IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 06.09.2021

\+ **O.M.P. (COMM) 485/2020 and IA Nos. 8660/2020 & 8662/2020**

ITMA HOTELS INDIA PVT LTD. ..... Petitioner

Versus

M/s. AMMTYS INTERIOR (INDIA)

PROJECTS PVT LTD. ..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Liz Mathew with Ms Sonali Jain, Advocates.

For the Respondents : Mr Vivekanand with Mr Abhishek Semwal, Advocates.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. ITMA Hotels India Pvt. Ltd (hereinafter 'ITMA'), a company incorporated under the Companies Act, 1956, has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter the 'A&C Act') impugning an arbitral award dated 14.02.2020 (hereinafter the 'impugned award') rendered by the Arbitral Tribunal comprising of a Sole Arbitrator.

2. The impugned award has been rendered in the context of disputes that have arisen between the parties in relation to two separate Work Orders dated 27.04.2012 and 11.08.2012.

3. Briefly stated, the relevant facts that are necessary to address the controversy are as under:

4. ITMA is a company engaged in providing accommodation services. The respondent, is a company incorporated under the Companies Act, 1956 and, is engaged in the busines of construction, interior and decorator's work.

5. ITMA through its consultant M/s Apeejay Surrendra Group (hereinafter the 'Consultant') invited the respondent for execution of the work described as interior works of banquet, pre-function, banquet entrance lobby at the first floor of the hotel- 'The Park, Kochi'.

7. The respondent responded to the invitation to tender and thereafter, negotiations were held between the parties at the office of the Consultant. The same culminated in ITMA issuing Work Order no. 137 for executing the "*interior works in the banquet hall, pre-function, banquet entrance lobby and male and female washrooms on the first floor of the Park Kochi*" to the respondent for a value of ₹1,15,00,000/-. The works were to be completed within a period of four months from the date of receipt of the said Work Order, that is, on or before 26.08.2012.

8. During the course of execution of the works under Work Order no. 137, on 11.08.2012, ITMA issued another work order being Work Order no. 189 to the respondent for execution of interior works in the restaurant including all lobbies as well as male and female washrooms located at the twenty-seventh and twenty-eight floor of the hotel, for a value of ₹83,74,635/-.

9. Disputes arose between the parties regarding non-payment of the Running Account Bills (RA Bills) by ITMA under both the Work Orders. In view of the disputes, the respondent invoked the Arbitration Clause in the aforesaid Work Orders by a letter dated 07.04.2015 and, accordingly, a Sole Arbitrator was appointed by this Court. The parties referred the disputes to the Arbitral Tribunal, and the arbitral proceedings culminated in the impugned award.

10. The claims made by the respondent in its Statement of Claims filed before the Arbitral Tribunal, are summarised as under:

Claim	Particulars	Claimed amount
Claim No. 1	Work done but not paid against the Work Order No. 137 including earnest money/ security deposit/ performance guarantee	₹26,68,750/-
Claim No. 2	Extra items executed under Work Order No.137 within periphery of banquet areas but not	₹17,07,000/-

	paid as per bill dated 05.01.2013 C-44A	
Claim No. 3	Extra items executed under Work Order No.137 but not paid within banquet halls as per bill dated 13.11.2013 C-58 and C-58A	₹8,50,340/-
Claim No. 4	WCT deducted under Work Order No.137 and 189 but TDS not issued	₹8,50,340/-
Claim No. 5	Loss of profit on balance unexecuted value of Work Order No. 137 @15%	₹1,72,500/-
Claim No. 6	Work done but not paid against the Work Order No. 189 including earnest money/ security deposit/ performance guarantee	₹28,64,123.75/-
Claim No. 7	Loss of profit on balance unexecuted value of Work Order No. 189 @15%	₹4,39,668.45/-
Claim No. 8	Loss of hire charges of shuttering other materials suffered due to retention and detention thereof from September 2013 to April 2014 @ ₹25,000/- per month and non-return thereof	₹4,50,000/-
Claim No. 9	Interest on above payment since November 2013 till date of payment @12% p.a.	₹90,81,369.8/-

Claim No. 10	Cost of arbitration proceedings	₹5,00,000/-

11. ITMA also raised the following counter-claims:

Counter Claim No. 1	Refund of ₹53, 26,158/- which is the excess collected over and above the work actually executed by AMMTYS along with interest @12% from 01.11.2013	₹53, 26,158/- along with interest @12% from 01.11.2013
Counter Claim No. 2	Claim of damages for delay	₹ 81,38,143/-
Counter Claim No. 3	Claim for damages towards abandonment of work	₹96,05,698/-
Counter Claim No. 4	Claim towards loss of revenue and loss of business opportunities	₹2,00,00,000/-
Counter Claim No. 5	Compound Interest on sum due for the period as determined	As determined
Counter Claim No. 6	Legal costs incurred towards arbitration	As determined

12. By the impugned award, the Arbitral Tribunal partly accepted the claims preferred by the respondent and awarded an aggregate amount of ₹1,10,47,353.70/- along with interest at the rate of 12% per

annum, in the event the awarded amount is not paid within a period of two months from the date of award, in its favour.

