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IN THE HIGH COURT OF DELHI AT NEW DELHI

% *Date of Decision: 12.01.2023*

\+ **FAO (COMM) 23/2021, CM Nos.47638/2019, 47640/2019, 47641/2019 & 3287/2021**

DELHI STATE INDUSTRIAL & INFRASTRUCTURE ..... Appellant

Through: Ms. Richa Dhawan & Mr. Anuj Chaturvedi, Advs.

versus

M/S SUKUMAR CHAND JAIN ..... Respondent

Through: Mr. Sarthak Mannan, Ms. Konika Mitra & Mr. Om Batra, Advs.

CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU
HON'BLE MR JUSTICE AMIT MAHAJAN

VIBHU BAKHRU, J.

1. Delhi State Industrial & Infrastructure Development Corporation Ltd. (hereafter '**DSIIDC**') has filed the present appeal under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 (hereafter '**the A&C Act**') impugning an order dated 03.05.2019 (hereafter '**the impugned order**') passed by the learned Commercial Court, whereby DSIIDC's application under Section 34 of the A&C Act, seeking to set aside an arbitral award dated 13.11.2014 (hereafter '**the impugned award**'), was rejected.

Factual Context

2. By a work order dated 18.07.2003 (hereafter '**the agreement**'), DSIIDC awarded the work of "*Construction of Pucca School Bldg.. at*

Dwarka, Sector-22, Delhi (Composite Work)" (hereafter '**the Dwarka Project**') to the respondent. The stipulated date of commencement of the Dwarka Project was on 27.03.2003. The Dwarka Project was to be completed within a period of eighteen months, that is, by 26.01.2005.

3. Thereafter, by a memo dated 02.09.2004, the Directorate (Works) Central Public Work Department (CPWD) added Clause 10CA to the agreement. The relevant extract of Clause 10CA reads as under:-

> "If after submission of the tender, the price of cement and/or steel reinforcement bars incorporated In the works (not being a material supplied from the Engineer-in-charge's stores in accordance with Clause 10 thereof) increase and such increase in the price prevailing at the time of the last stipulated date for receipt of tenders including extension, if any for the work, then the amount of the contract shall accordingly be varied and provided further that- any such increase shall not be payable if such an increase has become operative after the stipulated date of completion of the work in question."

4. In terms of the agreement, the respondent was paid running bills by DSIIDC. By letters dated 08.08.2005 and 16.08.2005, the respondent demanded additional payment from DSIIDC owing to rise in the prices of cement and steel reinforcement bars. Subsequently, by a letter dated 17.08.2005, DSIIDC rejected the respondent's request for escalation.

5. Thereafter, the respondent sought an extension of time to complete the Dwarka Project, which was extended by a period 246

days. DSIIDC contends that by a letter dated 24.04.2006, the respondent acknowledged the breach on its account, and stated that it would not claim any extra amount, on account of extension of time.

6. The respondent raised a Final Bill for an amount of ₹8,04,135/-. Thereafter, the respondent issued a No Claim Certificate (hereafter '**NCC**') dated 27.09.2007, *inter alia*, confirming that with the receipt of the said amount all its claims in respect of the said agreement would stand finally settled. However, by a letter dated 08.11.2007, the respondent withdrew the NCC dated 27.09.2007 and made a demand for an amount of ₹29,84,196.72/- along with interest from 01.03.2005 until the date of payment by DSIIDC. The respondent claimed that it had issued the NCC under the coercion of DSIIDC.

7. The respondent invoked the arbitration agreement. Thereafter, the respondent filed a petition under Section 11(6) of the A&C Act before this Court (being ARB. P. No. 435/2009), seeking appointment of a sole arbitrator. By an order dated 18.10.2010, the learned Single Judge directed the Chief Engineer / Administrative Head of DSIIDC to appoint an arbitrator within a period of thirty days from the date of the said order. The relevant extract of the said order reads as under:-

> **"**In my view, the submission of the petitioner that no claim certificate was issued under coercion cannot be outrightly rejected and it requires detailed consideration after permitting the partied to lead evidence, if any, in that regard before the arbitral tribunal.
>
> Considering the fact that the arbitration agreement

> requires the Chief Engineer or Administrative Head of DSIDC to appoint the arbitrator and it further goes on to state that no person shall act as an arbitrator and if no arbitrator is appointed by the Chief Engineer or Administrative Head of DSIDC, there shall be no arbitration between the parties. I direct the Chief Engineer or Administrative Head of DSIDC to make appointment of the arbitrator within 30 days from today.
>
> The arbitral tribunal so constituted shall examine the issues with regard to accord and satisfaction before examining the claim of the petitioner. It is made clear that no observation made by me in this order shall come in the way of the arbitral tribunal in determining the aforesaid issue. Petition stands disposed of in the aforesaid terms. Dasti."

