

IN THE HIGH COURT OF DELHI AT NEW DELHI
(Not reportable)

CS(OS) No. 1860 of 2006

Reserved on: 6th September, 2012
Decision on: 9th October, 2012

M/S GITA PUMPS Plaintiff
Through: Ms. Savita Malhotra, Advocate.

Versus

DELHI DEVELOPMENT AUTHORITY AND ANR. Defendants
Through: Mr. Bhupesh Narula, Advocate.

WITH

CS(OS) No. 1976 of 2006 & I.A. No. 15576 of 2006

DELHI DEVELOPMENT AUTHORITY Plaintiff
Through: Mr. Bhupesh Narula, Advocate.

Versus

M/S GITA PUMPS & ANR. Defendants
Through: Ms. Savita Malhotra, Advocate.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT
09.10.2012

1. This is the second round of litigation in the arbitral proceedings concerning the disputes between Delhi Development Authority ('DDA') and M/s. Gita Pumps (hereinafter referred to as 'Claimant') arising out of the award of the work of development of land at JJ (R) Colony, Jahangirpuri (SH: supply and installation of storm water pump sets), by a letter dated 21st

August 1982 by the DDA in favour of the Claimant.

2. A formal agreement was entered into between the parties on 26th August 1982 in terms of which the stipulated date of commencement of work was 31st August 1982 and the date of completion was 30th November 1982. The estimated cost of the work was Rs.8,76,887 and the tendered cost was Rs.8,51,826. The work was actually completed on 26th May 1986.

3. The Claimant invoked the arbitration clause on 6th August 1992. By a letter dated 25th December 1992, an Engineer Member of the DDA rejected the request on the ground that it was time barred. The Claimant then filed CS(OS) No.368 of 1993 under Section 20 of the Arbitration Act, 1940 ('Act'). By an order dated 24th July 1995, this Court directed the DDA to appoint a sole Arbitrator. The Engineer Member then appointed Mr. M. Kuppuswamy, the then Superintending Engineer ('SE') (Arbitration)-I, as sole Arbitrator. The Engineer Member also made Municipal Corporation of Delhi ('MCD') as party to the reference on the basis that the area where the work had been executed stood transferred to MCD with effect from 15th December 1988.

4. On 10th October 1995, Mr. Kuppuswamy adjourned the arbitral proceedings *sine die*. The Claimant then filed O.M.P. No.1 of 1996 in this Court seeking termination of his mandate. Meanwhile, since Mr. Kuppuswamy retired, the petition was disposed of as having become infructuous. This led to the Claimant filing O.M.P. No.70 of 2003 in which an order was passed by this Court on 31st January 2005 appointing an Advocate as sole Arbitrator to adjudicate the claims. An Award was passed

by the learned Arbitrator on 21st August 2006.

5. The learned Arbitrator rejected the preliminary objections raised by the DDA that the claims of the Claimant were barred by limitation. The learned Arbitrator also rejected other preliminary objection of the DDA that it was MCD which was liable for the claims. The learned Arbitrator found that the work had been completed even prior to transfer of the area to the MCD. Further, DDA had taken the final measurement in November 1988 and the SE had given concurrence to the completion on 5th December 1988 and prepared a pre-final bill on 21st January 1989. Further, the SE granted extension of time ('EOT') on 23rd January 1990. DDA had asked the Claimant to remove the defects on 18th June 1992. DDA informed the Claimant about the transfer of work to Electrical Division-VIII on 14th May 1992.

6. Claim No.1 was for a sum of Rs.1,46,660 for the work done as per 7th and final bill and for the security deposit deducted in the 6th running bill. The DDA admitted the liability but contended that MCD should meet it. Since the preliminary objections had already been rejected by the learned Arbitrator, he allowed Claim No.1 as prayed for.

7. Claim No.2 was for a sum of Rs.23,85,113 towards loss of profit. After holding that it was DDA which was solely responsible for the delay of 1273 days in handing over the site to the Claimant and denying release of payment on one pretext or other, the Claimant was held entitled to claim loss of profit. The learned Arbitrator held that the Claimant was entitled to 7.5% of the contract amount which worked out to Rs.63,886.95.

