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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
F-143

+ **O.M.P. No. 167 of 2007**

UNION OF INDIA

..... Petitioner

Through: Mr. R.V. Sinha, Central Govt.
Standing Counsel.

versus

BAHL BUILDERS (P) LTD. & ANR.

..... Respondents

Through: Mr. Sandeep Sharma with
Ms. Kanika Singh, Advocates.

CORAM: JUSTICE S. MURALIDHAR

ORDER

03.12.2012

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1. The Petitioner, Union of India through the Chief Engineer, Delhi Zone, Delhi Cantonment has, in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') challenged an Award dated 17th October 2006 passed by the sole Arbitrator (Respondent No. 2) in the disputes between the Petitioner and Respondent No. 1 Bahl Builders (P) Ltd., arising out of the work of construction of married accommodation for officers (D/S) Major to Brigadier 200 dwelling units (two-in-one concept) at Mahipalpur, Delhi Cantt.

2. The work was awarded to Respondent No. 1 by letter dated 5th January 1999 after Respondent No. 1 reduced its offer to Rs. 12,40,63,692.84 under the contract agreement ('CA') entered into between the parties.

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3. With disputes arising between the parties, Respondent No. 1 invoked the arbitration clause and subsequently filed an Arbitration Application No. 121 of 2003 under Section 11 of the Act. The said petition was disposed of by the Court on 10th September 2003 by the following order:

"AA.121/2003

By way of this petition, the petitioner seeks appointment of an Arbitrator to adjudicate the disputes between the parties.

The Respondents invited tenders for execution of the work named and styled as "Construction of Provision of Married Accommodation for Officers (D/S) Major to Brig 200 Dwelling units (two-in-ones) concept at Mahipalpur Delhi Cantt." In response to this advertisement, petitioner submitted its tender for the subject work, which was accepted and the subject work was awarded to it vide letter dated 5th January, 1999. The contract was governed by the General Conditions of Contract IAFW 2249 providing for settlement of all claims, rights, questions, disputes in any way arising out of and relating to the subject works contract by way of arbitration clause 70 thereof. The work was to be completed in two Phases within stipulated time. During the course of execution of the work there were various hindrances from respondents' side. A number of changes were ordered during the currency of the contract. Despite hindrances the work of Phase I was completed within scheduled time. However, there was delay in completion of work in Phase II. Disputes and differences arose between the parties. The petitioner invoked the arbitration clause vide letter dated 12th April, 2002. The respondents objected certain claims of the petitioner for being referred to the Arbitrator and also failed to appoint the Arbitrator within the stipulated time. Hence the present petition.

I have heard learned counsel for the parties.

Counsel for the respondents contends that an Arbitrator was appointed on 30th July, 2003. She has placed on record a copy of letter dated 30th July, 2003 appointing Shri B.N. Roy, CE (QS&C) as sole arbitrator. Only three claims were referred to

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the arbitrator viz. Refund of water charges being Rs.4,83,471/-; Interest past, pendentelite and future @ 18% p.a. and Cost of arbitration being Rs.75,000/-.

Learned counsel for the petitioner states that all disputes as stated in para 7 (xii) of the petition are referable to arbitration. Counsel for the respondent has no objection if all disputes as stated above are referred to Mr. B.N. Roy, Sole Arbitrator.

In these circumstances, the disputes enumerated in para xii are referred to Shri B.N. Roy, CE (QS&C), Sole Arbitrator for adjudication.

Petition stands disposed of.”

4. Respondent No. 1 filed seventeen claims before the learned Arbitrator.

The Petitioner filed its statement of defence on 15th April 2006. In para 1 of the statement of defence, it was contended by the Petitioner as under:

“As per E-in-C’s Branch policy certain claims outside the ambit of Arbitration were not referred to Arbitrator but as per Court Order dated 10 Sep 2003, all the claims have been referred to Arbitrator to first look into the arbitrability of these non-referred claims for adjudication.”

