

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

+ **Date of Decision: 28.03.2011**

% **O.M.P. 623/2009**

MUNICIPAL CORPORATION OF DELHI (MCD) Petitioner
Through: Ms. Mini Pushkarna, Advocate

versus

NARESH KUMAR GUPTA &
COMPANY PVT. LTD. B+ Respondent
Through: Mr. S.C. Singhal, Advocate

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

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

VIPIN SANGHI, J. (Oral)

1. The petitioner, MCD has filed this petition under section 34 of the Arbitration and Conciliation Act to assail the arbitral award dated 16.06.2009 passed by Shri Prem Kumar, the learned arbitrator, whereby he has allowed claims no.1 (for refund of earnest money), claim no.2 (for compensation of account of loss of profit due to breach of contract), claim no.4 (towards interest), and claim no.6 (towards the

arbitration costs), amounting to ₹ 34,24,384/-. The learned arbitrator has also awarded the amount of stamp duty, i.e. ₹ 3424/-. He has further granted interest on ₹ 34,27,808/- @ 9% p.a. from the date of the award till realization.

2. The respondent/contractor was awarded the work for construction of pucca school building of MC primary school at New Ashok Nagar, in AC-37/67 in Shahdara South, Delhi vide letter dated 11.03.2004. While the estimated cost put to tender was Rs.2,49,14,000/-, the amount tendered by the respondent contractor, and accepted by the petitioner was Rs.2,25,92,552/-. The respondent was called upon to start the work at once. It was stated that the time allowed to carry out the work shall be reckoned from tenth day of issue of the work order to commence the work.

3. In the Notice Inviting Tender (NIT) issued by the petitioner, clause 3 provided that the time allowed will be 24 months from the tenth day after the date of written orders to commence the work, or from the first day of handing over of the site, whichever is later, in accordance with the phasing, if any, indicated in the tender documents. Clause 4 of the NIT provided that the site will be fully made available at the time of the work order.

4. The “Clauses of Contract”, inter alia, prescribed in clause 5 the “Time and Extension for Delay”. The same reads as follows:

"Clause 5

Time and Extension for Delay

*The time allowed for execution of the works 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 15th 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 of (or) sic **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, Government shall without prejudice to any other right or remedy available in law, be at liberty to forfeit the earnest money absolutely". (emphasis supplied)*

5. Clause 10C and 10CC provided for payment on account of increase in prices/wages due to statutory order, and payment due to increase/decrease in prices/wages after receipt of tender for works.
6. The work involved dismantling of the existing structures and cost of the salvage was put at ₹ 1,70,626/-, which the respondent was required to deposit. Vide communication dated 16.04.2004, the petitioner called upon the respondent to execute the agreement within three days and also to deposit the amount of ₹ 1,70,626/- as shown in Part B of the work order before dismantling the old structure.
7. Undisputedly, the respondent contractor did not carry out any work under the contract. Neither the contract document was signed; nor the demolition work was carried out. The cost of salvage was also not deposited. According to the respondent, the said cost was not required to be deposited, and the same had to be adjusted from the

bills as and when raised by the respondent. The petitioner issued various communications to the respondent to execute the contract document and commence the works. The stand of the respondent was that the work site was not made available in full, and the drawings were not given to him. Eventually, the petitioner issued an show cause notice dated 11.01.2005 and rescinded the contract on 04.02.2005.

8. The case of the petitioner before the arbitral tribunal was that the respondent did not take any steps whatsoever in pursuance of the award of work to execute the work. Neither the contract was executed nor the amount of ₹ 1,70,626/- was deposited towards the salvage cost before taking up the demolition work, nor the construction work was carried out. On the other hand, the case of the respondent was that the site was not made available to the respondent as there was a running school and classes were going on. The said school was also designated as an election centre. The respondent also contended that the working drawings were not made available by the petitioner.

