

IN THE HIGH COURT OF DELHI AT NEW DELHI
(Not reportable)
CS (OS) 1380/2009 & IA No. 12089 of 2010

Reserved on: April 10, 2012
Decision on: April 25, 2012

M/S A.R. KHANNA & SONS Plaintiff
Through: Mr. Vivekanand, Advocate.

Versus

DELHI DEVELOPMENT AUTHORITY & ANR. Defendants
Through: Ms. Geeta Mehrotra, Advocate.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT
25.04.2012

IA No. 12089 of 2010

1. These are the objections by the Delhi Development Authority ('DDA') under Section 30 and 33 of the Arbitration Act, 1940 ('Act') against an Award dated 19th June 2009 of the sole Arbitrator in the disputes between DDA and M/s A.R. Khanna & Sons arising out of the award of work of construction of 144 M.I.G. dwelling units at Ashok Vihar Phase-I, S Block by the DDA in favour of the Plaintiff. The learned Arbitrator by the impugned Award awarded an aggregate sum of Rs. 12,13,484 in favour of the Plaintiff together with pre-suit interest @ 14% per annum, *pendente lite* interest at 12% per annum and future interest at 10% per annum.

2. This Court has heard the submissions of Mr. Vivekanand, learned counsel for the Plaintiff and Ms. Geeta Mehrotra, learned counsel for DDA.

3. DDA invited tenders for the work in 1982. The revised offer of the Plaintiff was accepted by the DDA and the work was awarded on 20th April 1982. The date of commencement of the work was 29th April 1982 and the stipulated date of completion was 28th January 1983. Various issues arose between the parties with the work not being able to be completed within time. The Plaintiff filed fourteen items of claims before the Arbitrator as well as five additional claims. The DDA filed five counter-claims.

4. Claim No. 1 was for a sum of Rs. 65,000/- towards refund of the amount withheld by DDA from the payments due to the Plaintiff. Reliance was placed by DDA on Clause 7 of the contract which provides intermediate payment as to when the work is done and not as payment for work actually done. Reference is also made to Clause 29 in terms of which the Engineer-in-charge of the DDA is entitled to withhold amount if there are in fact any claims for payment against the contractor.

5. As has been rightly observed by the learned Arbitrator, that in regard to the payments due from the contractor, the DDA filed counter-claims, and there was no specific provision in the contract for withholding amount for rectification of defects. In the absence of a specific provision in the contract permitting such withholding of amounts, the decision of the learned Arbitrator to allow the Plaintiff's claims to the extent of Rs. 61,300 cannot be said to be erroneous.

6. Claim No. 2 was for a sum of Rs. 1,00,000/- towards release of bank guarantee furnished by the Plaintiff for security deposit.

7. The reason given by the DDA for not releasing the bank guarantee is that it had claims against the contractor and had to recover those sums. Here again the learned Arbitrator rightly observed that the claims against the contractor by the DDA were being considered separately in DDA's counter-claims. In fact Counter Claim No. 3 of the DDA was partly allowed, and a sum of Rs. 1,50,000/- was awarded by the learned Arbitrator towards work which was got executed by the DDA at the risk and cost of the Plaintiff under Clause 14 of the contract. Consequently, the decision to allow Claim No. 2 in favour of the Plaintiff and directing release of the bank guarantee to the extent of Rs. 1 lakh cannot be said to be erroneous.

8. Claim No. 3 was for a sum of Rs. 2 lakhs under Clause 10(c) of the contract. The adjudication of this claim involved a determination as to who is responsible for the delay in completion of contract. The foundation drawings were made available for the three-storeyed block only on 13th July 1982 and for the four-storeyed block on 18th September 1982. The work was then at standstill between October to December 1982 for want of working drawings. The presence of a H.T. electric line over one of the three-storeyed block delayed the construction of that block by over six months as the obstruction was removed by the DDA only six months after the award of the work. As regards the availability of the cement, it appears that DDA had introduced a quota system for issuance of cement to their contractors. Consequently, the cement supplied to the Plaintiff was inadequate. There were instances where no cement was made available for a continuous stretch of ten to fifteen days. The issue of supply of other materials was also abnormally delayed. The door shutters were supplied only from early 1985 to September 1985, i.e., more than thirty months after the stipulated date of completion. The steel for casting the support system

of the R.C.C. tanks and 20 mm G.I. pipes were made available only in 1985. It is submitted that as soon as the said materials were made available, work was completed in October 1985. The drawings for external development works like roads, sewers, water supply lines, storm water drains, parks, railings etc. were supplied only after March 1984. The withholding of money by the DDA also led to financial crisis which in turn delayed the work further.

