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* IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 17th May, 2022

Pronounced on: 3rd June, 2022

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FAO (OS) (COMM) 77/2022

DELHI STATE INDUSTRIAL &
INFRASTRUCTURE DEVELOPMENT
CORPORATION LTD.

A - 3 & 4, Estaic Emporia Building.
Baba Kharak Singh Marg,
New Delhi - 110001.

..... Appellant

Represented by: Ms. Firdouse Qutab Wani,
Additional Standing Counsel
with Md. Zaryab Jamal Rizvim,
Advocate with Mr. Gopi Ram,
A.E./DSIIDC.

Versus

M/S. H.R. BUILDERS

Having Office At;
B - 37, Ashok Vihar,
Phase-I, Delhi-110052.

.....Respondent

Represented by: Mr. Avinash K. Trivedi, Ms.
Ritika Trivedi & Mr. Anurag
Kaushik, Advocates.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T

NEENA BANSAL KRISHNA, J.

1. The petitioner-Delhi State Industrial And Infrastructure Development Corporation Ltd, (*hereinafter referred to as "DSIIDC"*) has filed the present appeal under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 (*hereinafter referred to as the "Act 1996"*) read with Section 10 of the Delhi High Court Act, 1966, read with Section 13 of The Commercial Courts Act, 2015 against the judgment of the learned Single Judge dated 11th August, 2021, dismissing the objections under Section 34 of the Act 1996, preferred by DSIIDC.

2. The learned Arbitrator vide the impugned award dated 13th April, 2018 had awarded a net sum of ₹3,04,91,623/- along with interest in favour of the respondent-M/s H.R. Builders (*hereinafter referred as HRB*”).

3. The factual matrix in which the dispute has arisen is that the Government of National Capital Territory of Delhi (*hereinafter referred to as 'GNCTD'*) launched a Project for Refurbishment and Upgradation of 198 schools run by the GNCTD. The implementation of part of the project was entrusted to DSIIDC. DSIIDC invited tenders on 08th July, 2009 for the entire work including electrical and civil work for 25 schools which were part of the project. The bid of HRB was accepted and a Letter of Acceptance (LoA) was issued awarding the work of "*Integrated Infrastructure Development of Delhi Govt. Schools*" under the subhead "*Improvement and Upgradation of 25 Government Schools Buildings in North West 'A' District (Composite Work)*". The work was to commence on 28th September, 2009

and was stipulated to be completed on or before 27th September, 2010. A formal Agreement dated 30th September, 2009 was entered into between the parties for execution of the work. Twenty three schools were handed over by DSIIDC instead of twenty five schools as was agreed under the Agreement by the parties. There was considerable delay in completion of the work which was finally completed after a delay of 478 days on 18th January, 2012. DSIIDC withheld the part payment of final bills and also made certain recoveries from the amount payable to the HRB on account of delay, which according to DSIIDC was attributable to the respondent herein. Also the executed work was claimed to be faulty and damages were sought. On the other hand, respondent asserted that it was not only entitled to withhold amounts but also to the compensation on account of escalation and prolongation of works as well as profits for the works reduced from the scope of the Agreement relating to two schools which were not handed over to the respondent.

4. Disputes arose and HRB invoked the Arbitration Clause for reference of disputes to arbitration. The Arbitral Tribunal was constituted and Shri O.P. Bhatia, former Additional Director General (Works Special), CPWD was appointed as the Sole Arbitrator on 24th October, 2016 by the Chief Engineer, DSIIDC.

5. HRB filed its Claim of Statement before the Arbitral Tribunal. DSIIDC also filed a statement of defence as well as counter claim in the sum of ₹20,05,00,000/- on account of loss of reputation and loss of work and also cost of arbitration..