Reasons and Conclusion

13. Mr Mathew, learned counsel appearing for ITMA, assailed the impugned award on the ground as set out in Section 34(2)(a)(iv) of the A&C Act. According to him, Claim nos. 2 and 3 awarded by the Arbitral Tribunal fell outside the scope of the Arbitration Agreement and were not arbitrable. He contended that the Arbitration Clause under the Work Orders was confined to referring the disputes that arose in respect of the Work Orders and therefore, did not cover any claim for additional works. According to him, such work did not fall within the scope of works as covered under the two Work Orders in question. He submitted that, thus, there was no agreement between the parties to refer the said disputes to arbitration.

14. Next, he submitted that in the event it is accepted that the additional works, in respect of which the aforesaid claims (Claim nos. 2 and 3) were made by the respondent, related to the Work Orders, the impugned award would be liable to be set aside as being contrary to the express terms of the contract between the parties. He contended that the Work Orders were for a lump sum amount and in terms of Clause 10 of the Work Orders, no further amount was payable over and above the amount as mentioned in the respective Work Orders. He also drew the attention of this Court to Clause 18 of the Work Orders and submitted that in the event, the extra items were considered as a 'deviation' within

the meaning of Clause 18 of the Work Order, the same would require the express consent of ITMA. Since no such consent was granted, the extra work done could not be considered as a 'deviation' in terms of Clause 18 of the Work Orders and therefore, the impugned award is liable to be set aside.

15. Mr Mathew earnestly contended that either the impugned award in respect of Claim nos. 2 and 3 is liable to be set aside as without jurisdiction as the said claims are not arbitrable, or is liable to be set aside on the ground that it is patently illegal, being contrary to the express terms of the contract between the parties.

16. Before proceeding to address the aforesaid contentions, it is relevant to refer to the two claims in question – Claim nos. 2 and 3.

17. The respondent had claimed a sum of ₹17.07 lacs under Claim no. 2, in terms of its invoice dated 05.01.2013, which was in respect of items executed within the periphery of the banquet areas. The respondent's Claim no. 3 was for a sum of ₹39,04,100/-, in terms of its invoice dated 13.11.2013 for extra items executed within the banquet hall.

18. The respondent claimed that these invoices were for extra items under the Work Order no. 137. However, it was entitled to extra payment as the said items were not included within the scope of work as initially contemplated. The respondent relied upon the Bill of Quantities (BoQ) in support of its claim that the extra items in question

were not a part of the BoQ and therefore, were required to be paid in addition to the value as agreed between the parties.

19. Mr Mathew contended that the value of Work Order no. 137 was fixed at ₹1,15,00,000/- without making any reference to the BoQ. He submitted that the Arbitral Tribunal had grossly erred in referring to the BoQ in respect of Work Order no. 137.

20. Work Order no. 137 defined the scope of work to be as per Annexure "A" to the Work Order. Annexure "A" of the said Work Order described the work to be executed as under:

ANNEXURE A

S. No.	ITEM DESCRITPION	QTY	RATE/Unit	AMOUNT (Rs.)
1	Complete Interior work execution of Banquet, pre function, Banquet entrance lobby, Male female washrooms, passage towards kerala restaurant but excluding stone work. Work should strictly be carried out as per drawings and detaisl from base work to final finishing as per drawing except list of items to be supplied by THE PARK. Work to be complete in all respects and to be approved by Project manager.	Lum Sum	Lum sum	11500000
	Total (Inclusive of all taxes and duties)			**11500000**
(Rupees One Crore Fifteen Lakhs Only)				

