

IN THE HIGH COURT OF DELHI AT NEW DELHI
(Reportable)

CS(OS) No. 2222 of 2007

M/S ASSOCIATED BUILDERS Plaintiff
Through: Mr. Bhavesh Sharma, Advocate.

Versus

DELHI DEVELOPMENT AUTHORITY & ANR. Respondents
Through: Ms. Geeta Mehrotra, Advocate for
DDA.

CORAM: JUSTICE S. MURALIDHAR

ORDER
09.10.2012

I.A. No. 6310 of 2008

1. These are the objections filed by M/s Associated Builders ('the Contractor') under Sections 30 and 33 of the Arbitration Act, 1940 ('Act') to an Award dated 20th August 2007 passed by the learned sole Arbitrator in the disputes between the Contractor and Delhi Development Authority ('DDA') arising out of the work of construction of 1088 LIG Dwelling Units (NP) at Dilshad Garden, Pocket C, Zone E-6, Sub head: Construction of 320 LIG dwelling units in Phase I, which was awarded by the DDA to the Contractor.
2. The Contractor has preferred objections to the impugned Award as regards Claim Nos. 2 to 8, 11 to 14, 16 and the counter claims of the DDA to the extent allowed by the learned Arbitrator.
3. Claim No.2 was for a sum of Rs. 25,643.19 for providing hinges and

holdfast to steel *choukhats*. The case of the Contractor was that the amount was payable according to the weight of the hinges and hold fast and not as per their length. The learned Arbitrator rejected the claim by holding that under the provisions contained in the CPWD specification Volume I paragraphs 10.11.05 and 10.11.06, which formed part of the agreement, no separate amount was payable.

4. Mr. Bhavesh Sharma, learned counsel for the Contractor placed reliance on the wording of Item 6.1 and on the decision of this Court in ***P.C. Sharma v. Delhi Development Authority 2006 (1) Arb LR 403 (Delhi)*** [hereafter '***P.C. Sharma-II***'] to urge that the payment had to be made separately. A perusal of the said decision shows that in that case the DDA was relying upon the clause of the contract and resisting the applicability of the CPWD specifications. The Court negated the DDA's plea and held that the CPWD specifications were applicable. Here too, it is apparent that the CPWD specifications have been made applicable to the agreement in question and in terms thereof the item was not to be paid for separately. There is no illegality in the impugned Award as far as Claim No.2 is concerned.

5. As regards Claim No.3 for a sum of Rs. 8,590.82 towards exterior plaster beyond 10 m height, the learned Arbitrator has accepted the plea of the DDA that as per Serial No. 3.15 of the specifications and conditions, "the rate quoted by the Contractor shall hold good work at all heights and depths unless otherwise specified". The learned Arbitrator negated the plea of the Contractor that in terms of Para 13.1.9.8 of the CPWD specifications, external plastering at a height of over 10 m had to be paid extra.

6. The decision of the learned Arbitrator is contrary to the decision of this Court in ***S.A. Builders v. DDA 1998 (2) Arb LR 472 (Del)***, where it was observed as under:-

“3. This claim related to the award for extra item for plastering external walls of height beyond 10 metres. The Arbitrator while deciding this claim has held that in terms of CPWD Specification 1977, Vol.I, Page 327, external plastering at a height of over 10 metres is to be measured separately. For this extra plastering at a height of over 10 metres the contractor is entitled to an extra rate of Rs.1.28 per sq. mtr. in terms of the Delhi Schedule of Rates, 1974, Item 66, Page 127, including enhancement under Clause 12. The Arbitrator, therefore, held that as the quantity of work above the height of 10 metre was 12260 sq. mtr. as reported by the Executive Engineer the claimant was entitled to a sum of Rs. 15,693.

4. Mr. Sharma on behalf of DDA has objected to the award of this amount and the reasons given by the arbitrator. It is contended by Mr. Sharma that under Clause 3.15 of the Specifications and Conditions of the contract the rates quoted by the contractor were to hold for work at all heights and depths and that the contractor was not to be paid anything extra for maintaining in good condition all the work executed till completion of the entire work. It is, therefore, the contention of Mr. Sharma that as rates quoted by the contractor were to hold for work at all heights and depth the petitioner was not entitled to the extra rate for having done plastering above the height of 10 metres. In my view, the contention of Mr. Sharma is wholly fallacious. Under Clause 3.1.1. of the agreement, CPWD Specification for the works at Delhi, Vol.I and Vol.II, 1977 with correction slips up to the date of receipt of tender were applicable for execution of the work. In view of this clause in the Specifications and Conditions, in my view, the petitioner was entitled to extra rates for having worked above 10 metres height. Clause 3.15 is not applicable to the present case. Moreover, after the Arbitrator has given reasons for the petitioner to be entitled to the award of the said amount, in my view, this court will not sit as a court of appeal over the conclusions of the Arbitrator by re-examining and re-appraising the evidence considered by the Arbitrator. In my view, therefore, no case has been made out for setting aside the award in respect of this item.”