6. According to the appellant, HRB in its request for arbitration had made a claim for ₹53,90,498/- as payment due under the final bill but in its Statement of Claim before the Arbitral Tribunal, it made a claim of ₹1,40,94,470/- as the amount payable under the final bill. In addition, HRB also claimed ₹5,00,000/- as cost of arbitration vide Claim No.9 which was not included in the request for arbitration filed by it. Consequently, the claim before the Arbitral Tribunal included the disputes which had not been referred by the Chief Engineer, DSIIDC. HRB sent a Letter dated 29th March, 2017 to the Chief Engineer, DSIIDC requesting to modify the amount of Claim No.1 to ₹1,40,94,470/- and also to refer the claim relating to cost in the sum of ₹5,00,000/- to the Arbitral Tribunal. The request letter of HRB was forwarded by the Chief Engineer, DSIIDC to the Arbitral Tribunal with a request to give its "decision/observations". The Arbitral Tribunal vide its email dated 28th June, 2017 confirmed that the arbitral award would not exceed the amount of claim as had been referred.

7. HRB then filed an application under Section 23(3) of the Act 1996 on 26th August, 2017 praying that it may be permitted to amend its Claim Nos.1 and 9 in the Statement of Claim in the aforesaid terms. The proposed amendment was opposed by DSIIDC. The Arbitral Tribunal vide its order dated 27th September, 2017 allowed the HRB to pursue its Claim No.9 in regard to the costs but declined the amendment of Claim No.1 to enhance the claim value.

8. HRB preferred a petition under Article 227 of the Constitution of India being **CM(M) No.1458/2017** titled **M/s HR Builders vs. DSIIDC**

before this Court. While the petition was pending, the Arbitral Tribunal rendered the impugned award dated 13th April, 2018 directing DSIIDC to pay ₹3,04,91,623/- to the respondent and dismissed the counter claim of DSIIDC in the sum of ₹20,05,00,000/-. Consequently, HRB withdrew its petition on 10th July, 2018 with liberty to agitate its grievances in its petition under Section 34 of the Act 1996.

9. The objections were filed under Section 34 of the Act, 1996 vide Petition No. **OMP (COMM) 324/2018** in respect of the Order dated 27th September, 2017 disallowing the amendment to Claim No.1 but allowing Claim No.9 to claim costs which was disposed of by the learned Single Judge vide a separate Order dated 11th August, 2021.

10. DSIIDC filed separate objections under Section 34 of the Act, 1996 challenging the Award dated 13.04.2018. The learned Single Judge considered the contentions of both the parties and dismissed the objections under Section 34 of the Act, 1996. Aggrieved by the order of the learned Single Judge, the present appeal under Section 37 (1) (c) of the Act, 1996 has been preferred.

11. The respondent had claimed the amount of ₹1,04,60,700/- that was withheld by appellant as compensation for delay which was allowed by the learned Arbitrator. This grant of withheld amount is challenged by DSIIDC on the ground that as per Clause 2 of the Agreement, the decision of Project Director in respect of levy of compensation was final and binding and, therefore, an “*excepted matter*” and was beyond the jurisdiction of the Arbitrator. For this, reliance has been placed on the decision of Hon’ble

Supreme Court in the case of Mitra Guha Builders (India) Company vs. Oil and Natural Gas Corporation Limited 2020 (3) SCC 22. It is submitted that the levy of compensation on account of delay was not arbitrary as time was essence of the contract and, therefore, the findings of the Arbitral Tribunal to the contrary are liable to be set aside.

12. The other ground of challenge is that the award of labour cess at 1% and DVAT at 3% of the quantum of the work done, (quantified as ₹2,77,117/-) is erroneous. While the learned Arbitrator accepted that CPWD's Manual requires that the labour cess and DVAT is to be included in the analysis of rates, but has granted the claim beyond the rates approved by the concerned authority.