21. Note No. 1 to Annexure "A" also specified that "*all items as in drawings are included, even the items which are hidden and unseen (Sustainable Support Structures for every application), but are necessary to achieve the final finished product*" would be included in the description. Undoubtedly, all items included in the drawings were to be considered as included within the scope of work and a lump sum consideration was fixed for the same. The Arbitral Tribunal found that the extra items invoiced by the respondent were 'deviations'. In other words, these were not included within the scope of work as initially contemplated. The Arbitral Tribunal examined the evidence and material on record and found that the scope of the work as contemplated initially was further detailed in the BoQ that was exchanged between the parties. Undisputedly, the BoQ indicated the quantities to be executed under Work Order no. 137. The contention that the BoQ ought to be ignored, was not accepted by the Arbitral Tribunal. ITMA's contention that irrespective of the quantities to be executed and notwithstanding that the items were not initially contemplated by the parties, the respondent was required to execute the same as a part of the lump sum rate, was not accepted by the Arbitral Tribunal.

22. It is seen that Claim no. 2 was in respect of fixing wall paneling with marine ply; gypsum board false ceiling; bison board cladding on aluminum on wall/beams; and external bison board cladding on wall/beams. The learned counsel for ITMA has neither pointed out any drawings as initially sent to the respondent that would cover the said

items nor has ITMA contended that the same was included within the initial BoQ, as exchanged between the parties.

23. Similarly, Claim no. 3 relates to items such as removing of existing MDF paneling on ceiling surface, wooden cladding on light after leveling the M.S. Structure, extra orders item for installation of door frame and shutters resulting from the increase in size and shutter thickness for accommodate installation etc. The Arbitral Tribunal found that the items covered under Claim no. 3 were also over and above the BoQ items, as exchanged at the material time.

24. It is important to note that there is no dispute that the works for which the invoices were raised were in fact executed by the respondent. The respondent had also produced specific instructions, which required the respondent to proceed and execute the works and, submit its rates. Clearly, there would be no requirement for the Consultant to call upon the respondent to submit any rates, if the item of works were agreed to be included within the scope of work agreed between the parties.

25. The finding of the Arbitral Tribunal that the extra items – in respect of which the respondent had raised Claim nos. 2 and 3 – were not included in the work to be initially executed as it did not form a part of the BoQ exchanged at the material time, is a finding of fact based on evaluation of the material on record. The learned counsel for ITMA has also not contested the said finding. He had confined his submissions to the BoQ being alien to the Work Order and therefore, had urged that the Arbitral Tribunal had erred in relying upon the same. This Court is

unable to accept that the Arbitral Tribunal's decision relying on the BoQ exchanged between the parties, is perverse and warrants any interference. Clearly, the consideration for the work is premised on the item and quantum of work to be executed. The BoQ exchanged between the parties would clearly reflect the same. The Arbitral Tribunal's decision that the extra items went beyond the agreed scope of work as the same were not included in the BoQ, warrants no interference by this Court. The said view cannot be stated to be patently illegal and one that vitiates the impugned award.

26. The Arbitral Tribunal also held that there was no dispute that the specific items of work for which payment was claimed by the respondent (Claim nos. 2 and 3), were in fact executed. ITMA having accepted the said works, was liable to pay for the same. The contention that the impugned order is liable to be set aside as the subject claims (Claim nos. 2 and 3) raised by the respondent are not arbitrable, is unmerited. The Arbitration Clause under Work Order No.137 reads as under:

> "**21. ARBITRATION**
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> In the case of "arbitration clause" in terms of the Contract, in an event both the parties are not able to arrive at a mutually acceptable arbitrator - i.e. in case of disagreement as to the appointment of a single arbitrator then the Arbitration will be of two arbitrators (of considerable experience), one to be appointed by each party which arbitrators shall before taking upon themselves the burden of reference appoint an umpire. The Arbitrators or the Umpire shall have Power to open up, review and revise any certificate, opinion, decision,

> requisition or notice save in regard to the excepted matters in dispute which shall be submitted to him or them and of which notice shall have been given as aforesaid. The Award of the Arbitrators or the Umpire shall be final and binding on the Parties. This shall be deemed to be a submission to Arbitration within the meaning of the Indian Arbitration and Conciliation Act 1996,
>
> Terms and condition mentioned above are applicable in totality, thereby terms and conditions mentioned in your quotation stand NULL & VOID."

27. A plain reading of the Arbitration Clause indicates that the Arbitral Tribunal had the necessary jurisdiction to decide the disputes that were referred to arbitration. The Arbitral Tribunal also had the power to review and revise any opinion or decision in all matters save and except, the excepted matters. The jurisdiction of the Arbitral Tribunal was not confined to deciding the claims that were in relation to the scope of work as initially envisaged by the parties. The works that were done under the umbrella of the Work Order in question include extra items, which were directed to be executed as a part of the "*interior works of Banquet, pre-function, banquette entrance lobby and male female wash rooms on the first floor at "The Park, Kochi*".

