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* IN THE HIGH COURT OF DELHI AT NEW DELHI

% *Judgment Reserved on : April 23, 2012*
Judgment Pronounced on: May 07, 2012

+ FAO(OS) 16/2007

BAGGA BROS. Appellant
Represented by: Mr. Harish Malhotra, Senior Advocate
instructed by Mr. R.K. Modi, Advocate.

versus

D.D.A. & ORS. Respondents
Represented by: Nemo.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

PRADEEP NANDRAJOG, J.

1. The challenge in appeal is to the decision dated December 05, 2005 of the learned Single Judge rejecting challenge by the appellant to the award dated March 31, 1993 pronounced by the learned Sole Arbitrator.

2. Appellant's counter claim has been rejected by the learned Arbitrator and DDA's claim has been decreed in sum of ₹3,83,123/-. Claim by DDA was under five heads. The first claim, in sum of ₹81,631/- was to realize the forfeited security amount and the learned Arbitrator has awarded the same. Claim No.2 was the price difference at which DDA had re-

awarded the contract, vis-à-vis the price offered by the appellant. As against ₹4,26,114/- claimed the learned Arbitrator has allowed ₹2,84,774/-. Claim No.3 pertaining to pre-suit and pendente lite interest has been declined. Post award interest @11% per annum (simple) has been allowed. Claim No.4 in sum of ₹5,000/- toward cost of arbitration proceedings has been allowed. Claim No.5 in sum of ₹17,468/- towards cost for re-tendering the work has been allowed. Appellant's counter claim for refund of earnest money, loss of profit for wrongful rescission of the contract in sum of ₹1,08,672.60 has been denied and thus no interest has been held payable for the reason nothing has been awarded to the appellant.

3. Admittedly, no work was executed at site by the appellant.

4. Responding to a Notice Inviting Tender issued by DDA to provide and fix aluminium door and window frames and shutters as per approved drawings at a building under construction by DDA, appellant's quote, being found to be the lowest, was accepted. The date of commencement of the work was June 10, 1991. The work never took off.

5. The Notice Inviting Tender, as noted herein above had a working drawing. The work was for providing and fixing aluminium door and window frames. Unfortunately, the drawing throws no light as to what should be the thickness of the aluminium sheets from which the door and the window frames and shutters had to be fabricated. In the specifications, as listed in the description of the work, it was simply indicated that the frame and the shutters shall be

fabricated out of Section 4725, with the mullian Section No.4726 in Z section (Jindal make). It was indicated that the aluminium would be anodized, but thickness of anodizing was not specified.

6. Now, a contract for supply and installation of goods would require the goods to be either specified by a sample or by a description or by reference to a specification, and in the instant case we find that the goods are sought to be specified with reference to a specification of a number i.e. 'Section 4725' with mullian Section No.4726 (Jindal make).

7. To a technically qualified person it would stand to logic and reason that there would exist a catalogue, accepted in the trade, as indicative of what would be the description of the goods with reference to a Section number, and in the instant case the Section number being 4725 and 4726. This Section number, is expected to list, either the thickness of the aluminium sheet from which the frame and shutters had to be fabricated or the running foot or meter weight, so that it could be ascertained, either with reference to thickness of the sheet to be used, or the weight thereof, the dimensions of the sectional thickness of the aluminium door and window frames as also shutters.

8. Before commencing fabrication of the frames and shutters, the appellant went to the site and saw that the civil work executed, pertaining to where the doors and windows had to be affixed, had exposed brick work; without any plastering work. He wrote a letter informing DDA that since anodized aluminium sheets were to be used in fabricating the door and window frames and were required to be affixed

within the next four months, and plastering work had yet to be done; the plastering would adversely affect the frames inasmuch as the cement-stone grit mixture, with which the walls would be plastered, would stick to the frames and upon being removed would damage the anodizing, it was suggested that the aluminium frames could be epoxy painted by and this would mean that after the plastering work is over, such plaster which would dry up on the frames, on being removed, would result in no damage. The department considered and rejected the request and called upon the appellant to execute the work by anodizing the aluminium sheets and indicated that while anodizing the sheets, the minimum thickness of anodic coating should be 15 microns.

9. Now, admittedly, the tender specifications being silent on the thickness of the anodic coating, in that, it not being indicated as to what should be the thickness, in microns, of the anodic coating, the appellant immediately responded and informed DDA that the tender documents being silent with respect to the thickness of the anodic coating, he would be anodizing the aluminium sheets to an anodic coating of 5 microns; as this was the minimum thickness recognized and specified in the Indian Standards IS:1868-1982 issued by the Bureau of Indian Standards pertaining to '*Specification for anodic coatings on aluminium and its alloys*'.