8. Claim No.3 was for a sum of Rs.18,40,400 for loss on account of idle labour and machineries. The learned Arbitrator allowed 25% of the said claim which worked out to Rs.4,60,100. Claim No.4 was for a sum of Rs.2,75,992 on account of increase in price of materials and labour wages. The said claim was allowed on the basis of the JPC report filed by the Claimant which showed increase in prices and which had not been denied by the DDA.

9. As regards rate of interest under Claim No.5, the learned Arbitrator allowed interest @ 18% per annum from 1st December 1986 till the date of payment. The amount so calculated up to the date of the Award worked out to Rs.3,27,86,119. Rs. 35,000 was allowed as costs of litigation.

10. The learned Arbitrator issued a corrigendum to the Award on 9th September 2006 *inter alia* correcting the amount awarded under Claim No.1 as Rs.1,46,660, under Claim No.3 as Rs.4,60,100 and the interest amount under Claim No.5 as Rs.33,59,504.70.

11. DDA filed CS(OS) No.1976 of 2006 under Section 14(2) of the Act for a direction to the learned Arbitrator to file the original Award dated 21st August 2006 and the corrigendum dated 9th September 2006. The Claimant filed CS(OS) No.1860 of 2006 under Section 14 read with Section 17 of the Act for a direction to the learned Arbitrator to file the original Award as well as the corrigendum. After the Award was filed, DDA filed I.A. No.15576 of 2006 under Sections 30 and 33 of the Act objecting to the impugned Award.

12. Mr. Bhupesh Narula, learned counsel appearing for DDA first submitted

that the learned Arbitrator issued the corrigendum dated 9th September 2006 enhancing the interest amount to Rs. 33,59,504.70 without any notice to the parties. Secondly, it was submitted that the final bill was passed and accepted by the Claimant on 21st January 1989 and the limitation commenced on that date. It is submitted that the 90 days period ended on 21st April 1989, whereas the arbitration clause was invoked only on 6th August 1992. At the highest, the Claimant should have invoked the arbitration clause within three years from the date of intimation of the passing of the final bill i.e. on or before 21st January 1992. Reliance is placed on the decisions in ***Mahesh Chand v. Union of India (2005) 1 Arb.LR 153 (RAJ)***, ***National Insurance Company Limited v. Sujir Ganesh Nayak & Co. AIR 1997 SC 2049*** and ***Wild Life Institute of India, Dehradun v. Vijay Kumar Garg (1997) 10 SCC 528***. It is submitted that the amendment made to Section 28 of the Contract Act, 1872 ('CA'), does not apply since the contract was completed even prior to the amendment.

13. Countering the above submissions Ms. Savita Malhotra, learned counsel for the Claimant pointed out that as regards Claim No.1, DDA had already accepted the impugned Award and had made payment to the Claimant. She submitted that the corrigendum dated 9th September 2006 only incorporated the corrections of the typographical errors in the impugned Award and, therefore, no prejudice was caused to the DDA by non-issuance of notice. She pointed out that the EOT was approved only on 23rd January 1990 and defects were pointed out on 18th June 1992. The arbitration clause was invoked on 6th August 1992 and, therefore, the claims were within time. As regards the final bill she submitted that the Claimant had made only endorsement accepting the measurement and not the amount. The view taken

by the learned Arbitrator was a plausible one and did not call for interference.

14. The issue of limitation has been considered by the learned Arbitrator in the impugned Award. It was noted that on 14th May 1992 DDA informed the Claimant that the final bill payment would be released. The final bill only contained an endorsement to the effect “full and final measurement accepted”. As rightly observed by the learned Arbitrator, there is nothing to show that the DDA ever informed the Claimant that the final bill was ready for payment. This Court in ***Pandit Munshiram and Associates Pvt. Ltd. v. Delhi Development Authority (2002) 95 DLT 482*** held that where the final bill was accepted and payment was not made, the limitation for the purpose of Clause 25 had not begun to run. This Court concurs with the view of the learned Arbitrator that in the circumstances outlined, the claims of the Claimant should not be said to be barred by limitation.

