

IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. No. 428 of 2003

Reserved on: 30th July, 2012
Decision on: 23rd August, 2012

DELHI DEVELOPMENT AUTHORITY Petitioner
Through: Mr. Arjun Pant, Advocate.

Versus

M/S. ANANT RAJ AGENCIES & ANR. Respondents
Through: Ms. Biji Rajesh, Advocate.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT
23.08.2012

1. The Delhi Development Authority ('DDA') is aggrieved by an Award dated 18th July 2003, passed by the sole Arbitrator in the disputes between M/s. Anant Raj Agencies (Respondent No.1) and the DDA arising out of the award by the DDA in favour of the Respondent No.1, of the work of construction of multi-storeyed flats 120 Category III, 72 Category III (Duplex) flats in East of Kailash under SFS Pockets A & B.

2. The work was to begin on 23rd May 1983 and the stipulated date of completion was 22nd November 1984. The actual date of completion of the work was 30th April 1989. The disputes between the parties were referred to Mr. K.D. Bali who was appointed as sole Arbitrator by the DDA on 30th June 1992. After conducting seventy-nine hearings, Mr. Bali resigned by a letter dated 17th February 1997. He was substituted by Mr. H.B. Jha who held a further thirteen hearings and thereafter delivered the impugned Award.

3. This Court has heard the submissions of Mr. Arjun Pant, learned counsel for the DDA and Ms. Biji Rajesh, learned counsel for the Respondent No.1.

4. Claim No. 1(a) was for a sum of Rs. 13,50,000 being the difference of reasonable price and price paid for the work executed from 23rd April 1984 to 5th June 1985. The reasonable price was 160% above DSR 1977 while the payment was made at 122% above DSR 1977. Claim No. 1(b) was for a sum of Rs. 24,00,000 being the difference between the reasonable price and the price paid for the work executed from 5th June 1985 to the date of this notice. The reasonable price was considered as 175% above the DSR 1977 while the payment was made 122% above the DSR 1977. Claim No. 6 was for a sum of Rs. 40,27,000 on account of damages for the execution of the work beyond 22nd April 1986. Thus under the aforementioned claims, i.e., Claim No. 1(a), Claim No. 1(b) and Claim No. 6 the Petitioner had claimed a total sum of Rs. 77,77,000 which essentially was for prolongation of the contract beyond the stipulated date of completion. Since the three claims raised a common question, they were dealt with together by the learned Arbitrator.

5. The case of the Respondent No.1 was that there were delays which were caused by the DDA. These included delay in handing over the site, delay in deciding the depth of the excavation for raft foundation, delay in conducting tests for soil investigation, delay in making available the structural drawings, delay in engaging separate agency for supply and filling earth over the RCC Raft in the blocks, delay in vacation of site by other agencies engaged by DDA for work in the adjoining site, and delay due to non-decision regarding drawings of doors, windows, chokhats etc. So were the delays on account of the decision regarding details of lobby portion, railings, grills, lift etc. and delay in laying of conduit pipes for

electrical contractors and the failure to take a decision in regard to the location of water tanks, fire-fighting arrangement, water supply and drainage arrangement. In addition, it was stated that there was a shortage of CI pipes, cement and steel. Beginning 5th June 1986 the work stopped for over eight months due to non-receipt of approval of scheme from the Delhi Urban Art Commission. It was further submitted by Respondent No.1 that by granting extension of time ('EoT') without levy of compensation, DDA had admitted that it was entirely responsible for the delay.

6. The Executive Engineer ('EE') had himself recorded in the site hindrance register that the delay of 2431 days was fully on account of the hindrances created by the DDA. Respondent No.1 claimed enhancement @ 160% from 23rd November 1984 to 5th June 1985; @ 175% from 6th June 1985 to 21st April 1986; @ 197% from 22nd April 1986 to 31st December 1986 and @ 211% from 1st January 1987 to 30th April 1989 above the DSR 1977 applicable to the contract. The amounts were worked out on the basis of the periodical published by the Government of India and also on the basis of the prevailing tender rates during the relevant period. Respondent No.1 deducted the value of stipulated material as per the stipulated issue rates while working out the damages.

7. The case of the DDA was that since EoT had already been granted without levy of compensation, Respondent No.1 ought not to take any further advantage. It was submitted that in view of the Additional Condition Nos. 1 and 12 in Part II of the general specifications and conditions and Clause 10 of the agreement, the claims were liable to be dismissed. Moreover, Respondent No.1 had failed to prove the loss as claimed by producing its books of accounts.

