

IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. No.399/2006

Reserved on: December 7, 2011

Decision on: January 17, 2012

MUNICIPAL CORPORATION OF DELHI Petitioner
Through: Ms. Mini Pushkarna with
Ms. Perna Verma, Advocates.

versus

JAGBIR SINGH SHARMA AND ANR. Respondents
Through: Mr. Anil Sapra, Senior Advocate with
Mr. Vikas Sharma, Mr. Nishant Nandan
and Ms. Rupali Kapoor, Advocates.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT
17.01.2012

1. The challenge by the Municipal Corporation of Delhi ('MCD') in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') is to the Award dated 17th May, 2006 passed by the Sole Arbitrator in the dispute between MCD and Respondent No.1, Jagbir Singh Sharma, who was awarded the work of widening of the carriageway of 60 RPW roads in Okhla Industrial Area, Phase II.

2. Respondent No.1 was awarded the above work by Work Order dated 13th February, 2002 for an amount of Rs.31,95,382/-. The period of completion was six months. According to Respondent No.1, on account of certain orders by the Supreme Court the work in the quarries and mines in Delhi

and Haryana was stopped. By letter dated 30th July, 2002, the MCD issued a Notice to Respondent No.1 under Section 3(a), 3(b) and 3(c) of the Agreement asking him to show cause why the work had not been completed. By letter dated 12th August, 2002, Respondent No.1 pointed out that 75% of the excavation work was complete and material was available at site. According to Respondent No.1, the MCD was satisfied with the reply and took no action.

3. By letter dated 9th September, 2002, Respondent No.1 pointed out that work of more than Rs.8 lakh was executed but no advance payment had been received by him. By a further letter dated 19th September, 2002, Respondent No.1 pointed out that the work of more Rs.10 lakh had been executed but no payment had been made. By a further letter dated 24th September, 2002 Respondent No.1 pointed out to the MCD that he had invested Rs.10 lakh in the work, but no payment had been made.

4. By a letter dated 27th September, 2002, the MCD informed Respondent No.1 that no technical engineer had been deputed by Respondent No.1. This was disputed by Respondent No.1 by his letter dated 10th October, 2002 stating that technical persons had been deployed from the start of the work and they were at site till the completion of the work on 6th May, 2003.

5. According to the Respondent No.1, MCD paid two running bills but

thereafter failed to make payments. A further sum of Rs.20,17,186/- was payable. The defect liability period expired on 5th May, 2004 and thus the amount of security deposit of Rs.3,20,794/- including the amount of Rs.1 lakh deposited at the time of submission of the tender was required to be released by the MCD. Thereafter, when payments were not forthcoming, the Respondent invoked the arbitration clause. When no arbitrator was appointed, the Respondent filed an arbitration application under Section 11(6) of the Act in this Court. By order dated 20th May 2003 passed in the said petition, Shri R.P. Gupta, was appointed as the Sole Arbitrator.

6. During the course of the arbitration proceedings, it was submitted by the Respondent that no drawings for execution of the work were given at any time by the MCD. Consequently, by letter dated 28th July, 2005, the learned Arbitrator directed the MCD to furnish the details of the work done bill-wise and a sketch plan of the area as well as the balance work required to be done. This was to be indicated in the sketch plan of the area. However, no sketch having been made available by the MCD, the learned Arbitrator made available a copy of the layout plan of the area to Respondent No.1 as well as MCD and directed them to indicate the work executed. On the said lay out, Respondent No.1 marked various roads on which the work was executed. He indicated that on the roads shown in green colour, the work was executed and payment was made, whereas for the roads shown in red colour, the work was executed but payment was not made. Thereafter, the

learned Arbitrator visited the site on 2nd August 2005, and inspected the work done by Respondent No.1 on all roads as was indicated in the layout plan, in the presence of Respondent No.1 and the MCD. The learned Arbitrator found works on all roads shown in green as well as in the red existing on the site. Para 32 of the impugned Award dealt with the objections taken by the MCD in regard to a portion of the road shown as Y-1 to Z-8 in the layout plan. This was dealt with by the Arbitrator in the following manner:-