5. The above assertion of the Petitioner was not consistent with what had been agreed to before this Court when it passed the above order dated 10th September 2003. Nevertheless the learned Arbitrator examined the above plea which he recorded in para 9 of the Award as under:

“.....Union of India argued against arbitrability of the claims listed at serial no 2 to 6 & 8 to 17 in Appendix ‘A’ and stated that these are not arbitrable being outside the ambit of arbitration as all these claims are deemed to have been waived and extinguished in terms of Condition 65 of IAFW-2249 General Conditions of Contracts, forming part of contract

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agreement as all these claims except claim No 1&7 have been raised after signing of final bill.”

6. After noting the contention of Respondent No. 1 in relation to the above plea, the learned Arbitrator rejected the plea regarding arbitrability of the claims by the following reasoning:

- “(a) Condition 70 of IAFW-2249, General Conditions of Contract provides, “All disputes, between the parties to the contract (other than those for which decision of the CWE or any other person is by the contract expressed to be final and binding) shall, after written notice by either party to the contract to the other of them, shall be referred to sole arbitration of an”.
- (b) Section 16 of Arbitration & Conciliation Act 1996 provides that “the arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to existence or validity of the arbitration agreement and for that purpose an arbitration clause which forms of a contract shall be treated as an agreement independent of the other terms of the contract”. In terms of Section 16 (2) of Arbitration & Conciliation Act 1996, the objection that arbitral tribunal has no jurisdiction to arbitrate claims except claim No 1 & 7 should have been raised by Union of India before submission of statement of defence. Union of India has raised the said objection during hearing of the case and as such the objection now raised is time barred.
- (c) The claims listed in Appendix ‘A’ from serial no 2 to 6 & 8 to 17 do not fall under the category of ‘Excepted Matters’ and no final and binding decision of any authority has ever been conveyed in this regard.
- (d) Appointing authority while appointing me, as arbitrator has not asked to decide the arbitrability of claims objected to now by Union of India before proceeding further in the matter.

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- (e) I have been appointed as arbitrator pursuant to Delhi High Court order dated 10 Sep 2003. Counsel for Union of India had stated in the Court that they have no objection in case all the disputes are referred to the arbitrator for adjudication."

7. It was contended by Mr. R.V. Sinha, learned counsel for the Petitioner, that the learned Arbitrator's conclusion was contrary to the specific provisions of Condition No. 65 of I.A.F.W-2249 of the General Conditions of Contract ('GCC'). He submitted that once the final bill was submitted and payment accepted then it was not open to Respondent No. 1 to raise any further claim. He sought to place reliance on the decision of this Court in *Gurmukh Singh & Co. v. Municipal Corporation of Delhi* 2012 (193) DLT 302.

8. This Court does not find any merit in the above submission. In the first place, the only plea taken in the statement of defence was that the learned Arbitrator had to decide the question of arbitrability of the claims. This was contrary to this Court's order dated 10th September 2003 which referred the claims of Respondent No. 1 to the learned Arbitrator "for adjudication". The said order was not challenged by the Petitioner and became final. Once the claims were referred for adjudication, it was not open to the learned Arbitrator to decide whether they were in fact arbitrable. The learned Arbitrator was justified therefore in negating this plea of the Petitioner by relying upon the order dated 10th September 2003

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passed by the Court. Even otherwise it is seen that in the letter dated 14th August 2000 (Ex.C-21), and the letter dated 26th April 2001 (Ex.C-44), Respondent No. 1 had already detailed several items of claim which it later listed out in its petition under Section 11 of the Act. This was not a case where the Respondent No. 1 accepted the payment in full and final settlement and it later claimed that this was done under 'coercion' or 'duress'. Consequently, the decision in *Gurmukh Singh & Co. v. MCD* is of no assistance to the Petitioner.