8. The learned Arbitrator first concluded that by granting EoT the Engineer In-charge ('EIC') had himself admitted to the delay of 2431 days as being on account of the DDA. Moreover, the DDA had failed to lead evidence to show that any delay was caused by Respondent No.1. It was further held that Clause 10 (C) of the agreement would not apply since the delay was not confined to the issue of materials but in respect of various other factors. The contention of the DDA that Respondent No.1 had not produced the books of accounts was held as devoid of any merit "as the present claim has been worked out on cost increase method and also on price index method for which the books of accounts are not relevant". The learned Arbitrator adopted the cost indices issued by the government of India using which Respondent No.1 had worked out the escalation at Rs. 77,77,000. The learned Arbitrator worked out the escalation by applying the base difference in the cost increase that was prevalent in the month of receipt of tender and that which was prevalent at the time of the stipulated completion of tender and further in the month of the actual date of completion. Using this method, the learned Arbitrator worked out the escalation at Rs. 73,46,557 after deducting the sum of Rs.3,45,253 which had already been paid by the DDA to the Respondent No.1 under Clause 10(C) of the agreement. The learned Arbitrator worked out the net escalation at Rs. 70,01,304. However, it was held that since Respondent No.1 could have saved escalation by planning and buying materials in advance, it was appropriate in the interests of justice to restrict the claim to 50%. Accordingly a sum of Rs. 35,00,652 was awarded under Claim Nos. 1 (a) and (b) and Claim No. 6.

9. Mr. Arjun Pant, learned counsel for the DDA submitted that in the present case where the increase in the rates of items is not confined to labour and material, then Clause 10 (CC) of the contract was attracted. There was a specific formula set out in Clause 10 (CC). In fact, even

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when the work was in progress, the DDA had written to Respondent No.1 letters dated 23rd March 1985 and 26th September 1986 (Ex.A-3 and A-4) making it clear that the payments would be made to it as per the terms and conditions of the contract and not at the rates claimed by it. As regards the non-availability of the site, Clause 1 of the general specifications and conditions stipulated that where a part of the site was not available or there was unavoidable delay in supplying of materials stipulated, the programme of construction would be modified “and the contractor shall have no claim for any extra work or compensation on this account”. It was submitted that under Clause 6 of the agreement there could be no claim for any further compensation when EoT was granted without levy of compensation. Mr. Pant also referred to the decision of the learned Single Judge dated 4th December 2009 in CS (OS) No. 2614A of 1998 (***M/s Anant Raj Agencies v. DDA***) where in similar circumstances the Award on account of losses suffered due to increase in prices of building material and other expenses apart from the payment under Clause 10 (CC) was set aside.

10. The contention of Ms. Biji Rajesh, learned counsel for Respondent No.1, was that once the learned Arbitrator had considered the entire evidence and returned a categorical finding that the delay in completion of the work was entirely attributable to the DDA. This was a finding of fact which could not be challenged in a petition under Section 34 of the Arbitration and Conciliation Act, 1996 (‘Act’). On account of the delay caused by the DDA, Respondent No.1 had suffered damages and a proper scientific basis had been adopted by the learned Arbitrator for working out the damages. It was submitted that the view taken by the learned Arbitrator was a plausible one and did not call for interference.

11. In the instant case, the payment under Clause 10 (C) of the contract

for increase in price of labour and material had already been included. Rs. 3,45,253 had already been paid to Respondent No.1 on this account. The said amount was rightly deducted by the learned Arbitrator while computing the amount payable under these claims. However, for increases which were not covered by Clause 10 (C), the learned Arbitrator had to necessarily apply the other clause in the contract pertaining to escalation, i.e., Clause 10(CC). Admittedly, the contract extended far beyond the stipulated time and Clause 10(CC) sets out a specific formula for computing escalation during the extended period of the contract.

12. It has been held by the Division Bench of this Court in ***Delhi Development Authority v. K.C. Goel & Co. 2001 (II) AD (Delhi) 116*** and ***Delhi Development Authority v. U. Kashyap 1998 (VII) AD (Delhi) 300*** that if an escalation formula is provided in the contract, it would not be open to the learned Arbitrator to adopt some other formula for computing escalation as that would amount to legal misconduct. In the present case, the learned Arbitrator has adopted a formula different from the one set out in Clause 10(CC) of the contract. Even if one were to proceed on the basis that there was no Clause 10(CC) in the contract which was perhaps why DDA did not base its arguments on the said clause either before the learned Arbitrator or in the grounds urged in this petition, the resultant position would be that there was no clause in the contract that permitted the award of escalation. The learned Arbitrator could not have gone beyond the express provisions of the contract. It was explained by the Supreme Court in ***State of Orissa v. Sudhakar Das (2000) 3 SCC 27*** that in the absence of any escalation clause “an arbitrator cannot assume any jurisdiction to award any amount towards escalation”. Looked at from any angle, it is plain that in the present case the learned Arbitrator acted beyond the scope of the contract in adopting a formula for awarding escalation outside of what was to be found in the contract. The learned

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Arbitrator also erred in adopting an 'interest of justice' parameter in awarding 50% of the amount so determined. Such a decision was based on no evidence but on surmises and conjectures. Consequently, it is held that the impugned Award in respect of Claim No. 1(a), Claim No. 1(b) and Claim No. 6 suffers from patent illegality and requires to be set aside.

