

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

+ **FAO No. 231/2009**

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May 19, 2011

AMIT CONSTRUCTION & CO. Appellant
Through: Ms. Anju Jain and Mr. Hitesh Bachar,
Advocate

VERSUS

MUNICIPAL CORPORATION OF DELHI. Respondent
Through: Ms. Shyel Trehan, Advocate.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J. MEHTA

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

VALMIKI J. MEHTA, J (ORAL)

1. Costs of Rs.10,000/- imposed for restoring of the appeal vide order dated 4.3.2011 has been paid to the counsel for the respondent.
2. The challenge by means of this appeal under Section 37(i) of the Arbitration and Conciliation Act, 1996 (hereinafter 'the Act') is to the impugned judgment dated 19.3.2009 accepting the objections under Section 34 of the Act and setting aside the Award passed by the Arbitrator.

3. The issue on which the trial court allowed the objections was that the Arbitrator had gone against the contractual provision which required the appellant to file with the respondent receipts of the Sanitary Land Fill (SLF) site that the silt which was taken out from the required drains etc., was in fact dumped at the SLF sites. The relevant Clauses of the contract read as under:-

"2. The contractor will produce receipts from SLF site for that quantity of silt and other material which he will dump at SLF for making payment to him.

3. The department may ask the contractor to deposit the silt at any other site other than SLF also as per directions of Engineer-in-Charge.

4. The silt and other materials will be removed simultaneously by the contractor. The payment will be relisted to the contractor only after the site is cleared of all the silt etc."

4. It is settled law that an Award passed by an Arbitrator which violates the contractual provisions is clearly against public policy and is therefore bound to be set aside. I need not cite the catena of decisions of the Supreme Court on this aspect. In the present case, the appellant was awarded a contract with respect to desilting of drains of an area of DEMS West Zone, Delhi. The appellant claimed to have done the work and therefore claimed payment as the work which was done by the petitioner had been mentioned in the measurement books as recorded by the respondent. The respondent however claimed that there was a fraud of public revenue and various officers were chargesheeted, inasmuch as, the

payments were sought to be released to the contractors without actually desilting operations having taken place. The trial court has dealt with this aspect in the following words in the impugned judgment.

“Further it is also evident from the arbitration proceedings that despite being informed about the vigilance inquiry the Arbitrator did not seek any query from the department MCD with regard to the vigilance inquiry. Now, when the objections are being dealt –with by this court the Deputy Commissioner West Zone had been asked to state on affidavit the stage of the vigilance inquiry. This court has been informed that the vigilance inquiry regarding West Zone for the work in the year 2000-01 is still pending and vide order dated 15.4.2008 of the concerned authority, a charge sheet had been issued against may delinquent officials. The Dy. Commissioner (West) has also placed on record the copy of the related proceedings and the various details showing that a number of officials of the MCD of the rant of JE, AE, Accountant, EE have been slapped with a major penalty qua the lapses committed by them in respect of desilting of drains carried out by CSE Contractors. Further, charge sheets have also been issued to the many other delinquent officials whose names have been mentioned in the status report.”(underlining added)

5. The basis issue which has been decided by the trial court for accepting the objections was that the contractor/appellant was bound to get receipts from the SLF sites in proof of the fact that the desilted waste was dumped on the SLF sites, and admittedly, not a single document with respect to the dozens of trips, which would have been done by the appellant/contractor, have been filed to show that in fact there was dumping of the desilted material at the SLF site. The trial court has, therefore, in my opinion, rightly

given a finding that the contractor/appellant was not entitled to payment as no proof was filed, and which was required by the contractual clauses by filing of the receipts showing the dumping of the desilted materials at the SLF sites. In this regard, it would be relevant to refer to the following findings of the trial court and with which I agree:-