13. Further, the escalation for labour and material component of the works executed was required to be included in the bills submitted by the HRB and since this was not done it is deemed that the HRB had waived its claim in this regard. Further, the Arbitral Tribunal computed the escalation on the cost indices as approved by the Director General, CPWD for building works in Delhi and did not use cost indices for commodities published by Economic Bureau for computing this amount as was provided in the Agreement, rendering the decision of the Arbitral Tribunal contrary to Clause 10 CC of the Agreement.

14. The findings in regard to compensation awarded to the HRB by the Arbitral Tribunal has also been challenged as being patently erroneous on the ground that overheads were agreed to constitute 15% of the incremental value and not 15% in excess of labour and material component as set out in

Schedule 7 of the Agreement. The award of any amount in excess of 15% of the incremental value on the basis of labour and material component by the Arbitral Tribunal was completely beyond the terms of the Agreement and inconsistent with the law laid down by Hon'ble Division Bench of Supreme Court in the case of State of Rajasthan Vs. Nav Bharat Construction Co. (2006) 1 SCC 86, wherein it was observed that an Arbitrator cannot go beyond the terms of the contract and in the guise of doing justice, an Arbitrator cannot give an award contrary to the terms of the contract. Reliance has also been placed on the decision of Hon'ble Supreme Court in Bharat Coking Coal Ltd. Vs. L.K. Ahuja and Co. (2001) 4 SCC 86; Continental Construction Co. Ltd. Vs. State of M.P. (1988) 3 SCC 82.

15. Moreover, the dismissal of the counter claim of the DSIIDC by the Arbitral Tribunal was also patently erroneous as the DSIIDC had suffered damages and loss of reputation on account of loss of work. The GNCTD had withdrawn the work of development of site and construction of twenty new school buildings from the DSIIDC and transferred them to PWD by its Letter dated 07th May, 2012 due to prolongation/delay in completion of upgradation work of the schools. The DSIIDC was thus entitled to charge 5% of the value of the said work, the cost of which was estimated at ₹4,00,00,00,000/- (each school at the cost of ₹20,00,00,000/-).

16. The award rendered by the Arbitral Tribunal was illegal and in breach of fundamental policy of Indian Law as explained in Oil & Natural Gas Corporation Ltd. Vs. Saw-Pipes Ltd. (2003) 5 SCC 705. It was thus submitted that the arbitral Award dated 13th April, 2018 passed by the

learned Sole Arbitrator and Order dated 11th August, 2021 of learned Single Judge dismissing the objections under Section 34 of the Act, 1996 be set aside.

17. HRB has countered the challenge to the Award in respect of the compensation and asserted that it is not the quantum of compensation which was determined by the learned Arbitrator which is an “excepted matter” but the determination of only of the preceding fact i.e., of delay/prolongation (which was not an “excepted matter”) to conclude that the compensation was payable. The compensation has been quantified and awarded by the learned Arbitrator in accordance with the terms of LoA. It was submitted that there was no patent illegality of breach of fundamental policy of India and the appeal is without merit.

18. Submissions heard on behalf of both the parties.

19. The first contention of the petitioner-DSIIDC is that as per Clause 2 of the Agreement, decision of Project Director in respect of levy of compensation at the rate specified therein was final and binding and, therefore, the question of delay/prolongation and consequent compensation was not arbitrable. This aspect has been explained in the decision of Vidya Drolia Vs. Durga Trading Corporation Civil Appeal No.2404/2019 decided by the Hon’ble Supreme Court in December, 2020. It was observed that non-arbitrability is basic to arbitration as it relates to the very jurisdiction of the Arbitral Tribunal. Non-arbitrability has multiple meanings. ‘*Booz Allen & Hamilton Test*’ refers to three facets of non-arbitrability namely as under:

- “i) Whether the disputes are capable of adjudication and settlement by arbitration?
- ii) Whether the disputes are covered by the Arbitration Agreement?
- iii) Whether the parties have referred the disputes to arbitration?”