10. DDA gave no response but insisted that the anodic coating should be 15 microns. What was the basis for DDA to so insist, was never brought out.

11. To seek approval of a sample of the frame and the shutter, the appellant fabricated a sample frame with a door

shutter and used sheets weighing 0.470 kg per metre length for section 4725 and 0.93 kg per metre length for section 4726. DDA insisted that pertaining to the former section the weight should be 0.706 kg per metre length and for the latter 1.135 kg per metre length.

12. What was the basis for DDA to so insist? Nothing was brought out by DDA. As regards the appellant, it brought out that there is no government approved text in which the weight per metre length of Section 4725 and Section 4726 stands enlisted. The appellant brought out that as per the tender specifications the only thing indicated was that the frames and shutters would be anodized and would correspond to Section No.4725 and Section No.4726 and that they should be 'Jindal Make'. The appellant produced catalogue by 'Jindal', a known manufacturer of aluminium in India, and therefrom pointed out that pertaining to the two sections the catalogue would evidence that the two sections could have weights ranging from 0.470 kg per running metre for Section No.4725 and 0.93 kg per running metre for Section No.4726 going up to 0.706 kg per running metre for Section No.4725 and 1.135 kg per running metre for Section No.4726; in other words appellant pointed out that the tender not specifying any particular kind of aluminium sheet to be used, the appellant could use any kind of sheet of Jindal make as long as it corresponded to the section number in the catalogue of Jindal.

13. The dispute could not be settled. The work could not commence. Nothing was fabricated at site or brought at site. DDA re-tendered the work and this time indicated in the tender that pertaining to Section No.4725 the minimum weight per running metre would be 0.706 kg and pertaining to Section

4726 the minimum weight should be 1.135 kg per running metre. The work was awarded at a higher cost and DDA sought to recover the same from the appellant. The part security deposit available was forfeited. DDA's claim remained unsatisfied.

14. It was in the aforesaid backdrop that the issue fell in the lap of the learned Arbitrator. It being the admitted position that the appellant could not commence execution of the work on account of a twin dispute: (i) whether appellant was justified in fabricating the sample of the door and windows frame and shutters using aluminium of weight 0.470 kg per running metre length pertaining to Section 4725 and weight 0.93 kg per running metre for Section 4726; (ii) whether appellant was justified in stating that as per IS Code 1868 it was justified in anodizing the aluminium sheets with anodic thickness of 5 microns.

15. The impugned award, unfortunately, does not bring out the aforesaid.

16. The discussion of the learned Arbitrator is most inchoate on the subject and we quote:

“(b) Delay in conveying decision regarding use of alternate box section in lieu of aluminium ‘Z’ Section 4725.

The respondent had, on 12.8.1991 orally and voluntarily given his proposal to substitute ‘Z’ Section 4725 required mainly for item No.2 of schedule of quantities of the contract by a box section which was not in the contract. He felt that the claimant never gave decision till the date of rescission of contract viz. 4.10.1991.

The claimant stated that the respondent cannot take this as an excuse for non performance of the contract.

The total aluminium, in 9 different sections, required for the work was of the order of 7.8 t out of which section 4725 was nearly 2.49 t. Nothing prevented the respondent from ordering, collecting full quantity and anodizing the balance 8 sections weighing in all around 5.31 t. Further, since the claimant never suggested any change from the contract, the respondent could not presume the approval to his proposal, particularly in the absence of study of technical and financial implications by the claimant, and make this issue as an excuse for his not carrying out his obligations under the contract. Neither had the respondent produced both samples as directed nor given a proper proposal in writing along with rates for new item so as to enable the claimant to know the financial implication and to enable taking a decision. The new contract being operated by the claimant at the risk and cost of the respondent has not changed this provision of 'Z' Section 4725. Hence the excuse is not tenable.

(c) Sequence of operations.

The respondent stated that the claimant failed to convey his decision regarding whether the anodizing should precede or follow the fabrication and hence there was apparent delay in execution. The claimant denied.

It is seen from respondent's letter of 30.8.1991 that he was "going ahead" with anodizing first as asked by the claimant. The quantum of delay, if any, in giving decision by the claimant is not indicated anywhere by the respondent. A real expert in the manufacture of anodized aluminium windows for use in public works does not need anybody to tell him the correct sequence. Hence I do not consider that the claimant is responsible for any delay on this account.