9. The learned Arbitrator has noted that there was a delay in the DDA making available foundation drawings as well as in the layout drawings for the external development. The other instances of delays on account of the DDA were also substantiated by the documents on record. The learned Arbitrator rightly observed that if indeed the Plaintiff was responsible for delays, the DDA would have issued show cause notices during the stipulated contract period or thereafter. In fact, it had not issued any show cause notice regarding the delay in completion of the work. The first show cause notice was issued on 1st July 1983 nearly fifteen months after the stipulated date of start and nearly six months after the stipulated date of completion. The second show cause notice was issued on 24th April 1984 and third on 10th March 1986. In the circumstances, the delay of 1150 days attributed By Superintending Engineer ('SE') to the Plaintiff was without consideration of the entire facts and was, therefore factually incorrect. It was also held that the action taken by the SE to levy full 10% compensation was not justified. Consequently, the learned Arbitrator held that the Plaintiff was "fully entitled to receive escalation payments for the entire period of the contract". The Arbitrator ultimately awarded a sum of Rs. 31,900 as extra payment for labour escalation under Clause 10 of the contract.

10. The conclusions of the learned Arbitrator as regards Claim No. 3 are based on a detailed analysis of the evidence and cannot be said to be erroneous warranting interference by this Court.

11. Claim No. 4 was for a sum of Rs. 2,20,000 which had been withheld by DDA under the garb of part rate statement. Reference was made to Clause 7, 29 and 25A by DDA to urge that no sum was payable to the Plaintiff since the work was defective and with the works having been left incomplete by the Plaintiff, DDA had to get it rectified. The learned Arbitrator noted that DDA had presented its counter-claims for expenditure stated to have been incurred by it for rectification of the work which were being adjudicated as part of DDA's counter-claims. It has been rightly held that the Plaintiff had to be paid at full agreement rates once the work had been completed. With DDA's counter-claims requiring adjudication, the exact amount could be worked out later. It was held that the Plaintiff was entitled to receive a sum of Rs 2,19,884.02 as against Claim No. 4.

12. The reasoning of the learned Arbitrator in arriving at the above conclusion appears to be correct and a possible view to take in the matter. This Court is not, while adjudication of the objections under Sections 30 and 33 of the Act, expected to sit in appeal over the findings of the learned Arbitrator which are based on facts.

13. Claim No. 5 was rejected and against Claim No. 6, a sum of Rs. 30,000/- towards the refund of rebate subject to verification was awarded. This Court is unable to find any illegality vitiating the impugned Award insofar as Claim No. 6 is concerned.

14. In its objections under Sections 30 and 33 of the Act, DDA has also not challenged the finding on Claim No. 6.

15. It is contended that the learned Arbitrator erred in awarding Rs. 5,73,000 under the various sub-claims of Claim No. 7 without considering the objections raised by DDA.

16. There were twelve sub-heads under Claim No. 7. Sub-head No. I was for earthwork. Sub-head No. II was for concrete work and Sub-head No. III was for R.C.C. work and so on. Under each sub-head there were several sub-items of work. The challenge by DDA to the detailed reasoned Award under these sub-items is an invitation to re-appreciate the evidence only to come to a different conclusion. Such an exercise is impermissible given the scope of interference by this Court under Sections 30 and 33 of the Act.

17. Of the sub items under Claim No. 7, the substantive claims are under Claim No. 7.10.2 for a sum of Rs.1,18,240 towards terrazzo plaster done on the rough side of the brickwork. The learned Arbitrator went by the report of the Local Commissioner ('LC') which showed that the work for 21mm thick terrazzo plaster had been done. On this basis, the net quantity payable worked out to 1970.66 sq.m. The learned Arbitrator did not accept the claim of the Respondent to apply the rate of Rs. 71 per sq.m. and instead awarded Rs. 60 per sq.m. Nothing has been shown by the Defendant DDA to hold this part of the Award to be erroneous.

