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

% Judgment reserved on: 30.09.2014
Judgment delivered on: 24.12.2014

\+ **OMP 261/2013**

BRITISH SCAFFOLDING (I) LTD. ..... PETITIONER

Versus

INTERARCH BUILDING PRODUCTS (P) LTD. ..... RESPONDENT

Advocates who appeared in this case:

For the Petitioner	:	Ms. Sarika Goel and Mr. Rajeev Chauhan, Advocates
For the Respondent	:	Mr. Sanjiv Bahl, Mr. Karan Bharihoke and Mr. Eklavya Bahl, Advocates

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER,J

1. This is a petition seeking to challenge award dated 01.11.2012. The petition is preferred under Section 34 of the Arbitration and Conciliation Act, 1996 (in short the Act).

2. Before me, the only ground on which the award was assailed was that, the work order dated 06.12.2004 (in short, work order) required the respondent to supply material and consequently erect a pre-fabricated structure (i.e., the building) having a total weight / tonnage of 302.5 MTs, whereas what was put up had a weight / tonnage of only 228.956 MTs. Notably, the work order entailed design, engineering, manufacture, supply, transportation, delivery and erection of a pre fabricated building, at the

petitioner's designated work site, in Haridwar (in short the work in issue).

2.1 This according to the petitioner was the fundamental breach in the execution of the contract.

3. I must, however, indicate that in the petition, several grounds have been raised, none of which were argued, though dealt with, in the award, itself. Therefore, it was evident that the challenge was confined to tonnage of the material supplied, and the structure erected therefrom, at the designated site.

4. In order to appreciate the submissions made in the matter by both counsels, the following facts are required to be noticed :-

4.1 By virtue of the work order dated 06.12.2014, the respondent was entrusted with the responsibility of executing the work in issue. The total value of the work order as agreed to between the parties herein, was a sum of Rs.2.07 Crores. The work order specified the scope of supply and services, the delivery schedule, and the manner, in which, payments had to be made.

4.2 Importantly, clause 6 of the work order gave the petitioner, a right to inspect the material before its despatch, and also, during various stages of manufacture. The reason I am referring to this clause is that, in the written submissions filed on behalf of the petitioner, this issue, has been raised, though in the oral submissions made in court, there was no reference to the same.

4.3 In the context of the work order placed on the respondent, it may be important to note, that the work order was accompanied by Annexure 1, which, inter alia, adverted to, in clause 6, the weight / tonnage of the shed, sheeting and accessories, and crane beams. As to the scope and the effect of the said clause, I would be dealing with the same during the course of my

discussion, as I go along with the narration.

4.4 As per the aforementioned work order, the respondent was required to complete the work in issue and hand over the same by 31.03.2005. The record shows that extension was sought and was given to the respondent till 07.05.2005.

4.5 In so far as the petitioner was concerned, the respondent had abandoned the work, while the stand of the respondent was that, it had, supplied 100% of the material and carried out 95% of the erection work. The balance 5% of the erection work, according to the respondent, was minor in nature and related to fixation of nuts and bolts in certain places in what was a pre-fabricated building.

4.6 The respondent's grievance was that, despite, the aforesaid situation obtaining, the petitioner had failed to pay the balance sum of Rs. Rs.93.60 Lakhs. This sum was outstanding, according to respondent, on 23.4.2005.

4.7 It is the respondent's case that because it was unable to secure payment of the outstanding amounts that, it had to furnish a corporate guarantee, though, it was not part of the terms of the contract. According to the respondent, it was only thereafter that, on 07.06.2005, a sum of Rs.32 Lakhs was paid to it, followed by, release of another sum of Rs.40 Lakhs. With this, the balance amount due and payable to the respondent, was reduced to Rs.21.60 Lakhs, as on 22.06.2005. The respondent, however, laid claim to a further amount of Rs.12 Lakhs, towards erection work.

4.8 Evidently, the petitioner, sometime in mid June 2005, entered the pre-fabricated building, and commenced trial production, which was followed by commercial production.

4.9 The respondent, filed a petition under Section 9 of the Act. By an order dated 11.08.2005, with the consent of parties herein, an arbitrator was

appointed.