(d) Thickness and Unit weight of 'Z' Section 4725.

The respondent stated that since the claimant failed to indicate the thickness and/or unit weight of 'Z' Section 4725, he was not responsible for the delay in execution of the work. The claimant denied.

The question was raised for the first time on 23.9.1991 by the respondent. The contract having been awarded on 31.5.1991 (& formal agreement signed on 18.6.1991) and knowing that the time for completion was only four months it was necessary for the respondent to order the section immediately after award of contract to him. The respondent did not produce any evidence to show that he had placed the order giving "drawing number" of Jindal & that the manufacturer had found the order deficient for execution. From claimant's letter of 27.8.91 it is seen that work on other items had also not started by then. Even in his letters dated 30.8.91 the respondent has not asked for any clarification regarding the thickness or unit weight of section 4725. In fact, if he had any doubt he could have asked the clarification even before submission of tender. Further, in his letter of 23.9.91 the respondent has not clearly asked for any decision as such on the above issue from the claimant.

It is seen that the respondent's rate for the agreement item No.2 involving use of 'Z' section 4725 was only Rs.950/- whereas the reasonable rates were about 50% more. Hence apparently in his effort to reduce his losses he was making all out efforts to have this section substituted by an entirely new box section for which he expected to get a rate fixed based on market rates prevailing at the time of execution. Hence I do not consider that the claimant has been responsible for non procurement of 'Z' Section 4725 by the respondent.

(e) Anodic coating.

The respondent stated that he could not go ahead with the anodizing of the aluminium sections in the absence of the decision regarding the thickness of anodic coating from the claimant. He also stated that when the tenders were called later

for the same work the specification in the tender clearly indicated that the coating has to conform to grade AC-15 of IS 1868-1982. The claimant denied.

It is seen from the respondent's letter of 30.8.1991 that he had informed the claimant that he was "going ahead" with the anodizing. In fact the respondent never asked for any specific decisions as to whether he should provide 5 micron or 15 micron anodic coating. From claimant's letter of 4.10.91 it is clear that the respondent had brought only a nominal quantity of aluminium sections on 30.8.1991.

Further, if respondent's exhibit R-21 is to be believed, anodizing and (powder coating) was got done partly by him on or before 21.7.1991 without raising any doubt about the grade of anodic coating.

Hence there was no delay on account of alleged non-availability of decision regarding the thickness of anodic coating. The clarification in the subsequent tender papers was evidently as an abundant precaution to take care of doubts of the type raised in the instant case belatedly.

(f) Site/Size of openings.

The respondent was of the opinion that the openings in walls, where windows were to be provided, were not exactly rectangular and hence he could not go ahead with the work. The variations in the two opposite sides were stated to be between 4 & 5 mm. This issue was raised by the respondent for the first time on 30.8.1991 though he had taken over the site on 10.6.91 after receipt of letter of acceptance dated 31.5.1991.

The claimant had maintained that the variations was only upto 4-5 mm.

The actual measurements got done jointly by the parties during the course of arbitration proceedings have revealed variations more than 5 mm in quite a few cases.

(i) This, of course, does not affect the procurement of the aluminium sections. No

evidence was produced by the respondent to prove that he had ordered for the full requirement of the nine aluminium sections within a reasonable time after receipt of the letter of acceptance of his tender. He had never intimated to the claimant the quantity of different sections procured by him on different dates. No evidence was produced to show if any bill for secured advance was submitted by the respondent to the claimant nor copy of the such bill, if sent, was filed by either party.

Claimant had, however, indicated on 11.9.1991 that on 30.8.1991 nearly 25% of the quantity excluding section 4725 and consisting of 3 sections was brought to site from which not a single window could be made. In fact two out of the 3 sections brought to site pertained to the item of door and only one item to window. It is seen from claimant's documents that nearly 1.3 t of aluminium sections were brought to site on 30.8.91 as against total requirement of nearly of 7.83 t. The respondent did not state in his reply the "section-wise" quantity or the total quantity brought by him to the site.

(ii) The anodizing was apparently not done by 4.10.91 (except very small quantity) in spite of the respondent's statement in his letter of 30.8.1991 that he was "going ahead". No evidence has been produced to indicate the quantity of different sections anodized. Till the anodizing is complete to a reasonable extent, the fabrication can't start and the need for site arises only after the fabrication is completed. Hence non availability of site has not held up any fixing of doors and windows in this case."