The Impugned Award

8. The Arbitral Tribunal, comprising of Sh. G.K. Marwah, I.A.S (Retired) as the sole arbitrator, was constituted. One of the principal disputes that fell for consideration before the Arbitral Tribunal was whether the agreement stood discharged by accord and satisfaction. On 23.03.2011 the respondent filed its statement of claim before the Arbitral Tribunal. DSIIDC filed its Statement of Defence and also raised a counter claim. The parties submitted evidence in respect of the NCC.

9. The issue in respect of the accord and satisfaction – whether the respondent was compelled to furnish the NCC by coercion and undue influence – was common to both the Dwarka Project and the Construction of Pucca School Building at Rohini, Sector-20, Delhi

(Composite Work) pursuant to the Agreement No.DSIDC/EE/CD-XIII/Accts/2003-04/47 dated 18.07.2003 (hereafter '**the Rohini Project**').

10. The disputes between the parties relating to the Rohini Project were similar to the disputes involved in relation to the agreement for the Dwarka Project. Thus, the Arbitral Tribunal examined the disputes between the parties relating to the projects (the Dwarka Project and the Rohini Project). The impugned award is a common award in respect of the disputes arising between the parties in respect of agreements related to both the projects.

11. In terms of the order dated 18.10.2010, passed by this Court in ARB.P. No.435/2009 captioned *M/s Sukumar Chand Jain v. Delhi State Industrial Corporation Ltd*, the Arbitral Tribunal examined the disputes as to whether the agreements, relating to both the projects, would stand discharged by accord and satisfaction. It was DSIIDC's contention that in view of the NCC executed by the respondent, all disputes and claims stood finally settled and therefore, the respondent was precluded from raising any claim in connection with the contracts for the two projects. The respondent had claimed that it was coerced into executing the NCC. It had pursued its claims for escalation of cost of steel and cement with DSIIDC but its claims were not entertained. DSIIDC had also withheld the dues admittedly payable for execution of the works and the respondent was forced to furnish the NCC as, without receiving the same, DSIIDC would not process the Final Bill.

12. Both the parties furnished the evidence by way of affidavits. The Arbitral Tribunal found that the NCC was in the standard pre-printed format and the contractors were required to fill in the relevant details. Concededly, the said pre-printed format had been prescribed by DSIIDC. The Chief Project Manager of DSIIDC had submitted an affidavit, which clearly established that before release of the balance outstanding amount, the claimant (respondent) was required to furnish an NCC. The relevant extract of the statement affirmed in the said affidavit, as noted by the Arbitral Tribunal, reads as under:-

> "…. It is a procedural requirement in all Government departments as well as a general business practice that at the time settlement of final bills of a contractor, a no claim certificate is issued by the contractor in order to avoid frivolous disputes and claims made by the delinquent contractors. Therefore, before releasing the payment of the balance outstanding amount of Rs.5,40,574/-, the claimant was required to furnish a "No Claim Certificate."

13. The Arbitral Tribunal also found merit in the respondent's claim that it had been pursuing its claim for escalation in the price of steel and cement with DSIIDC, since 2004. It is also relevant to note that the respondent had led evidence to establish that it had borrowed funds from a bank for conducting its business. The respondent also availed the cash credit facility from the bank.

14. Considering the evidence on record, the Arbitral Tribunal found that the respondent had not furnished the NCC voluntarily but had been compelled to do so. Accordingly, the Arbitral Tribunal passed a

common order dated 18.03.2013, rejecting DSIIDC's contention that the claims, raised by the respondent, were not arbitrable or the agreements were discharged by accord and satisfaction.

15. Thereafter, the Arbitral Tribunal considered the claims and found that the Clause 10 CA of the General Conditions of the Contract, issued by CPWD by the Memorandum dated 02.09.2004, was applicable to the works in question. In terms of the said clause, the respondent would be entitled to escalation in the cost of steel and cement, as computed in terms of the formula as provided in the said clause.