15. It was next contended by Mr. Narula, learned counsel for the DDA that the learned Arbitrator erred in allowing Claim No.2 on account of loss of profit in the sum of Rs. 63,886.95, as the running bills had been paid from time to time and some of the amounts were already included in the final bill. Out of the total tendered cost of Rs.8,51,826, DDA had already paid to the Claimant a sum of Rs.7,33,252. The undisputed amount even according to the Claimant was Rs.1,46,660. This was the only amount that remained to be paid whereas the Claimant had claimed a sum of Rs. 23,85,113 based on the Hudson Formula. It was submitted that for claiming loss of profit based on Hudson Formula, the Claimant (Contractor) ought to have proved that the profit accounted for by the Claimant in his price was in fact capable of being

earned by him and further that he would have deployed the men and machinery elsewhere during the period the work was unable to be carried out due to delays on account of the DDA. It was submitted that the Claimant failed to produce satisfactory evidence in support of Claim No.2.

16. In reply it was submitted by Ms. Malhotra, learned counsel for the Claimant, that 10% is the expected profit that the Contractor factors in at the time of submitting a bid. DDA had never contended before the learned Arbitrator that the cost of materials included the profit of the Claimant. The payment made to the Claimant in the running bills did not include profit element. Moreover, the Claimant could not have anticipated that the period for the performance of the contract would be delayed by over 1273 days for reasons beyond the control of the Claimant. Usually the profit element that was built into the quoted rates was valid for 12 weeks.

17. In dealing with Claim No.2, the learned Arbitrator has considered the law explained by the Supreme Court in ***Bharat Coking Coal Ltd. v. L.K. Ahuja (2004) 5 SCC 109*** and ***Union of India v. Banwari Lal & Sons (P) Ltd. (2004) 5 SCC 304*** and noted that as per the rates committee reports submitted before him the profit percentage was around 10% of the contract amount. Admittedly, the Claimant was getting 80% of the cost of material in the running bills. The Court has been shown a tabulated chart of the payment of the running bills which bears out the above finding of the learned Arbitrator. The view taken by the learned Arbitrator was a plausible one. What has been allowed to the Claimant towards loss of profit is only 7.5% of the contract amount. The Court is unable to find any error apparent on the face of the Award as regards Claim No.2.

18. Claim No.3 was for loss on account of idle labour and machinery. The contention of Mr. Narula, counsel for DDA was that no evidence was produced by the Claimant in support of the said claim. He submitted that when the site was admittedly not handed over, there was no need for the Claimant to mobilise any labour, supervisor and engineer at the site. The Claimant had never written to the DDA about labour sitting idle at the site. Further, the Contractor was duty bound to mitigate his losses and produce satisfactory evidence. Rather than DDA demanding records from the Claimant, it was for the Claimant to have provided the DDA, the details of the labour and machinery employed which was remaining idle.

19. In reply, Ms. Malhotra referred to the special conditions in terms of which the work was undertaken by the Claimant. She submitted that DDA kept extending the period of completion of the work itself asking the Claimant about the project. The special conditions of contract required the Claimant to maintain a minimal staff at site. In particular, she referred to Clause 13 of the additional conditions which reads as under:

“13. Necessary space for storing items to be supplied by the successful tenderer shall be given by the Engineer-in-charge free of cost, but the responsibility for the watch and ward of the materials shall rest with the successful tenderer, till these are handed over to the Engineer-in-charge duly installed, tested and commissioned in position.”