17. Now, the learned Arbitrator has totally confused himself with reference to the appellant suggesting not to have 'Z' type section fabrication of the aluminium frames for doors and windows and suggesting a box type section on the reason the walls were not plastered and there would obviously be

gaps in the brick work and the aluminium section, by treating it as if the appellant was suggesting a change in the contractual specifications. The learned Arbitrator failed to appreciate that the appellant, as an experienced fabricator, was only suggesting to DDA that given the site condition i.e. the walls being unplastered, it would be advisable to have a box type section of the aluminium frames. Similarly, with respect to the appellant suggesting epoxy coating instead of anodizing the aluminium sheets, the learned Arbitrator fell into error by not understanding the context in which said suggestion was made, and is unjustified in opining that the appellant ought to know the sequence of events to be followed in fabricating and affixing the frames and the shutters.

18. A perusal of the impugned order would highlight that aforesaid two issues i.e. the right of the appellant to fabricate the frames and the shutters having weight 0.470 kg per running metre for Section 4725 and weight 0.93 kg per running metre for Section 4726 has nowhere being discussed vis-à-vis DDA's insistence that the weight of two sections should be 0.76 kg per running metre and 1.135 kg per running metre. Similarly, the issue of the thickness of anodizing being 5 microns as was insisted by the appellant and 15 microns by DDA has not been discussed.

19. It is apparent that the award suffers from the vice of non-application of mind. In fact, the two core issues have not even been discussed. The impugned order does not deal with the issue.

20. Admittedly, when the works were re-tendered, DDA indicated that the anodizing would correspond to AC grade 15

i.e. 15 micro metres and also specified the thickness of the sheets to be used requiring the running length per metre being of the desired weight which DDA was insisting, and suffice would it be to state that unless the first two issues were decided, only then could the resultant issue be decided i.e. whether the re-tendered works were of the same specification as were required to be executed by the appellant.

21. The appeal must succeed. It does. The impugned order dated December 05, 2005 is set aside. The award dated March 31, 1993 is also set aside.

22. At the hearing of the appeal, learned senior counsel for the appellant had stated that if this Court were to set aside the award; upon agreeing with the appellant that the learned Arbitrator has totally missed the point and has not even taken note of, much less having decided the twin issues which arose for consideration, the appellant would be prepared to bring the curtains down by not requiring the claim to be reconsidered and the counter-claim to be reconsidered and would not insist on refund of the part security amount in sum of ₹25,631/- so that the parties could say '*Quits*'.

23. Accordingly, as a result of setting aside of the impugned award we do not refer the matter to a re-arbitration considering that the contract in question pertains to the year 1991. Appellant's counter claim is a petty sum of ₹1,08,672.60 on account of the alleged loss of profit. DDA has been awarded ₹2,84,774/- + ₹81,631/- and cost of arbitration in sum of ₹5,000/-. A fresh arbitration would entail expenses equal to the claims.

24. Before closing, we would highlight the gross negligence of the officers of DDA in drafting the terms and conditions of the Notice Inviting Tender. The drawings attached with the Notice Inviting Tender were intended to convey the specifications of the door and window frames and shutters, but unfortunately the thickness of the section of the sheet to be used has not been specified. In the description contained in the tender documents it has been listed that the aluminium would correspond to Sections No.4725 and 4726, without realizing that there is no code issued by any government department or recognized agency which would throw light as to what would be the descriptive dimensions of the said two sections. Jindal, a known manufacturer of aluminium, has a catalogue, which evidences a range of weight per running metre of Aluminium Sections 4725 and 4726. The Engineers of DDA have shown meager knowledge of technical skills. As far as the contractor is concerned, knowing that he who quotes the lowest price would be the successful tenderer, the contractor was justified in quoting rates and offering the sections of the minimum notified weight. Similarly, pertaining to anodizing, if DDA desired thickness of 15 microns, it had to be so specified keeping in view that as per the IS Code issued by the Bureau of Indian Standards the normal anodizing on aluminium sheets envisages the same to be 5 microns and thus a contractor could insist that in the absence of a specification to the contrary, he would anodize the aluminium sheets having thickness only 5 microns.

25. Amount deposited by the appellant pursuant to interim orders which has been kept in a fixed deposit be returned to the appellant with accrued interest thereon.

26. Since none appeared for DDA at the hearing, we refrain from making any order as to costs.

(PRADEEP NANDRAJOG)
JUDGE

(SIDDHARTH MRIDUL)
JUDGE

MAY 07, 2012
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