7. The above decision has been followed in ***P.C. Sharma-II*** as well. Consequently, this Court sets aside the impugned Award as regards Claim No.3 and allows the said claim for a sum of Rs. 8,590.82.

8. Claim No.4 was for a sum of Rs. 95,414.46 on account of wrong specification as the work was done in RCC fins and facia but paid as RCC walls. The case of the Contractor was that the above item was covered under Clause 12(iii) of the agreement. The Contractor made this claim first in a letter dated 15th April 1987 to the DDA. Claim No.4 was also linked with Claim No.5 which was for a sum of Rs. 59,675.33 towards extra for centering shuttering for fins and facia. The case of the DDA was that the Contractor had not executed any work on fins and facia and was entitled to be paid only in terms of Item 3.7 for RCC in walls. The learned Arbitrator found that in fact the portion of the RCC hanging below the slab at the 5th and 6th floors was paid as RCC fins and facia and at the lower levels RCC railings were paid as per walls. The learned Arbitrator held this to be in order.

9. As pointed out by learned counsel for the Contractor, Item 3.7 of the contract related to RCC works in walls whereas Item 3.8 was RCC work in vertical and horizontal fins. There was a higher rate of consumption of the cement in the work of fins and facia at 4.74 quintals/cu m, whereas for concrete in wall it was 3.51 quintal/cu m. The Contractor had provided the justification for the claim for higher rates for RCC in fins and facia. There was no satisfactory reply given by the DDA to counter the above claim of the Contractor. The contention of the DDA that no such claim was made

while the work was in progress is belied by the letter dated 15th April 1987, which was exhibited as Ex. C-8, written by the Contractor to the DDA protesting that instead of making the payment of RCC in fins and facia, payment had been made RCC in walls resulting in the blocking of dues. The manner in which the learned Arbitrator dealt with this claim was unsatisfactory. He neither noticed nor discussed Ex.C-8. The payment for the 5th and the 6th floors was made by the DDA on the basis of RCC fins and facia. There was no justification for denying such payment in regard to the remaining floors. Consequently, this Court sets aside the impugned Award as regards Claim Nos.4 and 5 and allows them, as prayed for by the Contractor.

10. Learned counsel for the Contractor did not press the challenge to the impugned Award as regards the rejection of Claim No.6 which was for a sum of Rs.1,838.18 for supply of Jamuna Sand for filling under floors and amount payable extra.

11. Claim No.7 was for refund of Rs. 30,689.43 recovered or paid less by the DDA under the garb of defects. The case of the Contractor was that the defects were not notified to the Contractor by the DDA as was mandatory in terms of Clause 14 of the agreement. Without such notification it was not open to the DDA to unilaterally withhold or recover amounts on the ground of defects. On the other hand, the Contractor had, by a letter dated 27th February 1988 (Ex.C-4), informed the DDA that all defects would be removed as and when pointed out by the DDA. Moreover, the DDA had certified in the final bill that the work had been completed as per CPWD Specifications without the DDA incurring any expenditure on account of any defect.

12. Ms. Geeta Mehrotra, learned counsel for the DDA pointed out that a number of inspections had been carried out by DDA's officers from time to time. Defects were pointed out to the Contractor when he was present at the site himself or represented by his authorized Engineer. Wherever the Contractor was able to rectify the defects, he was allowed the full rates. Where the defects were not rectified, the work was paid at the reduced rates by the "competent authority." It is stated that the Contractor had accepted such reduction.

13. From a perusal of the impugned Award it is seen that the learned Arbitrator did not discuss the contentions of either of the parties. He virtually passed a non-speaking Award. The operative part of the Award in respect of Claim No.7 reads as under:

"After carefully examining the submission by both parties and seen from records that the amount claimed under this claim pertains to reduction in rates of various items duly approved by the competent authority and affected in the bill. Therefore, the claim is rejected."

14. This Court finds that there is no justification for the learned Arbitrator not to have noted Clause 14 of the agreement, the respective contentions of the parties or Exhibit C-4. No prior notice as mandated by Clause 14 appears to have been issued to the Contractor at any time by the DDA in respect of defects in the work during the time the work was in progress. The work was completed on 31st October 1987. The defect liability period was for 6 months thereafter. Indeed, the final bill had also been certified which showed that the work had been completed as per the CPWD Specifications.