20. Arbitration being a matter of contract, the parties are entitled to fix the boundaries so as to confer and limit the jurisdiction and legal authority of the arbitrator. An arbitration agreement can be comprehensive and broad to include any dispute or can be confined to specific disputes. The scope of arbitrator's jurisdiction invariably arises when the disputes that are arbitrable are enumerated or the arbitration agreement provides for exclusions as in case of “excepted matters” which are the matters where the parties expressly exclude certain disputes to be referred to arbitration in respect of which the Arbitral Tribunal may not have jurisdiction to adjudicate such disputes. The will of the parties as to the scope of arbitration is a subjective act personal to the parties.

21. In Vidya Drolia (supra) a reference has been made to the dictum of Constitutional Bench Judgment in SBP & Company Vs. Patel Engineering Ltd. & Anr. (2005) 8 SCC 618 and it was held that an application under Section 11 of the Act, 1996 need not set out in detail the disputes or the claims and may briefly refer to the subject matter or broad contours of the dispute. However when judicial proceedings are initiated and are pending, specific details of the claims and disputes are normally pleaded and, therefore, the court or the judicial authority has the advantage of these details. There is a difference between a non-arbitrable claim and a non-arbitrable

subject matter. Former may arise on account of scope of arbitration agreement and also when the claim is not capable of being resolved through arbitration. General non-arbitrability of the subject matter would relate to non-arbitrability in law. Exclusion or non-arbitability when clearly expressed would pose no difficulty. However, exclusion or non-arbitability of subjects or disputes from the purview of a private forum like arbitration by necessary implication requires setting out of the principles that should be applied.

22. In order to appreciate the contention of the appellant in regard to arbitrability of dispute, it would be pertinent to reproduce Clause 2 of the Agreement:

"If the contractor fails to maintain the required progress in terms of clause 5 or to complete the work and clear the site on or before the contract extended date of completion, he shall; without prejudice to any right or remedy available under the law to the Government on account of such breach, pay as agreed compensation the amount calculated at the rates stipulated below as the authority specified in schedule 'F' (whose decision in writing shall be final and binding) may decide on the amount of tendered value of the work for every completed day/month (as applicable) that the progress remains below that specified in Clause 5 or that the work remains incomplete. This will also apply to items or group of items for which a separate period of completion has been specified:-

(i) Compensation @1.5% per month of delay for delay of work to be computed on per day basis

Provided always that the total amount of compensation for delay to be paid under this Condition shall not exceed 10%

of the Tendered Value of work or of the Tendered Value of the item or group of items of work for which a separate period of completion is originally given."

23. There are two aspects which need to be considered in Clause 2; one is whether contractor has failed to maintain the required progress or complete the project within time and the second question is that in case there is delay or prolongation, what is the compensation payable to the party?

24. In terms of Clause 2, it is clearly stipulated that the authority as specified under Schedule F of the Agreement is empowered to calculate the compensation payable at the specified rate if the contractor fails to complete the work and clear the site as agreed. The decision of the specified Authority in regard to the computation of compensation is final and complete and is excluded from the scope of arbitration clause. However, the compensation becomes leviable only on account of delay. Whether HRB was responsible for delay in maintaining the required progress and completion of the works within the stipulated period was a question which is arbitrable and has been discussed by the Arbitrator in the impugned award.

25. The Arbitral Tribunal accepted the contention of HRB that the delay had to be viewed on an overall basis as milestones were also fixed in relation to financial terms and no specified period had been stipulated for separate school or separate items. The learned Single Judge, concurred with the conclusion of the Arbitral Tribunal that hindrance in question were on account of delay in handing over the sites, despite which the work was completed on 18th January, 2012. The learned Arbitral Tribunal found the

levy of compensation was unjustified on the ground that delay was not attributable to HRD. Moreover, actual loss or damage allegedly caused, was also not proved.