“32.The claimant further submitted that at site the work executed on a portion (Z-40 to Z-46) part of the road shown as Y-1 to Z-8 in the layout plan of the area and shaded with red colour, was only disputed by the Engineers of the respondent during inspection on 2.8.2005. The plea was that the work awarded to the claimant is of widening of 60 ft. wide road whereas the width of this road is 45 ft. The claimant disputed this and physically at site got checked the work executed. It was found that at some places the road appears to be 45 ft. wide because the same having been encroached after execution of the work by the claimant and where the road after widening of the same has not been encroached upon by the encroachers, the width of the road was found 60 ft. wide.”

7. Even as regards the work done on road marked as No.I, a dispute was raised by engineers of the MCD. The learned Arbitrator found the work at the site. On the road marked as No.II, again, the learned Arbitrator found that the work which was stated to have been executed in the presence of the

engineers of the MCD was found at site. The same was the position as regards the road marked as No.IV, where the width was found to be 60 ft. Likewise, the learned Arbitrator found the work at site on the road marked as No.V and road marked as No.VI.

8. Despite the learned Arbitrator requiring the MCD to provide three copies of the plan, only a sketch of the area was furnished at the hearing on 11th November, 2005.

9. Thereafter instead of producing the plans of the roads on which the Respondent was required to execute the work, the MCD sent factory-wise road maps. The learned Arbitrator compared the road shown on this road map with those provided by Respondent No.1 in the layout plans and found that 16 of the roads were available in the layout plan. The learned Arbitrator found that some portions of the road after widening had been encroached upon. Where they were not encroached upon, the width was 60 ft. wide. In para 47 the learned Arbitrator observed as under:-

“47. The Arbitrator also scrutinized the plea taken by the respondent in their letter dated 14.12.2005. On scrutiny of the roads shaded in green and red colours in the aforesaid layout plan of the area, road mentioned at Sl. No.14(b) (Z-30 to Z-35) marked in the lay out plan of the area as No. (V) by the respondent on 6.9.2005, claimant’s submissions dated 3.10.2005 it is found that on this road the respondent did not

require the claimant to execute the work. The work on road as mentioned at Sl. No.18 in the sketch was found executed at site and the plea of respondent is incorrect. The Arbitrator also found that the road from Z-7 to Z-54 stated at Sl. No.19 by the respondent is a part of road having the marking Y-1 to Z-7 and the work on this road was executed by the claimant. This is also 60 ft. wide road and not 80 ft wide road as stated by the respondent. Road given marking Z-40 to Z-46 (Sl.No.20) is also a part of road (Y-1 to Z-7) in the layout plan of the area shaded with red and green colours given the claimant and the work executed by the claimant on this part of road also. Similarly on road X-19 to X-37 (Sl.No.21) the work was found executed at site. According to the respondent no other contractor executed the work at site. Thus admittedly the work was executed by the claimant. The stand was changed by the respondent only when sketch indicating 18 roads was submitted with the letter dated 14.11.2005.”

10. The learned Arbitrator then proceeded to deal with the six claims of Respondent No.1. As regards Claim No.1 for a sum of Rs.20,17,186/-, the said claim was allowed since the work executed by Respondent No.1 was below the technical sanction, sanctioned by the Chief Engineer of the MCD. Interest at the rate of 12% on the above amount was allowed under Claim No.2 for the period from 6th May to 31st December, 2004. Claim No. 3 in the sum of Rs.3,20,794/- being refund for security deposit was allowed on the basis that the work executed by Respondent No.1 was to the satisfaction of the MCD on all roads and the defect liability period had also expired on

5th May, 2004. Interest in the sum of Rs.19,248/- on the aforementioned amount was allowed under Claim No.4. Claim No.5 for further interest on the amounts claimed under claims No.1 to 4 was rejected since interest had already been awarded on the amounts claimed under Claims No.1 and 3. Rs.80,000/- was awarded as costs under claim No.6. The five counter claims of the MCD were rejected with detailed reasons.

