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***IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on: 26.04.2022

\+ O.M.P. (COMM) 185/2022, I.A. 5905/2022 & I.A. 5906/2022

NORTH DELHI MUNICIPAL CORPORATION ..... Petitioner

versus

IJM CORPORATION BERHAD ..... Respondent

Advocates who appeared in this case:

For the Petitioner: Mr. Sachin Datta, Sr. Advocate with Ms. Renu Gupta, Mr. Himanshu Goel and Ms. Neetu Devarani, Advocates.

For the Respondent: Mr. Arjun Kumar Varma, Sr. Advocate with Mr. Yaman Kumar and Mr. Shashaank Bhansali, Advocates.

CORAM:-
HON'BLE MR. JUSTICE SANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J. (ORAL)

1. The petitioner by this application under Section 34 of the Arbitration and Conciliation Act 1996, impugns the award dated 03.07.2021 rendered by the Arbitral Tribunal deciding Issue no.3 in favour of the respondent and against the petitioner.

2. Issue no. 3 as framed reads as under:-

"Issue No. 3

> *Whether the action of the Respondent/PMC in granting provisional extension of time is in conformity with the terms of the agreement?"*

3. Learned Senior Counsel appearing for the petitioner submits that issue no.3 is intrinsically connected with issue no. 5 and the Arbitral Tribunal has erred in deciding issue no.3 in isolation.

4. Issue no.5 as framed reads as under:

"Issue No. 5

"Whether the actions of the Respondent/PMC in imposing liquidated damages/compensation for delay with retrospective effect is inconformity with the terms of the agreement?"

5. Learned Senior Counsel for the petitioner further contends that the Arbitral Tribunal has erred in rejecting the contention of the petitioner that the extension of the time granted was only provisional and petitioner had reserved its rights to impose liquidated damages at the end of the work.

6. Learned Senior Counsel for the petitioner further submits that the extension of time granted was only provisional and on the conclusion of the contract, petitioners were entitled to assess the exact number of days of delay and accordingly levy compensation for the

delayed period.

7. Per contra, learned Senior Counsel appearing for the respondent contends that the extension of the time was not provisional and can never be provisional and once extension of time is granted same cannot be curtailed specially after the extended period is over.

8. For purposes of determining the controversy, brief reference to the factual matrix would be required. Petitioner had awarded the subject contract to the respondent for construction of Civic Centre at JLN Marg, Minto Road, Delhi vide agreement dated 21.05.2005.

9. It is not in dispute that there were certain events which led to the delay in the execution of the contract. Respondent Contractor applied for extension of time on several occasions, which were granted.

10. Petitioner granted the requests in each case upto a specified date, however, also mentioned that it was without prejudice to the rights of the petitioner to recover liquidated damages in accordance with the provision of Clause 2 of the agreement.

11. The contention of the respondent is that the work was completed within the stipulated period of the contract by including the extended periods as sanctioned by the petitioner and the work did not

extend beyond the extensions granted by the petitioner.

12. The contention of the petitioner before the Arbitral Tribunal and even before this court is that at the conclusion of the work it was open to the petitioner to re-assess the extensions granted and determine as to whether the extensions granted were correct or not and also that the number of days could be reduced.

13. In the present case, petitioner has after the conclusion of the work and after the period stipulated by the contract and the extended periods as sanctioned, have expired, re-assessed the number of days of delay and reduced the extended period and levied compensation of liquidated damages.

14. Clause 2 refers to compensation for delay in completion of the work and reads as under:

> *"CLAUSE 2 Compensation for Delay*
>
> *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* <u>*before the contract or extended date of completion*</u>*, he shall, without prejudice to any other right or remedy available under the law to the MCD on account of such breach, pay as agreed compensation the amount calculated at the rates stipulated below as the Engineer-in-Charge (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.