26. The Arbitral Tribunal did not commit any jurisdictional error as it did not engage in the exercise of assessing the quantum of compensation payable in terms of Clause 2 of the Agreement which was an excepted matter. It restricted itself only to examine whether there was any delay on the basis of which the compensation could be paid.

27. In J.G. Enginners Pvt. Ltd. vs. Union of India and Anr. (2011) 5 SCC 758 similar clause as under consideration in the present case, was examined and the Hon'ble Supreme Court concluded that the decision of the specified Authority on the question whether the contractor is responsible for delay is not final and binding, but the decision of the specified Authority on the consequential issue of quantification of compensation is final. It was, thus, held that the question of determination of delay is an arbitrable dispute to be decided by the Arbitral Tribunal. The relevant paragraph of the judgement reads as under:

“14. Thus what is made final and conclusive by clauses (2) and (3) of the agreement, is not the decision of any authority on the issue whether the contractor was responsible for the delay or the department was responsible for the delay or on the question whether termination/rescission is valid or illegal. What is made final, is the decisions on consequential issues relating to quantification, if there is no dispute as to who committed breach. That is, if the contractor admits that he is in breach, or if the Arbitrator finds that the contractor is in

breach by being responsible for the delay, the decision of the Superintending Engineer will be final in regard to two issues. The first is the percentage (whether it should be 1% or less) of the value of the work that is to be levied as liquidated damages per day. The second is the determination of the actual excess cost in getting the work completed through an alternative agency. The decision as to who is responsible for the delay in execution and who committed breach is not made subject to any decision of the respondents or its officers, nor excepted from arbitration under any provision of the contract.

15. In fact the question whether the other party committed breach cannot be decided by the party alleging breach. A contract cannot provide that one party will be the arbiter to decide whether he committed breach or the other party committed breach. That question can only be decided by only an adjudicatory forum, that is, a court or an Arbitral Tribunal.”

28. In M/s Mitra Guha India (Co.) (*supra*) similar clause empowering the Superintending Engineer to decide on the contract value for the whole week where the work remained un-commenced and un-finished was considered. The said clause also provided the milestones of the work to be followed and provided the portion of the work to be completed in case the time allowed for completing the work exceeded one month. The Supreme Court found that the relevant clause provided a complete mechanism for determination of liability as well as the quantum and held that the same was beyond the scope of arbitration clause in that case.

29. The learned Single Judge has observed that DSIIDC had not raised any question regarding the jurisdiction of the Arbitral Tribunal to entertain

Claim No.2 which was in respect of delay. The said claim was specifically referred to the Arbitral Tribunal without any reservation by DSIIDC and no objection was taken that Clause 2 of the Agreement was an excepted matter. Rather, DSIIDC joined the controversy as to whether the compensation as recovered, was leviable.

30. The argument raised by the DSIIDC that the claim of the petitioner fell in an excepted manner and could not have been adjudicated by Arbitral Tribunal was found to be an after-thought and not supported by the pleadings and it has been rightly upheld by the Arbitral Tribunal's decision to award a sum of ₹1,04,60,700/- to HRD which was recovered by DSIIDC in the Final Bill. The conclusion arrived at by the learned Single Judge that the question of determination of delay was not an excepted matter, is based on the evidence and pleadings and does not suffer from any patent illegality.

31. The next question to be examined is whether the Arbitral Tribunal's decision to allow the M/s H.R. Builders's claim for Labour Cess @ 1% and DVAT @ 3% of the amount of work done is patently illegal.

32. The learned Arbitral Tribunal found that these items were not a part of the bid submitted by HRB and DSIIDC had made payments for these deviated items on the basis of analysis of rates as approved. However, it recovered Labour Cess @ 1% and DVAT @ 3% from its payments. The learned Arbitral Tribunal referred to CPWD Manual and accepted that Labour Cess and DVAT did not form part of the approved rates and, therefore, HRB was entitled to the claim in this regard. The learned Single

Judge observed that the conclusion of the learned Arbitral Tribunal were based on the material on record and did not call for any interference.