9. The respondent raised its claims, as aforesaid, for ₹ 1 lakh on account of refund of earnest money; ₹ 24,91,400/- on account of loss of profit due to breach of contract by the petitioner being 10% of the value of the estimated value of the work; ₹ 15 lacs due to staff remaining idle, establishment from T and P, shuttering and also mental agony and goodwill on account of breach of contract by the petitioner, interest @ 18%; and ₹ 1 lakh as arbitration costs. The petitioner, MCD also raised its counter claims, inter alia, towards the cost of work

carried out by calling fresh tenders at the risk and costs of the respondent, interest, and cost of arbitration.

10. The learned arbitrator returned a finding that it was the duty of the petitioner to provide the complete work site in one go to the respondent, to start the work. On account of the inability of the petitioner to provide the same for various reasons, the respondent could not be faulted for not starting the work at the site. The learned arbitrator held that the recession of the contract after issuance of show cause notice dated 11.01.2005 was not competent, and so was the recession of the contract vide letter dated 04.02.2005 incompetent. Consequently, the learned arbitrator held that the petitioner could not forfeit the respondents security deposit of ₹ 1 lakh. The learned arbitrator, by placing reliance on the various decisions, including the decision in ***M/s. A.T. Brij Paul Singh & Bros. v. State of Gujarat***; AIR 1984 SC 1703, held that the respondent was entitled to 10% of the estimated cost put to tender as compensation for loss of profit, and consequently awarded an amount of ₹ 24,91,100/-.

11. Claim no.3 made by the respondent for ₹ 15 lacs, as aforesaid, was however rejected on the ground that the respondent had failed to adduce any relevant or cogent evidence in support of the said claim.

12. Under claim no.4, the learned arbitrator awarded interest @ 9% p.a. The *pendente lite* interest from March 2006 upto June 2009 on the amount of ₹ 25,91,400/- was quantified at ₹ 7,57,984/- and awarded in favour of the respondent. He also awarded ₹ 75,000/- towards

arbitration fee in favour of the respondent. All the counter claims of the petitioner were rejected on the ground that the petitioner was responsible for breach of the contract.

13. The submission of learned counsel for the petitioner is that though the work site was not made fully available to the respondent initially, the same was made fully available in December 2004. She places reliance on the letter dated 23.12.2004 issued by the MCD to the respondent, which recorded that *"Now, it is to inform you that full site is available for start of work"*. The respondent was requested to start the work within seven days from the issue of letter, failing which action as deemed fit would be initiated.

14. The respondent responded to this letter vide letter dated 12.01.2005. The respondent did not deny the fact that that the full site was then available. It was stated by the respondent *"You have now admitted and confirmed vide your letter under reference that part site was available in Aug. 2004 and the full site is available now to start the work. We have already clarified about the availability of part site and the work could not be started as intimated through our various references as referred to above"*. In this communication, the respondent sought increase of the rates by 30% to carry out the work by quoting rates of materials such as cement, steel and bricks at the time of tendering in October 2003, and the rates prevalent in August 2004.

15. It is evident from the reading of the award, and it is not disputed that these two vital communications have not even been considered by the learned arbitrator while returning the finding that the complete work site was never made available to the respondent/contractor. The finding returned by the learned arbitrator with regard to the full site being not made available is in the teeth of the aforesaid two communications.

16. The Supreme Court, in **State of Rajasthan v. Puri Construction Co. Ltd. & Anr.**, (1994) 6 SCC 485 has held as follows:

