration, there is no scope for bringing in Section 478(2) of the DMC Act which applies only to civil proceedings in the form a suit. The plea of the Respondent that the limitation applicable to suits in terms of Section 478(2) would also apply to arbitration proceedings is, therefore, misconceived.

17. As a result of the above discussion, the Court is of the view that the following disputes raised by the Petitioner require to be referred to arbitration:

(i) Whether any amount remains to be paid by the NDMC to WSTL in terms of the ASA for the period up to the stipulated date of completion, i.e. 5th May 2008? And if so, whether WTSL is also entitled to interest on such amount?

(ii) Whether the entire amount agreed to be paid by the NDMC to WSTL for the extended period, i.e., beyond the scheduled date of completion up to 30th June 2011 has, in fact, been paid? Was the said amount required to be paid in one lot as claimed by DEL/WTSL? Is NDMC liable to pay WTSL any interest on the delayed payment?

(iii) Is the WSTL precluded from claiming compensation and any amount for the extended period beyond 30th June 2011 on account of the decision recorded in the minutes of the 43rd PIC Meeting held on 21st May 2011? And if not, what is the amount WSTL is entitled to including any interest on such amount?

(iv) Counter-claims of NDMC in respect of any of the above claims of the Petitioner or otherwise?

18. It is clarified that, for the extended period beyond 5th May 2008 and up to 30th June 2011, it will not be open to the Petitioner to claim any compensation including for the items mentioned in the minutes in the 43rd Meeting of the PIC on 21st May 2011.

19. The Court accordingly appoints Justice K.S.P. Radhakrishnan former Judge, Supreme Court of India, residing at D-19, 3rd Floor, Geetanjali Enclave, Saket, New Delhi-110017 (Tel: 011-26691415) as the sole Arbitrator to adjudicate the above disputes between the parties as noted in para 17. The arbitration shall take place under the aegis of the Delhi International Arbitration Centre (''DAC''). The fees of the learned Arbitrator will be in terms of the Delhi International Arbitration Centre Arbitration Proceedings (Arbitrators'' Fees) Rules.

20. The petition is disposed of. A copy of this order be communicated to the learned Arbitrator as well as Additional Coordinator, DAC forthwith. Order dasti.

