

IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. No. 439 of 2004

Reserved on: May 3, 2012
Decision on: May 31, 2012

DELHI DEVELOPMENT AUTHORITY Petitioner
Through: Ms. Geeta Mehrotra with
Mr. Rahul Tomar, Advocates.

Versus

H.S. KHANNA Respondent
Through: Mr. Vivekanand, Advocate.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT
31.05.2012

1. Although this petition was filed under Section 34 of the Arbitration and Conciliation Act, 1996 ('1996 Act') to challenge the Award dated 6th July 2004 passed by the sole Arbitrator, inasmuch as the disputes commenced before coming into the of the 1996 Act, a preliminary issue arose as to whether the present proceedings should be under the Arbitration Act, 1940 ('1940 Act'). I.A. No. 9572 of 2006 was filed by the Delhi Development Authority ('DDA') for this purpose. The said application was disposed of on 21st July 2009 with the Court clarifying that the present case was under the 1940 Act and that the present petition should be treated as objections under Sections 30 and 33 of the 1940 Act. Accordingly the present petition has been considered as such by the Court.

2. The disputes between the parties arose out of a contract awarded by the DDA in favour of the Respondent for construction of 148 houses on 36 sq.m. plots including services in Shalimar Bagh, Block A, Pocket G. An agreement dated 7th April 1980 was executed between the parties wherein the date of commencement of the work was 5th April 1980 and the date of completion was indicated as 4th October 1980. The work was actually completed on 17th November 1984. Disputes that arose between the parties were referred to arbitration by a sole Arbitrator who was appointed by an Engineer-Member, DDA by his letter dated 1st August 1985. When the Respondent objected to the said appointment and filed OMP No. 29 of 1989 under Sections 5, 8, 11 and 12 of the 1940 Act, this Court by an order dated 24th August 1994 appointed Justice G.C. Jain (retired), as Arbitrator. On the expiry of Justice G.C. Jain, a learned Advocate of this Court was appointed as the sole Arbitrator and the impugned Award was pronounced by him on 6th July 2004.

3. Of the twelve items of claims, the learned Arbitrator rejected Claim Nos. 1, 5, 8, 9 and 10. The Respondent was awarded a total sum of Rs. 3,55,833 with *pendente lite* and future simple interest at 9% from the date of proceedings till the date of payment.

4. Claim No. 2 was for an additional sum of Rs.75,000 under Clause 12(v) of the Agreement for the extra works executed. The case of Respondent was that the previous contractor had not completed the work

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awarded to him and the balance work was thereafter awarded to the Respondent. By various letters, the Respondent informed the DDA about the extra work that was executed and had also claimed extra payment. The case of the DDA, on the other hand was that the additional work alleged to have been executed by the Respondent had been paid for in the Running Account bills ('RA bills') as extra works and these RA bills had been accepted by the Respondent without protest. Secondly, it was pointed out that since the Respondent had restricted its claim to Rs. 75,000 instead of Rs. 83,698 as originally claimed, it was apparent that the claim was fictitious and was an afterthought. It was further contended that the Respondent was supposed to maintain a day-to-day record and the fact that the site order book was not made available by the DDA to the Respondent, was not relevant to the execution of the alleged extra works. By a letter dated 24th April 1981 the DDA informed the Respondent that he had never been directed to execute any extra/substituted items. However, the Respondent filed details of the extra work exhibited as Ex. C-29.

5. The learned Arbitrator found that the items claimed by the Respondent had not been included in the running bills. It was apparent from the bill of the previous contractor that no payment had been made for the various items. The second factor was that only some of the measurement books ('MBs') could be produced by the DDA, and that too

after a considerable period. The Respondent also took a stand that there were no MBs maintained which would show the extra work done by the Respondent. Since the relevant records had not been produced by the DDA, an adverse inference was drawn against it on a preponderance of probabilities and it was held that the version of the Respondent was more probable. Accordingly, Claim No. 2 was allowed in favour of the Respondent.