5. Upon completion of the pleadings, the learned arbitrator framed issues in the matter. The issues framed were nine (9), in number.

5.1 To be noted, parties had conducted examination-in-chief of the witnesses cited by them by tendering their evidence in the form of affidavits. Pertinently, one of the witnesses cited by the petitioner herein (i.e., RW-1), decided to stay away after he was partially cross-examined.

6. It is in this background that the impugned award came to be passed.

7. In support of the petition, arguments were advanced by Ms. Sarika Goel on behalf of the petitioner, while on behalf of the respondent submissions were made by Mr. Sanjiv Bahl.

8. As indicated above, the submissions of Ms. Goel were only centred on the alleged failure of the respondent to supply a building of required tonnage, which according to the petitioner, had to weigh 302.5 MTs.

8.1 For this purpose, she relied upon clause 6 of Annexure 1 appended to work order, as also, the letter dated 06.12.2004, supposedly written by the respondent to the petitioner.

8.2 In this behalf, reference was also made to two letters exchanged between the parties herein of even date, i.e., 17.06.2005. The first letter, apparently, was written by the petitioner on 17.06.2005, wherein the issue of tonnage qua the building in issue, was raised. To which, the respondent on the same date, apparently, sent a reply. In the reply, the respondent, apart from raising the aspect of blockage of payments, also made an assertion to the effect that the total weight of the building, which would include crane girders and sheeting, was more than 302.20 MTs.

8.3 Based on the aforesaid, it was contended that this fundamental breach of its obligation, undertaken by the respondent, was glossed over by the

learned arbitrator.

8.4 In support of the submission that the building was not of the prescribed weight / tonnage, the learned counsel also adverted to the fact that the record would show, that the, respondent, had supplied additional material, weighing nearly 6.5 MTs, only when the issue of weight / tonnage was raised. In other words, according to the learned counsel, this aspect by itself was indicative of the fact that the building in issue, was not of the prescribed weight.

8.5 As indicated above, in the written submissions, there is an issue raised pertaining to the right of the petitioner to inspect the material, prior to its despatch; an aspect which was not articulated during the course of the submissions made in court. Be that as it may, the petitioner has referred, in the written submissions, to the minutes of meeting dated 29.03.2005 to establish that the material was despatched to the site i.e., Haridwar, albeit without inspection. In this behalf, the learned counsel also referred to yet another letter issued by the petitioner, dated 02.04.2005.

9. Mr. Bahl, on the other hand, largely relied upon the findings recorded in the impugned award to support the respondent's stand that no interference was called for. It was Mr. Bahl's submission that this court was not called upon to appreciate in these proceedings the adequacy of the evidence placed before the learned arbitrator or, its quality. It was the submission of the learned counsel that it was only upon demonstration of the fact that no evidence was available on record, on a particular aspect of the matter, that this court, could interfere and set aside the award.

9.1 Specifically, on the aspects pertaining to the weight / tonnage of the pre-fabricated building erected at the designated site, and as regards, alleged failure to have the material inspected before despatch – it was contended,

that both submissions were an afterthought, in as much as, there is no articulation as to what was the material which was short supplied and the defects, if any, in the material supplied.

9.2 In so far as weight / tonnage of the building in issue is concerned, Mr. Bahl said that a bare reading of clause 6 of Annexure 1 of the work order would show that the weight /tonnage adverted to therein was an "indicative" figure, and that, what was more important was, the approval of the design specifications.

9.3 The learned counsel submitted that the petitioner had approved the design submitted by the respondent based on which, 95% of the building was erected.

9.4 Mr. Bahl further submitted that in so far as supply of additional material to the extent of 6.5 MTs was concerned, the said material was supplied, as this was part of the additional work, not covered by the contract, and therefore, the petitioner, could not use this aspect to demonstrate that the building in issue was not of the prescribed weight. As a matter of fact, in respect of material so supplied, the respondent had indicated to the petitioner, that the said material would be supplied only upon payment of an additional sum equivalent to Rs.4.25 Lakhs.

REASONS

10. I have heard the learned counsel for the parties and perused the record.

11. What emerges from the record is, as follows :-

(i). A work order dated 06.12.2004 was placed on the respondent by the petitioner qua the work in issue.