16. The Arbitral Tribunal found that the calculation of escalation, as provided by the parties, were more or less similar. The amount calculated by DSIIDC was marginally lower than the amount calculated by the respondent. The Arbitral Tribunal accepted the calculation as provided by DSIIDC and awarded a sum of ₹8,39,101/- on account of escalation in the cost of steel and ₹6,046.59/- as escalation on cost of the cement. The operative part of the impugned award reads as under:-

> "35. in view of the above discussion, facts and circumstances as enumerated above, I hereby award Rs. 8,45,148/- (Rupee eight lakh forty five thousand one hundred forty eight only) for Dwarka work and Rs. 7,00/993/- (Rupee seven lakh nine hundred ninety three only) for Rohini work to the claimant to be paid to him by the respondent. The claimant is further awarded an interest @ 9% PA, from 6 months (defect liability period) after the actual date of

> completion of the works till the date of payment of the amount to the claimant by the respondent."

The Impugned Order

17. Aggrieved by the impugned award, DSIIDC filed a petition under Section 34 of the A&C Act before the learned Commercial Court. The learned Commercial Court held that the impugned award was well-reasoned and fair. It did not warrant any interference under Section 34 of the A&C Act. The learned Commercial Court referred to the various judgements, whereby it was authoritatively held that the Arbitral Tribunal is the final arbiter of questions of fact, and the courts cannot supplant its opinion in place of that of the Arbitral Tribunal. The learned Commercial Court, following the said decisions held that there were no grounds to set aside the impugned award and accordingly, dismissed the appellant's application under Section 34 of the A&C Act.

Reasons and Conclusions

18. The learned counsel appearing for DSIIDC has confined his submissions to assailing the impugned order in regard to the issue of discharge of agreement by accord and satisfaction. He submitted that the respondent had furnished the NCC voluntarily and therefore, the disputes raised were not arbitrable.

19. It is necessary to bear in mind that neither the Commercial Court, considering the application for setting aside an award under Section 34 of the A&C Act, nor the appellate court, considering an

appeal under Section 37 of the A&C Act, is required to re-evaluate the evidence and re-adjudicate the disputes between the parties. The learned Commercial Court had rightly held that the scope of examination under Section 34 of the A&C Act was limited to ascertaining whether the Arbitral Award is required to be set aside on the grounds as set forth under Section 34 of the A&C Act. As noted above, one of the disputes required to be addressed by the Arbitral Tribunal was whether the agreement stood discharged by accord and satisfaction. The Arbitral Tribunal had considered the evidence led by the parties and had answered the question in favour of the respondent (claimant). As noted above, it is not in dispute that the NCC had been issued in a standard pre-printed format as provided by DSIIDC. It is also conceded by the learned counsel for DSIIDC that, as a matter of practice, DSIIDC does not clear the Final Bills unless an NCC has been issued by the concerned contractor. Thus, indisputably, the respondent would not be able to recover the amounts as admittedly due to it unless it furnished an NCC, as demanded by DSIIDC. It also established from the record that the appellant had raised a claim for escalation in the cost of steel and cement and DSIIDC had summarily rejected the same on the ground that no such payment could be made under the agreement. The respondent had continued to pursue DSIIDC in respect of the said claim and the Arbitral Tribunal had found that there was no reason for the respondent to voluntarily give up the said claim.

20. The respondent had, after furnishing the NCC, once again approached DSIIDC in respect of its claims. At this stage, DSIIDC had denied the same on the ground that it could not entertain the claim on account of the NCC.

21. It is also relevant to note that the respondent had withdrawn the NCC claiming that the same had been issued under coercion.

22. In view of the given facts, we are unable to accept that the decision of the Arbitral Tribunal to accept the respondent's contention that the NCC was issued under economic duress is patently illegal and vitiates the impugned award. The view expressed by the Arbitral Tribunal is a plausible one. It is based on the evidence and material placed on record.

23. In view of the above, we are unable to accept that the impugned award warranted any interference under Section 34 of the A&C Act.

24. We find no infirmity with the decision of the learned Commercial Court in rejecting the appellant's application under Section 34 of the A&C Act to set aside the impugned award.

25. The appeal is, accordingly, dismissed. All pending applications are also disposed of.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

JANUARY 12, 2023
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