6. The contention of DDA is that no reasons have been given by the learned Arbitrator in coming to the above conclusion and that it is based on surmises and conjectures. This Court does not find any merit in the above contention for the simple reason that a perusal of the Award shows that there is a detailed discussion in paras 16.1 to 16.5 of the Award as regards Claim No. 2. The reasons are comprehensive and clear. If indeed the DDA was unable to produce MBs to prove its claim that no extra work was performed by the Respondent, then an adverse inference had necessarily to be drawn against the DDA. This Court, therefore, rejects DDA's objection to the Award as regards Claim No. 2.

7. Claim No. 3 was for a sum of Rs. 85,000 for the work executed but not measured. Originally the Respondent had claimed a sum of Rs. 97,131.41 as per the details given in Ex. C-30. Later this claim was restricted to Rs. 85,000. The work executed but not measured pertained to "centering and shuttering; cement slurry; excavation in trenches;

dismantling of brick work; wrongful deduction; providing grooving in plaster; reinforcement of overweight steel etc.” The learned Arbitrator referred to the correspondence between the parties and to the fact that before the previous Arbitrator the DDA had sought opportunities from time to time to carry out the measurement but failed to do so. On the other hand, when the Respondent sought production of the site order book, the overweight steel record and the day-to-day record of the balance work maintained by the DDA, the DDA simply informed the Respondent by a letter dated 6th January 1996 that the site order book and steel register were not traceable, that the previous contractor’s bill had not been finalized and that it was not necessary to maintain a day-to-day register. It was in those circumstances that the learned Arbitrator again drew an adverse inference against the DDA since despite seeking several adjournments it was unable to produce the relevant records. After considering the amount of Tor Steel, the claim was restricted to Rs. 81,297.97 and learned Arbitrator awarded a sum of Rs. 81,298.

8. The objection of the DDA as far as the above Award is that all RA bills have been accepted by the Respondent and that the Respondent failed to submit any documents to support his claim. As already pointed out, the failure by the DDA to produce relevant records, which could have actually demonstrated its defence that it had paid for the work that was measured, resulted in the learned Arbitrator drawing an adverse

inference. This was but natural considering that much of the Respondent's claim was dependent on the records maintained by the DDA itself. Therefore, there is no merit in this objection and it is accordingly rejected.

9. Claim Nos. 4 and 5 were adjudicated together. Claim No. 4 was for the restoration of a sum of Rs. 85,000 held under part rate statement and extra and substituted items, and Claim No. 5 was for Rs. 15,000 wrongfully withheld by the DDA. While the Respondent contended that the work was completed on 15th December 1981, the DDA relied on the letter dated 17th November 1984 to show that the work was not completed satisfactorily. During the course of arbitration the DDA produced the 17th RA bill (Ex. R-28) from which it was apparent that an amount of Rs. 1151.28 and Rs. 20,000 have been withheld on account of rectification of defect vide M.B. No. 1084 on or about 1st June 1983. Certain entries showed that a sum of Rs. 1651.20 was withheld. Further, a sum of Rs. 2302.80 was withheld for anticipation of cement recovery.

10. The learned Arbitrator found that the fact that the work was completed was demonstrated by the certificates issued by the officials of the DDA. Ex. C-37 was one such certificate which not only recorded that the work had been completed satisfactory but recommended that the work of a bigger magnitude could be entrusted to the Respondent. It was observed by the Arbitrator that in the facts and circumstances, the burden

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was on the DDA to show that the work performed by the Respondent was defective and not in accordance with the CPWD specifications. Further, the Respondent had been paid only part of the rate without any basis and the reduction of the rates by the DDA could not be done unilaterally. In the circumstances, the claim in the sum of Rs. 29,506.16 was found to be justified. After accounting for the withheld sums, a total sum of Rs. 51,157 was awarded against Claim No. 4.

11. The contention of the DDA in regard to the above claim was that the completion certificate produced by the Respondent was a “procured one” and is not correct and genuine. The learned Arbitrator has referred to Ex. C-37 and C-38 which were certificates issued by the Engineer-in-Charge, DDA. If indeed, it was DDA’s case that the said certificate is not genuine, it would have not only made an averment to that effect in its reply to the statement of claim but also produced the concerned Engineer to prove it. It did not do either of these things. It is not possible, therefore, to determine at the present stage under Sections 30 and 33 of the 1940 Act whether in fact the said certificates are genuine. This is a matter of evidence which had to be led by the DDA before the Arbitrator, and which it failed to do so. The objection in regard to Claim No. 4 is therefore rejected.