15. In ***Vira Construction Co. v. Delhi Development Authority 1997 (2) Arb LR 102***, it was held that reductions could not have been made by the DDA after a period of more than three years of completion of the work and without giving opportunity to the Claimants to undo the shortcomings at an appropriate time. Reference in that case was made to both Clauses 6 and 14 of the contract. In ***P.C. Sharma & Co. v. DDA 1998 (Suppl) Arb LR 300*** (hereafter '***P.C. Sharma-I***'), the Court held that the recovery sought to be made by the DDA without notice of defects under Clause 14 of the agreement was not legally tenable.

16. Consequently, the rejection of Claim No.7 by the learned Arbitrator cannot be sustained in law. The DDA is directed to refund to the Contractor a sum of Rs. 30,689.43 recovered or paid less by it under the garb of defects.

17. Claim No.8 was for refund of Rs. 53,699.73 wrongly enforced under the garb of rebates against the monthly bill on extra and substituted item, final bill etc. In terms of the agreement between the parties, there were following four kinds of rebates:-

“(i) Rebate of 0.05% of the estimated cost for making the monthly payments.

(ii) Rebate of 0.10% of the estimated cost for the payment of final bill within six months from the date of completion.

(iii) Rebate of 0.10% of the gross amount of all the extra and substituted items.

(iv) Rebate of Rs. 3,000 of estimated cost for the release of security deposit within month after expiry of the maintenance period which is six months.”

18. For some reason, the learned Arbitrator, despite holding that the payments had not been made by the DDA within the time stipulated, held that “both the parties are equally at fault.” Accordingly, the learned Arbitrator only awarded 50% of the rebate availed on running account (‘RA’) and the final bills in the sum of Rs. 14,814 and the full rebate availed on account of extra items (‘EI’) and the substituted items (‘SI’) in the sum of Rs. 1,568, thus totaling to Rs. 16,382.

19. In ***Mohan Construction Co. v. DDA 2005 VII AD (Delhi) 44***, this Court noted that “where rebate is offered contingent upon performance of a reciprocal obligation, if obligation is not performed, benefit of rebate cannot be availed off.” In the present case, it is seen that the DDA defaulted in timely payment of 28 bills, as was noted by the learned Arbitrator in the impugned Award. Yet, DDA deducted Rs. 37,421 as rebate on the RA bills, deducted Rs. 8,595 against the final bill which was prepared 7 years after the date of the actual completion and Rs. 3,000 towards the refund of the security deposit of the Contractor. The said security deposit was released four years after the date of completion. There was no justification, whatsoever, for the DDA claiming the above rebates. Consequently, the impugned Award in respect of Claim No.8, to the extent that it denies the Contractor refund of the rebates wrongly availed of by the DDA is hereby set aside. The differential sum i.e., Rs.53,699.73-16,382, is directed to be refunded by the DDA to the Contractor, in addition to a sum of Rs. 16,382, i.e., awarded to the Contractor by the DDA.

20. The Contractor has not challenged the impugned Award as regards Claim Nos. 9 and 10.

21. Claim No.11 was for a sum of Rs.88,723.41 for providing glazing bars in steel windows and ventilators of various sizes. The learned Arbitrator rejected the said claim on the ground that despite opportunities given to the Contractor, he failed to produce the relevant drawings or any record.

22. The learned Arbitrator failed to note the letter dated 31st August 1985, written by the Executive Engineer ('EE') to the Contractor a copy of which was placed on record by the Contractor along with its rejoinder. The said letter reads as under:

“Today the sample for window frames were shown to me. You are hereby informed the window frames as furnished is not as per the drawing issued from the office of Shri R. Kasana Chief. Arch., DDA.

You are hereby informed to provide glazing bar as shown in Drawing for standard design of doors and Windows for LIG & MIG Housing Schemes. The samples may kindly be made as discussed and shall inform the undersigned so as to arrange a Meeting with EE HD XV for his approval in the matter please.”