18. Under sub-head 7.12 concerning water supply, there were fifteen sub-items. Out of these, ten items have been placed in the bill of DDA. The LC

could not check the quantities for five items because part of the work was buried. The learned Arbitrator proceeded to adjudicate the ten items for which work had been done. Detailed reasons have been given for each of these ten sub-items. No ground has been made out by DDA for interference with this part of the Award.

19. It is submitted that the Award in respect of Claim No. 8 for a sum of Rs. 12,50,000/- as extra rates for the works executed beyond the deviation limit covered under Clause 12A of the contract was without any evidence.

20. The learned Arbitrator noted that the Plaintiff had limited the claim to Rs. 8,76,674/-. In fact, on a detailed scrutiny the learned Arbitrator found errors in the claim submitted by the Plaintiff. He excluded those items which were in fact beyond the permissible limits of the supplying work and Item No. 2.1 of the development trade. It was found that other items were either within the permissible limit of 50% or were otherwise not covered under the relevant clause. Annexure A attached to the Award gave the calculation for the amount awarded under this claim. It is a detailed calculation indicating the total amount payable as Rs. 1,28,367. It is not possible to agree with the submission of the learned counsel for DDA that there was no evidence in support of the above claim.

21. The Award in respect of Claim No. 10 for a sum of Rs. 49,724 which was for extra payment in terms of Clause 12 (v) of the agreement has been challenged on the ground that this was without any evidence. A perusal of the impugned Award shows that the learned Arbitrator has discussed this claim in some detail. The Plaintiff's letters at Exhibit C-13, C-15, C-18 and

C-20 which pointed out that there was faulty cutting of the chases for electrical conduits by the electrical contractor, was taken note of by the learned Arbitrator. It was further noted that DDA had not contested the rates claimed by the Respondent for repairing the walls and the cut chases for electrical conduits and for cutting and refilling the chases in the R.C.C. slab. Still the learned Arbitrator did not award the rates as claimed by the Plaintiff but awarded only Rs. 100/- per flat for 144 flats and as regards filling of chases and Rs. 50/- per flat for 100 flats for slab cutting. The Court is not persuaded to hold that the learned Arbitrator had committed any error in determining the above claim.

22. The objection as regards the award in respect of Claim No. 11 which was for Rs. 40,000 on account of straightening and cutting of the steel is that the nomenclature of the agreement Item No. 3.9 included those works as well. The learned Arbitrator has referred to the decision of this Court in **Anant Raj Agencies v. DDA 2005 (1) Arb. LR 590 (Delhi)** and pointed out that in the present case the Plaintiff had made the claim even while the work was in progress. The view taken by the learned Arbitrator cannot be said to be perverse or implausible.

23. Claim No. 12 was for damages on account of various breaches of the contract. The learned Arbitrator has worked out the amount on the basis of one graduate engineer, two chowkidars and one supervisor. Ultimately a sum of Rs. 60,000 was awarded.

24. No error can be discerned in this part of the Award as well.

25. The award of pre-suit interest at 14% per annum from March 1987 to the date of publication of the Award and at 12% per annum as *pendente lite* interest has been assailed as being on the higher side.

26. Given the recent trend of decisions of the Supreme Court including the one in ***Krishna Bhagya Jala Nigam Ltd. v. G. Harischandra Reddy, (2007) 2 SCC 720***, this Court modifies the interest awarded to 9% per annum for all the periods up to the date of the payment.

27. No error has been committed by the learned Arbitrator as regards the award of costs. The rejection of the counter-claims of the Defendant was with detailed reasons which have not been shown to be perverse or erroneous. Consequently, this Court finds no reason to interfere with the impugned Award as regards the rejection of DDA's counter-claims.

28. For all of the aforementioned reasons, the objections to the Award by DDA, except for modification as regards the rate of interest in the manner indicated hereinbefore, are hereby rejected. With only there being a modification as regards the interest to 9% simple interest per annum for all periods on the awarded amounts up to the date of the payment, the impugned Award is made a rule of the court.

29. I.A No. 12089 of 2010 and the suit are disposed of. Decree be drawn up accordingly.

S. MURALIDHAR, J.

APRIL 25, 2012

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