33. The other contention of the DSIIDC was in regard to the escalation awarded in favour of the M/s H.R. Builders, which was claimed to be patently illegal. The learned Arbitral Tribunal found that the HRB had raised one Bill under Clause 10CA for the sum of ₹16,03,271/- as the escalation cost but the same was not paid. Moreover, the time allowed for the completion of the works was 12 months but there was an inordinate delay of 478 days. The learned Arbitral Tribunal observed that in the Competitive Bidding System, no contractor could cushion his quoted rates to cater to such extended period. The Arbitral Tribunal thus, concluded that since major part of the delay resulted in prolongation which was attributable to the DSIIDC, the HRB was entitled to escalation. The learned Single Judge again upheld the conclusion of the Arbitral Tribunal as well reasoned and had considered the indices adopted by Director General, CPWD to be more appropriate and had accordingly moderated the amount claimed by the HRB considering the time for completion of work far exceeded the initial period as contemplated under the Agreement, the Arbitral Tribunal's decision to award escalation on the basis of indices published by CPWD were held to be not perverse or unreasonable. Again, the learned Single Judge concluded that awarding of escalation in favour of the HRB, also does not suffer from any perversity and is based on the appreciation of the facts.

34. A sum of ₹48,45,700/- which was awarded by the Tribunal as overheads on account of prolongation of works, was also challenged. The

reasoning given by the Arbitral Tribunal while allowing this claim, was that HRB was required to be compensated for the prolongation of work on account of overheads incurred by it during the extended period and the sum so awarded and the Arbitral Tribunal moderated the amount as claimed by the HRB and awarded ₹48,45,700/- by applying Hudson formula. Again, it is a finding arrived at on the basis of evidence and is a factual conclusion which was found to be reasonable by the learned Single Judge and cannot be said to be perverse or patently illegal warranting interference by this Court.

35. Similarly, the award of interest and cost had been challenged as being exorbitant but again grant of interest @ 8.5% was held to be reasonable. This again was a determination on facts and thus, cannot be re-agitated in the present proceedings.

36. The DSIIDC had filed a counter claim of ₹20,00,00,000/- on account of loss of name, reputation and loss of work. However, the Arbitral Tribunal found that this claim was neither raised at the material time nor had DSIIDC asserted that it had incurred any loss. Moreover, no evidence whatsoever was laid on behalf of the DSIIDC to prove any direct loss and the calculation submitted by it was found to be hypothetical. The DSIIDC again has not been able to point out any evidence to the contrary or that the conclusions of the Arbitral Tribunal were arbitrary or hypothetical. It was held to be a counter blast to the claim of HRB.

37. The scope of interference under Section 34 and Section 37 of the Act, 1996 is extremely limited to when *an award is in conflict with the public policy of India*, which includes cases of fraud, breach of fundamental policy

of Indian law and breach of public morality or is patently illegal as held by the Apex Court in its decision in McDermott International Inc. Vs. Burn Standard Co. Ltd. (2006) 11 SCC 181 and Dyna Technologies (P) Ltd. Vs. Crompton Greaves Ltd. (2019) 20 SCC 1 and again reiterated in the recent decision of National Highway Authority of India vs. M. Hakeem (2021) 9 SCC 1.

38. The conclusions arrived at by learned Arbitrator in his Award dated 13th April, 2018, including dismissal of the counter claim, were found to be well reasoned and based on the interpretation of various Clauses of the contract and the facts, which could not be termed as perverse or patently illegal and rightly held to be beyond the scope of interference under Section 34 of the Act, 1996 by learned Single Judge in the impugned order dated 11th August, 2021.

39. There is no merit in the present appeal under S.37 of the Act, 1996 and the appeal is hereby dismissed.

(NEENA BANSAL KRISHNA)
JUDGE

(MUKTA GUPTA)
JUDGE

JUNE 03, 2022
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