23. It is sought to be submitted by Ms. Geeta Mehrotra, learned counsel for the DDA, that the above letter only drew attention of the Contractor to the fact that the window frames as furnished were not as per the drawing issued by the DDA. The second paragraph of the above letter specifically asked the Contractor to provide “glazing bar as shown in drawing for standard Design of Doors and Windows for L.I.G. & M.I.G. Housing Schemes.” Therefore, there was no need for the Contractor to have produced drawings since, even according to the DDA, the Contractor was to follow the drawings for the standard design of doors and windows. The above letter showed that the Contractor had to undertake the work as directed by the EE. In fact, by a

letter dated 23rd September 1986, addressed to the EE (marked as Ex.C-40), the Contractor informed the DDA that it would be charging extra over quoted rates of steel window and ventilator for providing glazing bars. The rate analysis was also enclosed with the said letter.

24. The above documents have not been referred to by the learned Arbitrator and Claim No.11 was therefore wrongly rejected. The Award in respect of Claim No.11 is set aside and the Contractor is held entitled to the additional payment of Rs.88,723.41 for providing glazing bars.

25. Claim No.12 was for a sum of Rs. 4,32,689.57 for the balance payment of the work done but not paid. The Contractor revised the said claim to Rs. 2,69,180.22, which was split into two components. Rs. 98,805 was towards the balance against the final bill and Rs. 1,32,066 was towards the wrong reduction of Clause 10(cc) payment in the final bill. The learned Arbitrator allowed Rs. 98,805 which was proved to have been withheld by the DDA in the final bill. As regards the reduction of the payment in the sum of Rs.1,32,066, the learned Arbitrator observed that this aspect “has already been settled in the Claim No.13”. While discussing Claim No. 13, which was the balance payment under Clause 10(cc) to the extent of Rs. 1,23,230, the learned Arbitrator observed that the Contractor had failed to establish as to how the reduction made by the DDA was erroneous. It was further observed that “the indices adopted by the respondent are on the basis of average of indices of three months previous to the month in which the quarterly payment was made.”

26. Mr. Bhavesh Sharma, learned counsel for the Contractor, pointed out that

the Contractor had placed before the learned Arbitrator relevant documents which showed that after working out the Clause 10(cc) payment for Rs. 9,86,948, excluding the final bill on quarterly basis as per the formula set out in the agreement, the DDA had scaled down the payment to Rs. 8,78,500 by adopting the average of indices on monthly basis instead of on quarterly basis. It was on account of the revised method of monthly basis that the DDA reduced the payment under Clause 10(cc) further by a sum of Rs. 1,32,066. Under Claim No.13, this amount was not settled. In fact, the claim itself was rejected. In the final bill, the DDA calculated the payment under Clause 10(cc) at Rs. 68,840 on quarterly basis, but later changed this to monthly basis. Mr. Sharma relied upon the decisions of this Court in **Anant Raj Agencies v. DDA 2005 (1) Arb LR 590 (Delhi)** and **Delhi Development Authority v. U. Kashyap 1999 (1) Arb LR 88**.

27. In **Anant Raj Agencies v. DDA**, it was made clear by the Court that “benefit of Clause 10 (CC) had to be worked out every quarter and for said reason the clause stipulated arithmetical average of indices relevant to 3 calendar months.” This was reiterated in **Delhi Development Authority v. U. Kashyap**. Ms. Geeta Mehrotra learned counsel for the DDA on the other hand sought to place reliance on the decision in **K.R. Builders Private Ltd. v. Delhi Development Authority 144(2007) DLT 741** to urge that the amounts under Clause 10(cc) had to be calculated strictly as per the formula provided.

28. The case of the Contractor was that he should be given Clause 10(cc) payment only as per the formula set out in the agreement. The DDA erroneously deviated from that formula and adopted a monthly instead of a quarterly basis for computation of the amount based on the price indices.

This Court is of the view that the impugned Award, both in respect of Claim Nos.12 and 13 to the extent that it rejected the plea of the Contractor for payment of Clause 10(cc) amount is hereby set aside. The Contractor is held entitled under Claim No.12 to a sum of Rs. 1,32,066 and a sum of Rs. 1,23,230 under Claim No.13.

29. Claim No.14 was for damages on account of maintaining establishment beyond the stipulated completion in the sum of Rs. 3,20,000. This was later revised to Rs. 2,72,797. Claim No.15 was for 15% damages on account of the market increase in the cost of material and labour beyond the stipulated date of completion of the work. The learned Arbitrator has rejected both claims. It was held that the Contractor failed to produce the vouchers, the books of accounts and the delivery notes.

30. Learned counsel for the Contractor pointed that the work was delayed for a period of about 23 months beyond the stipulated date of completion for reasons attributable to the DDA. Had any breach been committed by the Contractor, then the DDA would have imposed a penalty of 1% per day.