13. Claim No. 7 was for Rs.8,90,500 on account of overweight steel issued whereas the payment was made on the basis of standard weights. The learned Arbitrator noted that DDA had not produced the records and that there was no dispute about the quantity of total tor steel issued by it which was 2372.658 MT whereas it was paid for the standard weight of 2221.542 MT. From the final bill, the learned Arbitrator found that the total steel paid was 2221.801 MT. The learned Arbitrator added 1% wastage to it and the total quantity worked to 2244.022 MT. On this basis, it was held that 128.636 MT had been paid less. The learned Arbitrator accounted for the sum of Rs. 3,33,021 paid by DDA for 62.598 MT at the issue rate of Rs. 5320 per MT on account of overweight of steel and calculated the amount payable to Respondent No.1 as Rs. 4,38,023.

14. Although it was sought to be contended that under Clause 42(iii) of the agreement a 5% wastage for cutting steel was permissible, the fact remains that DDA failed to produce any record before the learned Arbitrator regarding overweight steel. Moreover, DDA had not refuted the contents of various letters written to it by the Respondent No.1. This is a purely factual aspect which cannot be gone into at this stage particularly in the absence of DDA producing any record before the learned Arbitrator. It is not possible for this Court to examine those records for the first time in the proceedings under Section 34 of the Act. Consequently, the Award in respect of Claim No. 7 does not call for interference.

15. Claim No. 8 was for a sum of Rs. 6,07,500 on account of straightening bent up bars issued in bent up bundles. In the present case, the Respondent No.1 produced before the learned Arbitrator a letter dated 28th May 1984 written by it to the effect that it would be claiming extra for straightening and cutting of the steel bars. The learned Arbitrator examined agreement Item No. 3.11(b) which included operation of “benting, binding and placing in position the steel bars” but did not include the element of “straightening and cutting”.

16. Mr. Pant places reliance on the decision in ***Wee Aar Constructive Builders v. Delhi Development Authority 2001 (IV) AD (Delhi) 65*** and submits that the learned Arbitrator erred in treating the said claim as maintainable when the said work was included in the original scope of work.

17. In ***Anant Raj Agencies v. Delhi Development Authority 2005 (IV) AD (Delhi) 197***, the aforementioned decision as well as an earlier decision in ***K.C. Chhibber v. DDA*** (decision of a Single Judge dated 18th January 1991) in CS (OS) No. 1985-A of 1984 was considered. It was noted that in ***Wee Aar Constructive Builders v. Delhi Development Authority***, a learned Single Judge distinguished the earlier decision in ***K.C. Chhibber v. DDA*** on the ground that in the said case, i.e., ***K.C. Chhibber’s*** case, the Petitioner informed DDA that straightening of steel was to be provided as an extra item of work and this was not objected to by DDA. In the present case, Respondent No.1 informed DDA that it will be claiming extra payment for straightening and cutting since the steel was issued in bent up bundles and not supplied in cut sizes. Consequently, in the present case the learned Arbitrator was justified in awarding a sum of Rs. 5,93,164 against Claim No. 8.

18. Claim No. 10 was for a sum of Rs. 73,44,658 on account of execution of items of works which have exceeded the deviation limit of 50% set out in the agreement thus attracting Clause 12-A. Respondent No.1 by its letters (Ex. C-111 to C-187) informed DDA about the deviations and intimated the rates duly supported by analysis which it would be charging for executing the work which quantities exceeded the deviation limit. The case of the DDA was that since the total value of the contract had not exceeded the deviation limit and the restrictions in Clause 12(VI) of the contract were not met, Respondent No.1 could not claim the market rates. Reliance was placed by Respondent No.1 on decisions of the Supreme Court and High Courts.

19. The learned Arbitrator found that Respondent No.1 had indeed informed DDA that it would be claiming extra for executing items which exceeded the deviation limit and at no point in time had DDA asked it not to do so. DDA did not object to the analysis of rates as submitted by Respondent No.1. There was also no dispute as regards the item of quantities exceeded beyond the deviation limit. Going by the CPWD analysis of rates which permitted only 10% contractor's profits, the learned Arbitrator reduced the claim amount by 15% and awarded Rs. 62,42,959.

20. There was criticism of the said portion of the Award by Mr. Pant, learned counsel for DDA, that this was a duplication of the claim that had been awarded under Claim No. 1(a), Claim No. 1(b) and Claim No. 6. However, no such plea was raised before the learned Arbitrator. The question of the work exceeding the deviation limit was distinct and covered under Clause 12-A of the contract. The claim was preceded by several letters written by Respondent No.1 to DDA, a fact not denied by DDA. The learned Arbitrator appears to have rightly analyzed the

contractual position and come to the correct conclusion that the said amount was payable. This Court is, therefore, not persuaded to interfere with the Award in respect of Claim No. 10.