12. Claim No. 6 was for a sum of Rs. 23,876 on account of removal and disposal of excavated earth dumped on the lanes and inside the houses.

Again, from the letters written by the Respondent to the DDA on various dates which were referred to by the learned Arbitrator, it was found that the Respondent had excavated the earth to the extent of 1458.16 cubic meter. Here again the relevant MBs which could have shown the performance of this work by the Respondent, were not produced by the DDA despite being granted various opportunities by the learned Arbitrator. If the earth was excavated by the earlier contractor and he was not paid for its removal and disposal, then it was probable that it must have been removed by the Respondent. The learned Arbitrator referred to the letters written by the Respondent giving the details of the earth removed from different portions of the work. In particular the learned Arbitrator referred to Annexure E of C-22 which gave the total amount expended on this account as Rs. 23,873.07. Therefore, there is no merit in the objection that this claim was based on probabilities or that the learned Arbitrator overlooked the correspondence relied upon by the DDA. This is a matter of appreciation of evidence and the learned Arbitrator cannot be faulted for arriving at the conclusion that the Respondent was entitled to a sum of Rs. 23,873.

13. Claim No. 7 was for a sum of Rs. 94,505 being the amount paid short on account of steel doors, windows and ventilators. The Respondent was claiming this amount for cost of fixing and welding and had written various letters to the DDA in this behalf. The case of the

DDA was that the payments had been made in the 17th RA bill. The Respondent pointed out that the said bill only showed the payment of a sum of Rs. 50,100.42 whereas the total claim was for a sum of Rs. 1,44,605.69 for the entire work of fixing of steel doors, windows and ventilators.

14. After discussing the letters written by the Respondent to the DDA, it was concluded by the learned Arbitrator that the facts stated in those letters remained unrebutted. A perusal of 17th RA bill also showed that the plea of the DDA that the entire amount was paid to the Respondent, was not sustainable. Since the Respondent had been paid a sum of Rs. 50,100.42, the learned Arbitrator held that the balance amount is payable to the Respondent. This again is a question of appreciation of evidence and this Court is not expected to sit in appeal over the determination of the learned Arbitrator in that behalf. This Court is unable to discern any error apparent on the face of the Award in regard to Claim No. 7.

15. Claim No. 11 was for a sum of Rs. 30,000 on account of theft of material against the secured advance. The material handed over to the DDA was placed in the lock and key of the DDA. The goods were stolen after the possession was taken from the Respondent. Nevertheless a sum of Rs. 30,000 was recovered/deducted from the bill of the Respondent. Reliance was placed on a letter dated 8th September 1981 (Ex. C-13)

whereby the DDA was informed by the Respondent that the material was

lying in DDA's custody and the Respondent should not be held liable for the loss of that material. The contents of the said letter are not denied by the DDA. The learned Arbitrator rightly observed that since the material comprised of brass bib cocks and other materials which were prone to theft and pilferage, the Respondent rightly did not install them and gave them to the DDA. In the circumstances, it was held that the sum of Rs. 30,000 was wrongly deducted from the bill of the Respondent. The only defence of DDA in regard to this claim was that it was the responsibility of the Respondent to protect the material from theft. It cannot be said that the conclusion drawn by the learned Arbitrator was an improbable one. The inference drawn on a reading of letters written by the Respondent to the DDA was plausible and cannot be faulted.

16. The award of simple interest at 9% under Claim No. 12 cannot be said to be unreasonable.

17. There are no grounds made out for interference with the impugned Award of the learned Arbitrator. The objections are hereby rejected. The Award dated 6th July 2004 is made rule of the Court. The decree sheet be drawn up accordingly.

18. The petition is disposed of.

S. MURALIDHAR, J

MAY 31, 2012

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