"In recent times, error in law and fact in basing an award has not given the wide immunity as enjoyed earlier, by expanding the import and implication of legal misconduct' of an arbitrator so that award by the arbitrator does not perpetrate gross miscarriage of justice and the same is not reduced to mockery of a fair decisions of the lis between the parties to arbitration. Precisely for the aforesaid reasons, the erroneous application of law constituting the very basis of the award and improper and incorrect findings of fact, which without closer and intrinsic scrutiny, are demonstrable on the face of the materials on record, have been held, very rightly, as legal misconduct rendering the award as invalid. It is necessary, however, to put a note of caution that in the anxiety to render justice to the party to arbitration, the court should not reappraise the evidence intrinsically with a close scrutiny for finding out that the conclusion drawn from some facts, by the arbitrator is, according to the understanding of the court, erroneous. Such exercise of power which can be exercised by an appellate court with power to reverse the finding of fact, is alien to scope and ambit of challenge of an award under the Arbitration Act. Where the error of finding of facts having a bearing on the award is patent and is easily demonstrable without the necessity of carefully weighing the various possible view points, the interference with award based on erroneous finding of fact is permissible. Similarly, if an award is based by applying a principle of law which is patently erroneous and but for such erroneous application of legal principle, the award could have been

made, such award is liable to be aside by holding that there has been legal misconduct on the part of the arbitrator. In ultimate analysis, it is a question of delicate balancing between the permissible limit of error of law and fact and patently erroneous finding easily demonstrable from the materials on record and application of principle of law forming the basis of the award which is patently erroneous. It may be indicated here that however objectively the problem may be viewed, the subjective element inherent in the judge deciding the problem, is bound to creep in and influence the decision. By long training in the art of dispassionate analysis, such subjective element is, however, reduced to minimum. Keeping the aforesaid principle in mind, the challenge to the validity of the impugned award is to be considered with reference to judicial decisions on the subject."

17. Since the learned arbitrator has failed to consider the relevant evidence brought before him, the finding of fact returned by him is clearly vitiated and cannot be sustained. He has completely ignored the categorical case of the petitioner that the site was available when the letter dated 23.12.2004 was issued by it, and the response thereto given by the respondent. This error in the finding of fact, which has vital bearing on the determination of the issue: which of the parties was in breach of the contract, is patent and demonstrated on the plain reading of the award.

18. A perusal of the contractual terms, as extracted hereinabove, shows that the time for execution of the work was to be reckoned from the 15th day mentioned in the letter of award, 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*. Therefore, the time for execution of the work, even if the site was available in December

2004, would continue to have remained for two years and would have commenced only upon taking over of the site in December 2004 by the respondent. The respondent did not dispute that the full site was available in December 2004. The reason given by him for not carrying out the work was escalation in the rates of materials. This claim of the respondent is sufficiently taken care of by clause 10C and 10CC of the contract. The increase in rates, therefore, could not have provided a good justification for the respondent not to commence the work. Consequently, the finding that the breach of the contract was on the part of the petitioner, and not on the part of the respondent also appears to be patently erroneous.

19. Similarly, it is pointed out by learned counsel for the petitioner that the learned arbitrator has not considered the communication dated 02.06.2004, wherein the petitioner called upon the respondent to collect the necessary drawings from the office of the Executive Engineer, XXXI or from the concerned JE/AE II. In the face of this communication, the finding of the arbitrator that the drawings were not made available to the respondent cannot be sustained, as this communication has not at all been taken note of at all.

20. I may observe that the learned arbitrator has displayed a casual and perfunctory approach in deciding the reference. Even though the actual tendered cost of the work was Rs.2,25,92,552/-, he has computed the compensation @ 10% on the estimated cost put to tender. Even if the claim for damages on account of loss of profit were

allowable (which cannot be allowed in view of the above discussion), the same could have been computed only by reference to the tendered amount and not the estimated cost put to tender. Similarly, the award of interest from the date of the award @ 9% p.a. has been made on the entire amount of Rs.34,27,808/-, which includes the *pendente lite* interest awarded of Rs.7,57,984/-. The learned arbitrator could not have awarded interest on interest as done by him, in any event.

21. In the light of the aforesaid, the impugned award suffers from patent illegalities as the learned arbitrator completely ignored the evidence brought on record, and the same is accordingly set aside in its entirety. The parties are left to bear their respective costs.

VIPIN SANGHI, J

MARCH 28, 2011

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