9. Claim No. 1 was for a sum of Rs. 4,86,471 (later revised to Rs. 4,83,471) towards refund of water charges. The case of the Respondent No. 1 was that the recovery effected by the Petitioner for supply of water by referring to Condition No. 31 of the GCC was against the provisions of the contract and that the Respondent No. 1 had objected to this action by a letter dated 10th/13th September 1999 (Ex.C-15). Reference was also made to various other letters including Ex.C-21 and Ex.C-44 where Respondent No. 1 stated that it worked out the lump sum amount on the basis that there will be no recovery of water charges. In particular Respondent No. 1 referred to the Special Conditions of the Contract ('SCC') which neither provided for supply of water free of cost nor supply of water on payment. Accepting the plea of Respondent No. 1, the learned Arbitrator gave his reasons for allowing the claim as under:

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“24. I have heard, examined and considered arguments and submissions of both parties. Condition 31 of IAFW-2249 vide sub para 2 provides, ‘In the event of a provision existing in the tender documents for MES Supply of Water on payment and contractor desiring to buy it from MES, he will be permitted to draw it from MES Water Supply System or other MES source at such point or points as may be decided by Garrison Engineer on his sole discretion and the contractor shall make necessary arrangements at his own cost for lifting, pumping, carrying or conveying water to the site of works as required.’ There is no provision in the contract agreement for supply of water on payment. As per special condition 1 on serial page no 150 of contract agreement, if any provision in special conditions is at variance with IAFW-2249 and IAFW-2159 including errata/amendments thereto, the special conditions shall be deemed to take precedence. Special Conditions neither provide for supply of water free of cost nor on payment. As per contra proferentem rule for interpretation of contract, if two possible meanings remain, after an admissible evidence to arrive at the true meaning, then the meaning will be adopted which is most against the person using the words or expressions which have given rise to the difficulty in construction subject to this, that the construction thus adopted must not work out wrong. Words are to be construed against the person or party who uses them, provided this construction does not work out wrong. In absence of any stipulation in Special Conditions to issue water on payment and the order of preference stipulated in Special Condition on serial page 150 of CA and rule of Contra Pro-ferentem for interpretation of the contract, I am of considered view that the water was to be issued to contractor free of cost.”

10. Mr. Sinha assailed the above finding by contending that it was the General Condition No. 31 of I.A.F.W 2249 which would apply. It is seen that the learned Arbitrator has accounted for the above contention but applied the rule of *contra proferentem*. The view taken by the learned Arbitrator in respect of Claim No. 1 was a plausible one and cannot be said to be suffering from any patent illegality warranting interference by the Court.

11. Claim No. 2 was for a sum of Rs. 9,70,000 (later revised to Rs. 9,57,695) towards excavation in hard rock and soft rock by chiseling for road and path work paid under Schedule A Section IV in lieu of Section X. Claim No. 3 was for a sum of Rs.1,45,000 (revised amount Rs. 1,40,420) for excavation in hard rock by chiseling for external electrification. Claim No. 4 was for a sum of Rs. 2,30,000 for excavation in hard rock by chiseling for laying water supply mains. The issue before the learned Arbitrator was whether the excavation carried out for culverts was different from the excavation carried out for the purposes of laying of the road. While the quantity indicated in Schedule A Section IV related to excavation for the road surface, the excavation carried out for buildings and leveling of site around buildings was covered under Schedule A Section X. The learned Arbitrator examined both clauses and also took note of Particular Specifications ('PS') Clause 3.2.1 (a). It was held that the Petitioner measured the site development for services under respective sections only because the rates quoted by the Contractor under Schedule A Section X were higher when compared to the rates quoted under the respective section of services. The quantities mentioned in Schedule A Section IV were for culverts and not for site development. There was a distinction of two types of excavation. Accordingly the learned Arbitrator awarded the Respondent No. 1 a sum of Rs. 9,57,000 under Claim No. 2.