*****   *****   *****"

(underlining supplied)

15. Clause 5 of the Agreement reads as under:

"<u>CLAUSE 5</u>

Time and Extension for Delay

The time allowed for execution of the work as specified in the Schedule F' or the extended time in accordance with these conditions shall be the essence of the Contract. The execution of the works shall commence from the 10th day or such time period as mentioned in Letter of Award after the date on which the Engineer-in-Charge issues written orders to commence the work or from the date of handing over of the site whichever is later. If the Contractor commits default in commencing the execution of the work as aforesaid MCD shall without prejudice to any other right or remedy available in law, be at liberty to forfeit the earnest money and performance guarantee absolutely.

5.1 As soon as possible after the Contract is concluded the Contractor shall submit a Time & Progress Chart for each milestone and get it approved by the Department. The Chart shall be prepared in direct relation to the time stated in the Contract documents for completion of items of the works. It shall indicate the forecast of the dates of commencement and completion of various trades

of sections of the work and may be amended as necessary by agreement between the Engineer-in Charge and the Contractor within the limitations of time imposed in the Contract documents, and further to ensure good progress during the execution of the work, the contractor shall in all cases in which the time allowed for any work, exceeds one month (save for special jobs for which a separate programme has been agreed upon) complete the work as per milestones.

5.2 *If the work(s) be delayed by:-*

(i) force majeure, or

(ii) abnormally bad weather, or

(iii) serious loss or damage by fire, or

(iv) civil commotion, local commotion of workmen, strike or lockout, affecting any of the trades employed on the work, or

(v) delay on the part of other contractors or tradesmen engaged by Engineer-in-Charge in executing work not forming part of the Contract, or

(vi) any other cause which, in the absolute discretion of the authority mentioned in Schedule 'F' is beyond the Contractor's control.

then upon the happening of any such event causing delay, the Contractor shall immediately give notice thereof in writing to the Engineer-in-Charge but shall nevertheless use constantly his best

endeavours to prevent or make good the delay and shall do all that may be reasonably required to the satisfaction of the Engineer-in-Charge to proceed with the works.

5.3 Request for rescheduling of Milestones and extension of time, to be eligible for consideration, shall be made by the Contractor in writing within fourteen days of the happening of the event causing delay on the prescribed form. The Contractor may also, if practicable, indicate in such a request the period for which extension is desired.

5.4 In any such case the authority mentioned in Schedule 'F' may give a fair and reasonable extension of time and reschedule the milestones for completion of work, such extension shall be communicated to the contractor by the Engineer-in-Charge in writing, within 3 months of the date of receipt of such request. Non application by the contractor for extension of time shall not be a bar for giving a fair and reasonable extension by the Engineer-in-Charge and this shall be binding on the contractor."

16. Referring to clauses 5.3 and 5.4, the Arbitral Tribunal has held as under :-

"Thus, in case where the contractor does not make a request for rescheduling of milestone and EOT within the period of fourteen days, only two alternatives are left to the Respondent (EIC) / competent authority, namely: -

i) To give a fair and reasonable extension (as per clause 5.4) even, in spite of, non-application by the contractor, or,

ii) To declare that the contractor is not eligible for consideration for EOT, after ensuring that such declaration would be fair and reasonable, as per clause 5.3.

There is no third choice available to the Respondent under the contract.

Thus, in the present case, after considering the contractor as eligible for EOT, question of any further default of the contractor, on the provisions of Clause No. 5.3, does not arise."

17. Clause 5.2 provides for the eventualities under which extension of time can be granted, Clause 5.2 further stipulates that on happening of any of the events stipulated therein the contractor is to a give notice to the engineer in-charge. The contractor however, has to continue to make best endeavors to prevent or make good the delay and is also required to carry on to proceeds with the work to the satisfaction of the engineer-in-charge.

18. Clause 5.3 of the contract stipulates that the contractor is eligible for consideration for rescheduling the milestone and extension of time and must make a request in writing within 14 days of the happening of the event. In the said request the contractor has to also

indicate the period for which the extension is desired.