20. A perusal of the impugned Award as regards Claim No.3 shows that the learned Arbitrator considered Clause 36 of the agreement which required maintenance of minimum staff. However, in the case of the Claimant, there were additional conditions referred to hereinabove. It was indeed not reasonable for DDA to require the Claimant to produce proof of engagement

of the minimal staff required to be maintained by it in terms of the agreement, several years after the event. The site order book and the hindrance register also formed part of the arbitral records and supported the plea of the Claimant in this regard. The calculations submitted by the Claimant were based on the circulars and notifications issued by the Government, copies of which were exhibited as Ex. CW-1/27 (collectively). The learned Arbitrator has allowed only 25% of the amount claimed which cannot, in the circumstances, be said to be either contrary to the evidence on record or erroneous. Given the long period of time over which the Claimant was required to remain on the site, the allowing of 25% of the sum claimed was just and reasonable. The Award in respect of Claim No.3, does not call for interference.

21. Claim No.4 on account of increase in price of materials and labour wages was restricted by the Claimant to Rs. 2,75,992. The Claimant provided a detailed explanation in the form of a tabulated chart. The Claimant also enclosed the latest figures of basic prices of raw materials and indices for the Indian Pump Manufacturers Association ('IPMA') Price Variation Clause ('PVC'). The Claimant had in its letter dated 11th May 1985 pointed out that the delay in supply of the pump was due to non-availability of the site which was beyond the Claimant's control. It was pointed out that "the entire responsibility for this delay lies with the department and as such we should be allowed this necessary increase in the cost of the CI pipes". In response thereto, DDA by a letter dated 16th May 1985, stated "regarding payment, any increase payable as per terms and conditions of the agreement will be paid to you. Nothing beyond the terms and conditions of the agreement can be accepted". Clause 10C of the

agreement also provided for escalation on account of statutory increase in the cost of material and labour. The JPC report submitted by the Claimant indicated both the cost of material as well as the labour. The view taken by the learned Arbitrator in respect of Claim No.4 on the basis of the above materials was a plausible one. The allowing of Claim No.4 to the extent of Rs.2,75,992, cannot be said to be erroneous.

22. Mr. Narula next submitted that the award of interest @ 18% per annum from 26th May 1986 on the amounts under Claim Nos. 2, 3 and 4 was erroneous. It was submitted that the said claims were by way of damages and were, therefore, not due on the date when the arbitration clause was invoked. The Arbitrator should not have allowed pre-suit and the *pendente lite* interest on the said amount. Further, the delay in appointing an Arbitrator by the Court, cannot be attributed to the DDA.

23. It has been pointed out by Ms. Malhotra that 18% was the agreed rate of interest under the agreement and was consistent with the borrowing rate in commercial dealings and, therefore, the Award did not call for interference.

24. The dispute in the present case has remained unresolved nearly for 20 years. It would be recalled that the arbitration clause was invoked more than 20 years ago on 6th August 1992 by the Claimant. The long numbers of years for which the dispute has been pending, is also a factor that has to be taken into account while awarding interest. As explained by the Supreme Court in ***Krishna Bhagya Jala Nigam Ltd. v. G. Harischandra Reddy (2007) 2 SCC 720*** that if a long number of years have elapsed since commencement of the dispute, then award of interest at 18% is not justified.

25. Consequently, this Court considers it appropriate to modify the simple interest rate to 9% per annum on the amounts awarded under Claim Nos. 2, 3 and 4 from the date of invocation of the arbitration clause i.e. 6th August 1992 till the date of payment, subject to further condition that the said payment should be made within eight weeks from today, failing which DDA would be liable to pay simple interest @ 12% per annum for the period of delay beyond eight weeks.

26. Consequently, the objections by the DDA to the Award in respect of Claim Nos.2, 3 and 4 are rejected and the award of interest under Claim No.5 is modified to the above extent. The impugned Award dated 21st August 2006 as modified by the corrigendum dated 9th September 2006 and further modified by this order, is made rule of the Court.

27. I.A. No.15576 of 2006 in CS(OS) No.1976 of 2006, CS(OS) No.1860 of 2006 and CS(OS) No.1976 of 2006 are disposed of in the above terms. The decree sheets be drawn up accordingly.

S. MURALIDHAR, J.

OCTOBER 9, 2012

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