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By the same logic, the learned Arbitrator granted the Respondent No. 1 a sum of Rs. 1,40,420 under Claim No 3 and a sum of Rs. 2,24,440 under Claim No. 4.

12. The above claims have been decided again on an interpretation of the clauses of the CA and it was open to the learned Arbitrator to form an opinion in that regard. This Court is not persuaded to hold that any patent illegality has been committed by the learned Arbitrator in deciding the above claims.

13. Claim No. 5 was for a sum of Rs. 1,60,000 (revised to Rs. 1,59,153.71) towards water proofing of vertical surfaces to sunken floors. It was contended by the Petitioner that the decision of the Accepting Officer ('AO') under Condition No. 6A of IAFW-2249 was final and binding. It relied on the letter dated 11th December 1999 (Ex.R-14) and letter dated 24th September 1999 (Ex.R-15) to contend that the water proofing to vertical surfaces of sunken portion was included in lump sum. The said two letters have been perused by the Court. They refer to the decision of the AO but a copy of such decision was never placed before the learned Arbitrator. The drawings produced before the learned Arbitrator indicated water proofing treatment to walls and bottom slabs. However, in the order of precedence, the provisions contained in PS superseded the drawings. The PS did not mention about any treatment to

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vertical walls and waterproofing carried out to walls. Consequently, it was held that such work was an extra work beyond the terms of the CA.

14. Having examined the impugned Award and documents that constituted the arbitral record, this Court is of the view that no error has been committed by the learned Arbitrator in accepting the claim of Respondent No. 1 for water proofing of vertical surfaces. Indeed the PS makes no mention of treatment of vertical walls. Thus the learned Arbitrator was right in treating it as an extra work and Respondent No. 1 was entitled to payment for such extra work as claimed by it.

15. Claim No. 7 was for a sum of Rs. 19,98,057 for reimbursement of sales tax on works contract levied by the Govt. of National Capital Territory of Delhi ('GNCTD') from 1st December 1999. The only plea of Mr. Sinha was that it was not possible for the Petitioner to ascertain whether the sales tax paid by Respondent No. 1 was in fact for the same CA. Three *challans* were produced before the learned Arbitrator by Respondent No. 1 to substantiate its plea. The said *challans* have also been perused by the Court. They do refer to this particular CA. Consequently, the conclusion of the learned Arbitrator that Respondent No. 1 was entitled to be reimbursed a sum of Rs. 19,61,175 under Claim No. 7 does not call for interference.

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16. Claim No. 10 was for a sum of Rs. 7,00,000 (later revised to Rs. 3,97,143) for payment of work done against development of site/site clearance, dressing and leveling of buildings. It was noticed by the learned Arbitrator that the Contractor/Respondent No. 1 had limited its claim only to Schedule A Section V, i.e., sewage disposal as per the details in Appendix 10. It was held that laying of sewage pipes was an activity and as such excavation and earthwork for development of site had to be measured under Schedule A Section X. The liability of Respondent No. 1 was limited to plus 25% of the quantities catered in the CA for the respective section. Accordingly, Respondent No 1 was awarded a sum of Rs. 3,55,700. This Court does not find any infirmity in the above reasoning or conclusion of the learned Arbitrator.

17. Interest was claimed under Claim No. 16 at the rate of 18% per annum. The learned Arbitrator has awarded simple interest at 10% per annum in respect of those claims which were allowed with effect from 5th April 2001 up to the date of the Award. If the payment was not made within three months, the post-Award simple interest was to be paid at 12% per annum. This Court is unable to find any legal infirmity even as regards the award of interest.

18. For the aforementioned reasons, this Court does not find any ground having been made out for interference with the impugned Award of the

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learned Arbitrator. The petition is dismissed but, in the circumstances,
with no order as to costs.



S. MURALIDHAR, J

DECEMBER 03, 2012
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- Fresh IPR 1683/13 - To release the decretal amount
- By respondent