(ii). Clause 6 of Annexure 1 adverted to the tonnage of the material which was to be supplied by the respondent. Importantly, the said clause used a

term which alluded to the fact that the tonnage specified was "***indicative***", and that, the supplier (i.e, the respondent) was required to provide the material as per the design drawings duly approved by the purchaser i.e., the petitioner.

(iii). At the stage at which the disputes arose between the parties, the total amounts outstanding even according to the respondent was, a sum of Rs.33.60 Lakhs, which included Rs.21.60 Lakhs towards supplies made and, Rs.12 Lakhs, towards erection work.

(iv). The petitioner, at some stage, did raise issues with regard to material being sent to site, without having them inspected. There was though, no rejection of the material so supplied by the respondent, on that score.

(v). While there was delay in execution of the work in issue, as per the time line stipulated (which expired on 31.03.2005), there was extension granted by the petitioner, without any caveats. The respondent's grievance, in this behalf was that, delay was caused on account of the petitioner's failure to grant approval, in time, qua design drawings. Reference, in this regard may be made to letter dated 22.01.2005, wherein the respondent wrote to the petitioner that because of delay in approval of design drawings, it was unable to plan manufacture of anchor bolts, templates and material. Accordingly, the respondent indicated that the schedule would get extended.

(vi). That the respondent had supplied 100% of the material and completed nearly 95% of the erection work.

12. In this background, what requires to be examined with regard to the main issue raised before me, is : Firstly, whether or not the weight / tonnage of the building as indicted in clause 6 of Annexure 1, was an indicative figure or not. Secondly, whether it was possible for the respondent to establish that the pre fabricated structure (i.e., building) was of the indicative

weight /tonnage after the petitioner, on his own showing, entered the building and made use of it. In this context, the petitioner's grievance that the respondent abandoned the execution of the work in issue, will also have to be examined.

12.1 For this purpose, it may be relevant to extract clause 6 of Annexure 1, in its entirety :

> "..As specified by the supplier, the Tonnage for the shed, sheeting and accessories, and gantry Girder is as under :-
>
> a. Structure : 205 Tons
> b. Sheeting and accessories : 45 Tons
> c. Crane Beams : 52.5 Tons
>
> Above tonnages are **indicative** and the supplier will be required to supply as per the design, drawings duly approved by the purchaser."
>
> (emphasis is mine)

12.2 A bare perusal of the aforesaid clause would show that the weight / tonnage of various materials adverted to in the clause was an indicative figure. The emphasis, was that, the material, which the respondent had to supply was to conform to the design drawings, duly approved, by the petitioner.

12.3 Before me, no dispute has been raised by the petitioner that the material was not supplied as per the design drawings approved by the petitioner.

12.4 As indicated above, by me, though pre-despatch inspections may not have taken place in each and every case, nothing by way of documentary evidence or evidence in any other form was placed before me by the counsel for the petitioner, which would demonstrate that on this count material was returned to the petitioner. In this regard, reference may be had to the following extract from the testimony of the petitioner's witness RW-2 :

> "..it is correct that we never rejected any material supplied at the site by the claimant company.."

12.5 As a matter of fact, the learned arbitrator has recorded a finding of fact based on the deposition of the witnesses cited by the petitioner, which would show that the petitioner had commenced usage of the building in mid June 2005, which was operable, without a single complaint, at least, at the stage, at which, evidence was led before the learned arbitrator.

12.6 The evidence also revealed that the petitioner had carried out commercial production and made a profit of Rs.40 Crores.

12.7 I must only indicate that in the petition, there is an averment to the effect that the finding in the award, that the petitioner, had made a profit of Rs.40 Crores was inaccurate for the reason that for the period in issue i.e., 2005-2006, it had a total turnover of Rs.9 Crores. This assertion of the petitioner cannot be accepted in view of the fact that the learned arbitrator has returned the said finding based on the testimony of the petitioner's own witness i.e., RW-1, which finds mention in paragraph 39 of the award.