31. From the arbitral record it is seen the Contractor submitted a letter dated 16th January 1987 (Ex.C-29) followed by a letter dated 20th March 1987 (Ex.C-32). Further, the Contractor had submitted the salary vouchers of the staff who had to be engaged during the prolongation of the contract. A balance sheet of the period of prolongation was also placed before the learned Arbitrator. Therefore, it was erroneous on the part of the learned Arbitrator to hold that there was no documentary evidence placed before him by the Contractor in support of the claim.

32. Learned counsel for the DDA submitted that the plea for damages could not be entertained where escalation under Clause 10(cc) was awarded. As explained by the Supreme Court in ***M/s A.T. Brij Paul Singh and Bros. v. State of Gujarat AIR 1984 SC 1703***, an estimate of 5% to 7% of the contract value can be awarded to the Contractor as damages. This was not a case where the Contractor has not produced any documents whatsoever. He has provided the salary vouchers for the period of prolongation. These were not even referred to by the learned Arbitrator. Further, Ex.C-29 and Ex.C-32 were not noticed. The rejection of Claim No.14 was therefore erroneous. The value of the contract was Rs. 1.06 crores and the work was to be completed in one year. The Contractor has limited his claim to Rs. 2,72,797 which is not even 25% of what he would have been entitled to if the formula of 5% was applied. Consequently, in respect of Claim No. 14 the Contractor is held entitled to Rs. 2,72,797.

33. Under Claim No.16, a sum of Rs. 50,000 has been claimed on account of the delay in taking over of possession of the flats by the DDA. This was for a period of 26 months, i.e., from 31st October 1987 to 31st December 1989. Again, the claim was rejected on the ground that no details were furnished by the Contractor. It is seen that the request for payment was made by the Contractor by letter dated 18th November 1987 (Ex.C-5), enclosing the vouchers as proof of payment of salaries. As explained by this Court in ***Anant Raj Agencies*** (supra), where there is delay in DDA taking possession of the flats the Contractor is required to engage minimal watch and ward staff. There were adequate documents on record to enable the learned Arbitrator to have allowed Claim No.16. The Award in respect of Claim No.16 is hereby set aside and the amount of Rs.50,000 as claimed is allowed

to the Contractor.

34. The learned Arbitrator has awarded the DDA under Counter Claim Nos. 1 and 2 a sum of Rs. 60,989 together with interest @ 9% per annum from the date of the passing of the final bill till the date of payment. The said counter claims were time barred. They were raised by the DDA for the first time on 18th February 2005, i.e., nearly seventeen years after the date of completion of the contract i.e. 31st October 1987. Even if the DDA were to contend that the occasion for filing the counter claims did not arise till the Contractor invoked the arbitration clause, it is seen that by an order dated 22nd August 1995 passed in Suit No. 331-A of 1994, the Court had directed the DDA to appoint an Arbitrator. Even before the Arbitrator so appointed, the DDA did not file its counter claims. Consequently, the DDA's counter claims filed for the first time on 18th February 2005 were time barred and ought not to have been entertained by the learned Arbitrator. The impugned Award in respect of the counter claims is hereby set aside.

35. In conclusion, the Award in respect of Claim No. 2 is upheld. The amounts awarded in favour of the Contractor under Claim Nos. 1, 8, 12 and 17 are also upheld. The impugned Award in respect of Claims 3 to 7, 8 (to the extent disallowed), 11, 12 (to the extent disallowed), 13, 14, 16 and the counter claims of the DDA is set aside. In other words, Claim No.3 for a sum of Rs. 8,590.82, Claim No. 4 for a sum of Rs. 95,414.46, Claim No. 5 for a sum of (Rs. 59,675.33 minus Rs. 16,382), Claim No. 7 for a sum of Rs. 30,689.43, Claim No. 8 for a sum of Rs.53,699.73, Claim No. 11 for a sum of Rs.88,723.41, Claim No. 12 for a sum of Rs. 1,32,066, Claim No. 13 for a sum of Rs. 1,23,230, Claim No.14 for a sum of Rs. 2,72,797 and Claim No.

16 for a sum of Rs. 50,000 are allowed in favour of the Contractor. DDA's counter claims are rejected as being time barred. The above amounts will be paid to the Contractor by the DDA together with simple interest at 9% for the period 20th August 1993 till the date of the present decree i.e. today, and simple interest at 7.25% per annum on the said sums from today till the date of payment.

36. The impugned Award dated 20th August 2007 as modified above is made rule of the Court. I.A. No. 6310 of 2008 and CS (OS) No. 2222 of 2007 are disposed of in the above terms. Decree sheet be drawn up accordingly.

S. MURALIDHAR, J.

October 9, 2012

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