19. Clause 5.4 stipulates that the engineer in charge has to give a fair and reasonable extension of time and reschedule the milestone for completion of the work. Such extension has to be communicated to the contractor in writing within three months of the date of receipt of such request. Even in a case where there is no application filed by the contractor the engineer in charge is empowered to grant fair and reasonable extension, which extension would be binding on the contractor.

20. In the present case, requests for the extension were made and granted, though petitioner reserved their right to levy to recover liquidated damages in accordance with provisions of Clause 2 of the agreement.

21. The contention of learned Senior Counsel for the petitioner that the extensions were only provisional and Petitioner could reassess the delay is not sustainable.

22. Once a request is received and extension of time is granted, the engineer in charge/the competent authority cannot after the extended period is over turn around and reassess the extension to the detriment of the contractor. If extension is granted, say for a period of three months, the engineer in charge after expiry of three months cannot

turn around and say that the extension should have, in fact, been for a period of two months.

23. Though it may be open to the competent authority/engineer in-charge to, in the first instance, grant an extension for a shorter period than requested and thereafter extend it further but he cannot having once granted it, curtail it retrospectively.

24. Clause 5.4 stipulates that the decision on the extension of time has to be communicated within a period of three months, which pre-supposes that an estimation or calculation would have to be made by the competent authority within the period of three months and a conscious decision taken and communicated. The competent authority cannot mechanically grant an extension in the first instance and then after the period is over, reduce the same retrospectively.

25. I am in complete agreement with the view taken by the Arbitral Tribunal in deciding Issue no.3 and in holding that only two options were available to the competent authority, i.e. (i) either to grant a fair and reasonable extension in terms of Clause 5.4 even in case where there is no application by the contractor; or (ii) to declare that the contractor is not eligible for consideration for extension of time.

26. The competent authority would not be empowered to treat the extension of time granted as provisional and thereafter reduce the

period after the period is itself over.

27. Further, contention of learned Senior Counsel for the petitioner that issue No. 3 could not have been decided in isolation, *dehors* decision on issue No. 5 is also not sustainable for the reason that both the issues are independent of each other, though, there may be some overlap.

28. Issue No.5 pertains to imposition of liquidated damages /compensation for delay. Clause 2 of the contract prescribes for imposition of damages in case the work is not completed within the contractual period and the extended period. Issue No. 3 is as to whether the extension of time is provisional or not.

29. Even if there is some overlap in the said issues, there is no error committed by the Tribunal in deciding them separately, particularly when there is no error in the findings returned in respect of issue No.3. The view taken by the arbitral tribunal is a plausible view.

30. If in the facts of the case, the tribunal was to come to a conclusion that the work was not completed within the period of the contract or the extended date of completion then it would be open to the Arbitral Tribunal to decide issue No.5 accordingly.

31. Further, the decision on issue No.3 is a question of law and

interpretation of the conditions of the contract and the decision on issue No.5 would primarily be a question of fact. Merely because issue No.3 has been decided does not pre judge issue No.5. Clearly, there is no error committed by the Arbitral Tribunal in deciding issue No.3 first and leaving the determination of issue No.5 to a later date.

32. Furthermore, it may be observed that the subject award emanates out of an International Commercial Arbitration with its seat in Delhi and Section 34(2A) of the Arbitration Act is not applicable and as such the challenge to the award is further limited than as may be available in the case of a domestic arbitration.

33. Even otherwise, this court has found that there is no error, leave alone a patent illegality, committed by the Arbitral Tribunal in deciding issue No.3 particularly in interpreting Clauses 5.2 to 5.4 of the agreement.

34. In view of the above, there is no merit in the petition. The petition is accordingly dismissed.

35. It is clarified that the Arbitral Tribunal would be at liberty to decide the remaining issues without being influenced by anything stated herein on merits.

APRIL 26, 2022/So **SANJEEV SACHDEVA, J**