12.8 Therefore, the reliance, placed by the learned counsel for the petitioner, on the provisions of clause 6 of Annexure 1 and the letter dated 06.12.2004, can have no bearing on the matter in view of the fact that the petitioner, admittedly, entered the building without issuing a virtual completion certificate. The building, being a pre-fabricated structure, and not a brick and mortar structure; it could not have been ruled with certainty, given the time gap, that the building was not of the required weight / tonnage when erected. Moreover, having regard to the state of evidence; with each side adhering to its stand taken in the pleadings, the respondent's version had to be given more weight. This aspect comes to fore, dehors the fact that clause 6 of Annexure 1, while adverting to the total weight /

tonnage (i.e. 302.5 MTs), made it clear that, it was only, an indicative weight.

12.9 It may be important to note at this stage, that the, petitioner for the first time moved an application for inspection of a building by a technical expert, on 05.10.2011, even though arbitration proceedings had commenced in October 2005. The learned arbitrator by a reasoned order, dismissed this application on 30.11.2011. In this context, it must be said that the petitioner had placed on record a report of 2006 of a Chartered Engineer, which in my view, was correctly rejected by the learned arbitrator, as it was not proved.

13. As regards the argument of the petitioner that since, additional material weighing 6.5 MTs, was supplied by the respondent, and therefore, a conclusion should be drawn that the weight / tonnage of the building, was not, as per the prescribed weight, is an argument, which according to me, is untenable, in view of the following finding of fact returned by the learned arbitrator.

> "..The tonnage theory again has to fail because material used was to be as per the approved design and drawings, which stand confirmed by the agreement where it speaks of the weightage as indicative. Respondent's submission that the claimant had asked for additional payment after some additional weight of 6.5 MT was to be used and that it settles that tonnage was firm – should fail again because the respondent had asked some change in the erection which was not covered under the agreed designs / drawings and required some additional material 6.5 MT for which a special letter was written by the claimant to the respondent. Claimant's letter ex. CW-1/R-1 specially says – "As regards removal of column on grid J/II additional portal bracing is required for which additional foundation will need to be provided. The extra steel on account of portal bracing, jack-beam, strengthening of adjacent columns after deduction of one column weight and heavier crane beams for 15.75 m span is 6.50 MT and additional price due to this change will be Rs.4,25,000/-". Obviously – work being extra and not covered

> under the agreement was rightly being asked for making additional payment and this, therefore, cannot fix the point that tonnage was firm and not indicative.."

13.1 In this context, there are other two crucial findings returned by the learned arbitrator.

13.2 First, that it was the petitioner's obligation to issue a "virtual completion certificate", before making use of the building. This finding was arrived at by the learned arbitrator based on the testimony of the petitioner's witness i.e., RW-2. Based on this finding, the arbitrator rejected the assertion of the petitioner that the respondent had abandoned the work.

13.3 Second, that the respondent's version that only 5% of the contract, in terms of value remained to be executed had to be accepted, as against the petitioner's assertion that the quantum of work left out was 25%, in view of the failure of the petitioner to detail out the work left out, and therefore, it could not be said that the respondent abandoned work.

14. These finding dovetailed, with the finding that, the respondent's payments, were blocked, despite, a major portion of the work having been executed, did not leave, to my mind, any scope for entertaining the argument advanced, at one stage, on behalf of the petitioner that, it had no choice but to enter the building in issue.

15. The logical fall out of this would be that given the time and space between the use of the building and the demand for technical inspection, it was not feasible to determine the weight / tonnage of the pre fabricated structure i.e., the building in issue.

16. The learned arbitrator therefore, based on the evidence placed before him has come to the conclusion that the petitioner's assertion in this behalf is not correct and, I see no reason to disagree with the same, specially, when

it falls within the realm of appreciation of evidence placed before the learned arbitrator.

16.1 As a matter of fact, the learned arbitrator had made it a point to deduct 5% of the contract value i.e., a sum of Rs.10.35 Lakhs out of a total claim towards moneys due and outstanding, in respect of work, which remained unfinished.

17. For the aforesaid reasons, I find no merit in the petition. The same is accordingly dismissed. Parties will, however, bear their own costs.

RAJIV SHAKDHER, J

DECEMBER 24, 2014
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