21. Claim No. 14 was for a sum of Rs. 1,58,200 on account of disputed amounts regarding rates for providing and fixing steel plates and columns to receive the lintels. There was no dispute as to the total quantity of work executed by Respondent No.1. However, the payment was made in respect of the above items by DDA at a rate for which it did not give details. It appears that during the course of the execution of the work, Respondent No.1 informed DDA that it would be charging market rate for executing the said extra item and DDA did not respond by stating that the said condition was not acceptable to it. The Award of the learned Arbitrator in regard to Claim No. 14 appears to be a reasoned one based on the evidence on record and does not call for interference.

22. Claim No. 15 was for a sum of Rs. 1,72,000 on account of the difference in rates for providing and fixing 42mm thick fire proof shutters. The learned Arbitrator has awarded Respondent No.1 a sum of Rs. 1,69,626 on the basis that the details for the said amount were based on the statement of facts, after deducting the sum of Rs. 1,64,418 paid by DDA. The dispute was really as regards the rate at which the extra item was to be paid. DDA had paid the final bill in two parts. The substituted item was paid at Rs. 283.86 per sq.m. and extra item at Rs.178.69 per sq.m. However, DDA failed to place on record the rate analysis. On the other hand, Respondent No.1 placed on record analysis of rates of item as Appendix C-8, based on the rates charged by the supplier. The acceptance of the said analysis by the learned Arbitrator cannot be said to be *per se* illegal. The challenge to Award in respect of Claim No. 15 is, therefore, negatived.

23. Claim No. 16 was for a sum of Rs. 3,15,900 on account of shuttering and centering wrongly paid under the items of beams instead of suspended floors. The learned Arbitrator awarded a sum of Rs. 3,15,881. A perusal of the impugned Award shows that detailed reasons have been given by the learned Arbitrator by analyzing the relevant provisions of the contract and comparing it with the CPWD Specifications 1977. This Court is not persuaded to interfere with the Award in respect of Claim No. 16.

24. Claim No. 18 was for a sum of Rs. 1,14,800 on account of providing machine cut kota stones instead of manually dressed stones. Analyzing para 11.21.1 of the CPWD Specifications 1977 Vol. I, the learned Arbitrator noted that it did not mention about the cutting and dressing of the size of the stone slabs by machines. Even para 11.21.2 did not mention about cutting and dressing of the stone slab by machine. On that basis, it was concluded that this was a separate operation which involved extra expenditure and for which the Respondent No.1 was liable to be reimbursed. This Court is unable to find any infirmity in the said decision of the learned Arbitrator.

25. This Court has also examined in some detail the Award in respect of Claim No. 22 in the sum of Rs. 2,91,874 on account of providing MS plate duly welded to pressed steel frames and making holes in the plate and in the frame to receive the hinges for the shutter including base tie; the Award in respect of Claim No. 23 in the sum of Rs. 1,41,660 on account of providing mullion bars and additional fillings and section members; the Award in respect of Claim No. 24 in the sum of Rs. 79,200 on account of MS steel shutters procured for electrical niches; the Award in respect of Claim No. 25 in the sum of Rs. 2,75,590 for providing double heights centering and shuttering for columns and beams; the Award in respect of Claim No. 33 in the sum of Rs. 1,12,083 on account

of incorrect derivation of rates of substituted items; the Award in respect of Claim No. 34 in the sum of Rs. 2,08,250 on account of wrong deduction made in Item No. 3.18 for plastering of RCC surface with cement plaster and the Award in respect of Claim No. 36 in the sum of Rs. 3,67,200 on account of expenditure incurred for maintenance of permanent staff and labour for handing over the flats to the allottees. Detailed reasons have been given by the learned Arbitrator under each of these items of claims. This Court is unable to discern any patent illegality in that regard.

26. The learned Arbitrator has elaborately dealt with Claim No. 35 in regard to non-payment of final bill for a sum of Rs. 2,23,44,370.12 as well as the claims for extra and substituted items not claimed. Each item has been analyzed threadbare and the amount worked out in great detail. This Court is not expected to re-appreciate the evidence and sit in appeal over the findings of the learned Arbitrator. The DDA has not been able to persuade this Court to interfere with the Award in this regard.

27. The net result of the above discussion is that this Court sets aside the impugned Award in respect of Claim No. 1(a), Claim No. 1(b) and Claim No. 6 in the sum of Rs. 35,00,652 and affirms the remaining Award as such.

28. The petition is disposed of in the above terms with no order as to costs.

S. MURALIDHAR, J.

AUGUST 23, 2012

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