

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

+ FAO(OS) NO.765/2006

Date of Decision: 29TH October 2009

DELHI DEVELOPMENT AUTHORITY ...Appellant

Through Mr. Bhupesh Narula, Advocate

versus

M/S VERMA CONSTRUCTION COMPANY Respondent

Through Mr. Mukesh Narain, Proxy counsel for

Mr. B. M. Sehgal, Advocate

CORAM:

HON'BLE MR. JUSTICE MUKUL MUDGAL

HON'BLE MS. JUSTICE REVA KHETRAPAL

1. Whether the Reporters of local papers
may be allowed to see the judgment? No.
2. To be referred to the Reporter or not? Yes.
3. Whether the judgment should be
reported in the Digest? Yes.

% JUDGMENT(Oral)

MUKUL MUDGAL,J.

1. In this appeal against the judgment of the learned Single Judge dated 18th September 2006 we are essentially concerned with the claim No.2 amounting to Rs.1,38,099.08 which was enhanced to that figure by the learned Single Judge from the sum awarded by the Arbitrator.

2. The facts of the case briefly stated are as follows:

(a) By the Agreement No.29/EE/NDI/87-88 work of construction of LIG flats in Pitampura was allotted by DDA to M/s Verma Construction Company, the contractor.

(b) Date of commencement of work was 20th December, 1987. Date of completion was 19th June 1988. Works were completed on 19th March 1991.

(c) The respondent contractor had 19 substantive claims. The appellant DDA had proceeded to levy liquidated damages under Clause 2 of the Contract. The appellant had withheld payments due to the respondent to effect recoveries pursuant to the liquidated damages levied.

(d) Disputes between the appellant and the respondent was referred to the arbitrator.

3. The arbitrator, S.E. (Arbitration)-II on 17th April 1994 made the award. The objections were filed by the appellant and the respondent. The learned Single Judge delivered the judgment thereon on 18th September 2006.

4. In the award dated 17th April 1994, the sum of Rs.49,216.95 was awarded under claim No.2. The awarding of the sum of Rs.49,216.95 by the arbitrator was recorded by the learned Single Judge in the following finding in Paragraph 24 of the judgment:

“Recording that in view of Ex.R-95, i.e., final bill prepared by DDA, on quantities reflected as measured by DDA, a sum of Rs.1,38,099.08 was a justified payment, learned arbitrator has awarded Rs.49,216.95. While doing so, learned arbitrator has held that in view of liquidated damages levied by the competent authority, DDA was entitled to recover Rs.75,778/-.”

5. We are not referring to the other claims as the appeal itself states that the challenge is confined to the claim no.2. Even in claim no.2 we are only concerned with the adjustment claimed by the appellant in respect of the finding in paragraph 24. The settled position of law in respect of the above has been summarized in the case of ***Delhi Development Authority vs. Bhagat Construction Co. (P) Ltd. and Anr., 2004 (3) Arb. LR 548 (Delhi) (DB)*** wherein it has been held that the decision of the Superintending Engineer (S.E.) levying compensation under Clause 2 is not arbitrable but that the decision of the S.E. will not

negate the power of the Arbitrator to decide the question as to who was responsible for the delay in adjudicating upon the claims and counter claims of the parties.

6. In another judgment of this High Court in the case of *Delhi Development Authority vs. M/s. Sudhir Brothers, 1995 (2) Arb. LR 306 (Delhi) (DB)*, the law has been thus summarized:-

“4. Our attention has been drawn to the arbitration clause and also the relevant clause which relates to exclusion of certain matters from the purview of arbitration. The relevant clause 2 in the arbitration agreement deals with the question of compensation and directs that the concerned engineer should decide this question and his decision is final. The arbitration clause opens with the words “Unless otherwise provided”. **In view of this language, it is obvious from the decision of the Supreme Court in Vishwanath Sood v. Union of India and another AIR 1989 SC 952, that the Arbitrator could not have gone into the merits of the levy of compensation by the engineer.** In that view of the matter, the DDA ought not to have requested the Arbitrator to include the said amount in the arbitration award. We are told by the counsel for the appellant/DDA the Arbitrator was in fact informed that he could not go into the matter on merits. In any event, the DDA committed a blunder in requesting Arbitrator to formally include the above said amount as part of the award. Taking advantage of the said request, the contractor argued the question of levy on merits and obtained a decision from the Arbitrator in his favour.”
(emphasis supplied)

“6. It will, therefore, be for the DDA to seek to recover the said amount of Rs.5,69,743 in whatever manner it is open to it and in case any such proceedings are taken, it will be open to the contractor to raise all defences that may be open to him in law to contend the levy is bad. In case, the DDA seeks to recover the said amount of compensation from the contractor it will be open to the contractor to file a suit and raise all such contentions as he may deem fit. We make it clear that the question of limitation will not be raised by either of the parties, in view of the above unfortunate procedure adopted by both parties.”

7. Relying upon the aforesaid two judgments, this High Court in yet another Division Bench judgment titled *Delhi Development Authority vs. Sunder Lal Khatri & Sons* decided on 24th January, 2009 in FAO(OS) No.498/2006, relying upon paragraph 6 of the judgment in *Sudhir Brothers (supra)* and setting aside the award of the Arbitrator on the counter claim pertaining to levy of compensation by the Engineer under Clause 2 held that it will be open to the DDA to either file a suit to recover the said amount, or upon adjustment of such amount by the DDA from the dues of the respondent arising from the contract in question, it will be open to the contractor to file a suit and such suit shall be disposed of in view of the law laid down in the case of *Sudhir Brothers (supra)*.

8. In view of the above position of law, we are of the view that out of total amount of Rs.1,38,099.08, a sum of Rs.62,321.08 shall be released to the respondent contractor along with the proportionate interest, and the balance amount of Rs.75,778/- along with the proportionate interest shall be released to the appellant DDA. The amounts so directed shall be released to the parties not later than six weeks from today. However, it will be open to the respondent contractor to institute civil proceedings in accordance with law to recover the amount of Rs.75,778/-, if so advised.

We clarify that the question of limitation will not be raised by the appellant in the event the respondent chooses to file a suit to recover the balance amount claimed to be due to it.

9. The appeal, accordingly, stands disposed of.

MUKUL MUDGAL
(Judge)

REVA KHETRAPAL
(Judge)

October 29, 2009

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