“It is evident from the record that initially the entire set of terms and conditions has not been placed on record but thereafter only after the directions of this court the same were placed on record alongwith the supporting affidavit of the Deputy Commissioner West on the aspect of existing trade practice. It is evident from the various documents placed on record that the requirement of the contractor to make the video film and still photographs for desilting of drain before the start of work, during the progress of the work and on the completion of the work on day to day basis, had been inserted only later in the Special Conditions and the same were not a part of the conditions earlier in the year 2000 when the present contract was entered into between the parties. However, the special conditions duly admitted by both the parties, shows that as per special condition no.2 the contractor was required to produce the receipts from the SLF site for that quantity of silt and other material which he will dump at the SLF sites for making the payment to him. It is evident from the arbitration proceedings that the claimant/contractor did not produce the said receipts from the SLF site of the quantity of silt and other material dumped at the SLF site for making the payment to him, a fact which is admitted by the claimant/present respondent. It is only natural that once the silt is removed from a particular place it has to be deposited at some site and it is only then the measurement of the work done can be calculated. In the present case it had been pleaded by the present objector before the Arbitrator that desilting work involve two processes i.e. firstly desilting and second carriage of silt of SLF site and it is evident that the Arbitrator has failed to appreciate that both the works cannot be separated or segregated since removal of silt at one site would involve its deposit at some alternative site only when the work can be measured. The special terms and conditions duly admitted

by both the parties before the Arbitrator require firstly that the contractor would produce the receipts from the SLF sites for the quantity of silt and other material which he dumped at the SLF sites for making payment to him and secondly that the department may ask the contractor to deposit the silt at other site other than SLF sites as per the directions of the Engineer Incharge.” (underlining added).

6. Learned counsel for the appellant firstly sought to argue that the trial court had failed to rely upon a circular which was sought to be filed before it showing that there were directions by the concerned Engineer to deposit the desilted material at an alternative SLF site. However, when the attention of the counsel was drawn to internal pages 30 to 32 of the impugned judgment, it was agreed that this aspect has in fact been dealt with by the trial court. The aspect which was urged was that by virtue of the circular/note of the respondent, the desilted material could have been deposited at the alternative land filled site and which was done, and therefore, the contractor/appellant was entitled to payment. The trial court in this regard has, inter alia, held that even for proof of dumping on alternative SLF site there was the requirement of obtaining receipts from the alternative SLF site. The trial court has dealt with aspect of the note/circular of entitlement of the contractor to deposit at the alternative land filled site as under:-

“I have considered the submissions made before me by both the counsels. **Firstly** the said document i.e. noting dated 3.5.____ was never placed before the Arbitrator nor relied upon by the respondent as evident from the record of proceedings. **Secondly** even otherwise if the said internal noting is taken to be correct and authentic, there is a specific requirement in the said note dated 3.5.____ now placed before this court for the first time, that the payment to the Contractors shall only be made against the

authenticated slips duly received by the contractor at the alternative site. Therefore, in case if the silt was deposited by the contractor/respondent the alternative site (which however is not the plea of the respondent before the Arbitrator), it was necessary for the contractor to have placed before the department the authenticated slips from the competent officers to show that the silt which had been removed from the site had been dumped at the alternative site which again has not been done and therefore, the said noting would not help the respondent no.1 in any manner.”(underlining added).

7. Learned counsel for the appellant sought to argue that the Arbitrator has in fact otherwise, in detail, considered other evidences and after considering those evidences has held that the contractor in fact did the work of desilting and was entitled to payment. In my opinion, this argument of the counsel is not acceptable in view of the direct provisions of the contract which require slips/receipts to be obtained from the SLF site to show that in fact the desilted material was lifted from the relevant site and dumped at the SLF site. I agree with the submission of the counsel for the respondent that merely because there can be evidences in the form of measurement books would not conclusively mean that actual work of desilting was in fact necessarily done, once the contract specifically required receipts in proof of desilting having been taken place, and the desilted material having been deposited at the SLF sites. In my opinion, in the interest of law, justice and equity, surely payment cannot be made to the contractors though for the dozens of trips alleged to be done for dumping of the material not a single receipt was placed on record. If I accept the argument of learned counsel for the appellant, it would mean that there may be in certain cases, collusion

between certain undesirable officers of the MCD and contractors by making notations in the measurement books and simply claim payment on the basis of such notations although there actually may not have taken place desilting operation. I do not subscribe to such argument as raised on behalf of the appellant.

8. In view of the above, I do not find any error whatsoever in the impugned judgment. The appeal being without merit is accordingly dismissed leaving the parties to bear their own costs.

9. Trial court record be sent back.

May 19, 2011
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VALMIKI J. MEHTA, J.