11. Ms. Mini Pushkarna, learned counsel for the MCD, first submitted that the learned Arbitrator erred in overlooking the objections of the MCD to the claim of Respondent No.1 in regard to the widening work on roads 9 to 18. There was a delay in the Respondent's starting the work. Numerous letters were issued in this regard. It is submitted that the claim of Respondent No.1 that the work was completed on 6th May, 2003 was a false one. It is stated that despite Respondent No.1 having been granted extensions of time, he failed to complete the work. According to the MCD, no work was executed after the second running bill up to 6th May, 2003. Lastly, it was submitted that the claim of Respondent No.1 was not *bona fide* inasmuch as he first made a claim only on 18th September, 2004 after completing the work on 6th May, 2003 i.e. after a lapse of more than one year. The findings of the learned Arbitrator on the inspection conducted as regards the completion of the work on different roads, was also disputed.

12. Learned counsel for Respondent No.1, on the other hand, pointed out

that findings of the learned Arbitrator were purely factual. This Court was not expected to re-appreciate the evidence. The finding was further that roads 19 to 21 were part of roads 1 to 18. As regards the delay in Respondent No.1 starting the work, it is submitted that extensions were granted by the MCD itself as it was realized that the materials in the form of concrete, cement, etc. were not issued in time to Respondent No.1 by the MCD. It was further submitted that between the same parties, with regard to another set of roads, the award was upheld by this Court by order dated 17th September, 2007 in OMP No.160 of 2007 titled as ***MCD v. Jagbir Singh Sharma***. Reliance is also placed on the judgment of the Division Bench of this Court in ***Union of India v. Arctic India, 2010 (4) Arb LR 58 (Delhi) (DB)*** as regards the scope of interference by this Court with the impugned Award.

13. The above submissions of the parties have been considered. Learned counsel for the Petitioner has been unable to make out any ground for holding the Award to be 'patently illegal', which is the criterion spelt out for interference by the Supreme Court in ***ONGC Ltd. v. Garware Shipping Corporation Ltd., (2007) 13 SCC 434***. As regards the award of interest, although in ***State of Rajasthan v. Ferro Concrete Construction Pvt. Ltd. (2009) 12 SCC 1*** it was held that in matters governed by the old Act, interest at the rate of 18% per annum would constitute an error apparent on the face of the Award, in the present case, the Award is under the 1996 Act

and Section 31(7)(b) itself envisages no restriction on the rate of interest being awarded by the Arbitrator *pendente lite*. As rightly pointed out by the learned counsel for the Respondent, the findings of the learned Arbitrator have been based on site visits undertaken of the roads identified on the layout plan and physically determining that work was executed on different roads by the Respondent. It is not possible for this Court to re-appreciate the evidence and come to a different conclusion on the evidence. A reading of the impugned Award reveals that the learned Arbitrator has analyzed the facts in sufficient detail and come to a definite conclusion based on the evidence placed on record. The Award is also based on personal observations of the learned Arbitrator during his site visits. In the circumstances, it is not possible to accept the submission of learned counsel for the Petitioner that learned Arbitrator overlooked the objections of the MCD.

14. As regards the delay in start of the work, as pointed out by the learned counsel for Respondent No.1, there were several letters issued by the MCD itself extending the time for completion of the works. These letters are set out in MCD's own letter dated 15th December, 2004. Extensions were granted as late as on 2nd June, 2004. Whether, in fact, delay was caused by the Respondent was also a question of fact and it is not possible to hold that the finding in this regard of the learned Arbitrator is perverse or contrary to the evidence on record.

15. For the aforementioned reasons this Court is unable to interfere with the impugned Award. The petition is dismissed, but in the circumstances, with no order as to costs.

S. MURALIDHAR, J.

January 17th, 2012
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