28. The contention that the impugned award is contrary to the express terms of the contract inasmuch as the Arbitral Tribunal has awarded value for extra items executed by the respondent, that were in addition to the work as initially agreed, is also unpersuasive. ITMA had relied upon Clause 10 of the Work Order, which reads as under:

> "10. **VARIATIONS IN QUANTITIES**:

> This is a lump sum order for executing the works as per annexure A, any variations in the rates due to changes in quantities is considered as included in ordered rate. Nothing would be paid extra for any hidden/seen/unseen items."

29. The Arbitral Tribunal had found that the said Clause is not applicable as the extra items in respect of which the subject claims were made were not merely variations in the quantities but additional items that were not covered within the scope of works as initially contemplated. In terms of the Work Order, the respondent was obliged to perform the work as per the drawings furnished to it. Obviously, the same has a clear nexus with the BoQ. However, the Arbitral Tribunal accepted that there was a variation in the scope of work inasmuch as the additional items and/or items of changed specifications were required to be executed. These items cannot *sensu stricto* be considered as changes in the quantities but were in the nature of a 'deviation'. The view of the Arbitral Tribunal is certainly a plausible view and it is difficult to accept that the same is perverse or patently erroneous. The controversy is clearly within the realm of interpretation of the terms of the Work Order and, was well within the jurisdiction of the Arbitral Tribunal.

30. In the alternative, it was contended on behalf of ITMA that no payments for deviation could be made in terms of Clause 18 of the Work order unless the same had ITMA's prior approval. It was further contended that ITMA had not accorded its prior approval to execution

of the extra items for which Claim nos. 2 and 3 were raised by the respondent.

31. Clause 18 of the Work Order reads as under:

> "18. Deviation
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> Any unauthorized deviation from the job by you will attract penalty through deduction from your bills. Any deviation/or changes by the consultant in the assigned job should have our prior approval falling which no extra payment will be allowed at any cost."

32. The Tribunal had examined the aforesaid contention and had found that the execution of the extra items did in fact have ITMA's approval.

33. The Arbitral Tribunal had also noted that there was material that established that the Consultant was also acting on behalf of ITMA. The Work Order was signed by the Consultant on behalf of ITMA. The respondent was directed to do the work of extra items and also submit its quotes, which it did. ITMA was also aware that the works, as directed, had been executed. It had raised no protest that extra items did not have its approval. The Arbitral Tribunal also noted that all the instructions with regard to the Work Orders had been issued by the Consultant. Therefore, the Arbitral Tribunal liberally interpreted the words "prior approval" as used in Clause 18 of the Work Order.

34. It is important to note that the Work Order did not require that prior approval of ITMA for any deviation should be in writing. It merely required the deviation to have the prior approval of ITMA.

Concededly, all instructions with regard to execution of the works were issued by the Consultant. The record also indicates that some of the emails regarding execution of the works were marked to ITMA. ITMA did not at any stage object to the execution of the extra items. It is also clear that there is no dispute with respect to execution of the extra items as claimed by respondent. In the given circumstances, the decision of the Arbitral Tribunal that the approval of ITMA for extra items could be inferred, cannot be stated to be perverse or patently erroneous.

35. The contention that the impugned award is unreasoned and falls foul of the provisions of Section 31 of the A&C Act, is without any merit. A plain reading of the impugned award indicates that the reasons are articulated and the Arbitral Tribunal has provided sufficient reasons for the conclusions drawn by it. Merely because the contentions of the parties were extensively noted does not in any manner indicate that the findings rendered by the Arbitral Tribunal are, unreasoned.

36. It was also contended on behalf of ITMA that the award for extra items was without any evidence or basis. This contention is also without merit as the respondent had submitted rates for extra items and the same are mentioned in the communications (e-mails) sent by the respondent. The respondent had thereafter, raised an invoice on the said basis. The invoiced amount has been awarded to the respondent. There was no dispute that the value of the invoice conformed to the rates quoted by the respondent. It is also material to indicate that the rates for extra items were not disputed by ITMA at the material time.

37. In view of the above, this Court finds no reason to interfere with the impugned award. The petition is unmerited and is, accordingly, dismissed. All pending applications are also disposed of.

VIBHU BAKHRU, J

SEPTEMBER 6, 2021
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