

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
 F-115
 + **CS(OS) No.2237 of 2007**

M/S DEEP BUILDERS Plaintiff
 Through: Mr. R. Rajappan, Advocate.

Versus

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

CORAM: JUSTICE S. MURALIDHAR

ORDER
01.11.2012

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1. These are the objections filed by the Delhi Development Authority ('DDA') to an Award dated 29th October 2007 passed by the learned sole Arbitrator in the disputes between the Plaintiff, M/s. Deep Builders (hereinafter referred to as the 'Contractor') and the DDA, arising out of the work of construction of 832 Economically Weaker Section ('EWS') houses in Sector-11, Rohini, Delhi which was awarded to the Contractor by a letter dated 1st March 1989.

2. In terms of the formal agreement entered into between the parties on 10th March 1989, the work was started on 11th March 1989 and was to be completed by 10th March 1990. However, the work was actually completed on 29th May 1992.

3. The Contractor invoked Clause 25 of the agreement and sought reference of its disputes to arbitration. The Superintending Engineer ('SE') (Arbitration) was appointed as the sole Arbitrator by the Engineer Member of DDA on 20th November 1995. 16 items of claims were filed by the Contractor before the learned Arbitrator. The Contractor also filed additional claims. The DDA, on its part, filed Counter Claim Nos.1 and 2.

4. During the pendency of the present proceedings, a number of Arbitrators had changed and finally, by an order dated 29th March 2007, this Court appointed Mr. S.S. Jain, SE (Arbitration-I) as the sole Arbitrator to conclude the proceedings and publish the Award.

5. In terms of the impugned Award, the learned Arbitrator allowed some of the claims and the additional claims of the Contractor and rejected the counter claims of DDA.

6. The DDA has filed the present objections under Sections 30 and 33 of the Arbitration Act, 1940 ('Act') as regards the Award in respect of Claim Nos.1 to 3, 7 to 9, 11, 16 and additional Claim Nos.2, 3, 4 and 18. The DDA is also aggrieved by the rejection of its Counter Claim Nos.1 and 2 by the learned Arbitrator.

7. Claim No.1 by the Contractor was for a sum of Rs. 2,08,813 towards refund of rebate wrongly deducted by the DDA while making payment of the Running Account ('RA') bills. The case of the Contractor was that the rebate could be availed of only if the payments were made on time, but since admittedly the DDA did not make the payment of the RA bills within time, it could not have availed of the rebate.

8. The learned Arbitrator has taken note of the statement of the Contractor that as a matter of practice, it was the DDA which prepared the RA bills. The learned Arbitrator also found, as a matter of fact, that DDA failed to make payments to the Contractor within the stipulated time against the RA bills for the months of July 1989, November 1989, June 1990, November 1990, March 1991, June 1991, November 1991, February 1992 and April 1992. Accordingly, a sum of Rs. 63,779 was awarded to the Contractor under Claim No.1.

9. Claim No.2 was for a sum of Rs. 2,08,813 towards the refund of rebate availed of by the DDA while making the payment of the final bill. Here again, the learned Arbitrator held that the final bill was finalized only on 30th March 1995 and not within six months of the date of the completion of the work, i.e., 29th May 1992.

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10. Claim No.3 was for a sum of Rs.10,219 towards refund of the rebate deducted towards the release of the security deposit within one month of the expiry of the maintenance period. Admittedly, the security deposit was not released within six months from the date of the completion of the contract.

11. As regards the above claims, the case of the DDA was that under Clause 8 of the agreement, it was the Contractor who was to prepare the RA bills. Also, the final bill had to be prepared by the Contractor. The contention is that where essentially the condition of Clause 8, i.e., submission of RA bills by the Contractor, followed by the submission of the final bill, was not complied with, the question of the DDA wrongly availing of the rebate for failure to make timely payment did not arise.

12. Having considered the above objections to the Award in respect of Claim Nos.1 to 3, this Court is of the view that the impugned Award does not suffer from any error in this regard. The learned Arbitrator was a technical person and had also served the DDA as SE and was, therefore, aware of the actual practice being adopted by the DDA itself, quite contrary to the requirement of Clause 8. In other words, note was taken by the learned Arbitrator of the fact that it was invariably the DDA which prepared both the RA bill and the final bill.

13. Mr. R. Rajappan, learned counsel for the Contractor, drew the attention of the Court to the decision of this Court in *G.D. Tewari & Co. v. DDA 2005(2) Arb.LR 241 (Delhi)*. He has further pointed out that during the period when the work in question was executed, the practice was for the Contractors to never prepare the RA bills and the final bill, but leave it to the DDA to do so for the simple reason that the measurements recorded in the measurement books ('MBs') were in the custody of the DDA. No access thereof was being given to the Contractor. Without such vital information in the RA bills or the final bill prepared by the Contractor were liable to be found defective by the DDA, since it would not, in any event, agree with the measurements recorded by the Contractor which might vary with those recorded by DDA in its MBs, which were not available to the Contractor. It is for this reason that the Contractor was compelled to accept the payments of the RA bills as and when prepared by the DDA.

14. The above submissions were also made before the learned Arbitrator, as can be seen from the impugned Award. The DDA does not appear to have seriously disputed the above factual position. Although Clause 8 itself requires the Contractor, in the first instance, to prepare the RA bills, the clause further contemplates that DDA will prepare the RA bills in the event of failure by the Contractor to submit the RA bills. The same is the position

as regards the final bill. Therefore, in both the instances, the view taken by the learned Arbitrator, arising from his long experience of earlier serving as SE, was a plausible one to take. As long as the DDA did not make the payments within the time as stipulated in the contract for the purpose of availing of the rebate, there was every justification in the arbitration requiring refund of such rebate wrongly availed of. The Award in respect of Claim Nos.1 to 3 turned on interpretation of the clauses of the contract in light of the factual position and practicable realities. It is not possible to hold that the learned Arbitrator committed any error apparent on the face of the Award in allowing Claim Nos.1 to 3 in favour of the Contractor. The Objection to the impugned Award with regard to Claim Nos.1 to 3 is, accordingly, rejected.

15. Claim No.7 was for a sum of Rs. 51,431 towards refund of overcharge in issue of SCI pipes which was due to wrong mode of measurement. The objection by the DDA to the learned Arbitrator awarding Rs. 40,340 is that for the payment of pipes work, the length of socket was not to be taken into consideration. The learned Arbitrator has found, as a matter of fact, that the length of sockets was duly accounted for in the issue and recovery of pipes when it ought not to have been taken into account. It essentially turned on facts and, therefore, it cannot be said that the decision of the learned

Arbitrator suffers from any error apparent on the face of the Award.

16. Claim No.8 was for a sum of Rs. 1,10,000 towards release of the bank guarantee ('BG') furnished towards the security deposit and Rs. 10,000 towards incidental expenditure for illegal revalidation of the BG. The learned Arbitrator found that a sum of Rs. 50,000 was lying with the DDA against the security deposit, but was adjusted against Counter Claim No.1. Since there was a stay against such adjustment, it was held that the Contractor was entitled to refund of Rs. 50,000. This Court is unable to find any error apparent on the face of the Award as far as the above decision of the learned Arbitrator is concerned. Consequently, the objections in respect of the Award as regards Claim Nos.7 and 8 are hereby rejected.

17. Under Claim No.9, the Contractor has sought refund of a sum of Rs. 3,61,473, being the lump sum taken from RA bills. The DDA pointed out that it had withheld only Rs.3,58,473, of which a sum of Rs. 1,50,473 had already been refunded to the Contractor. The remaining amount, according to the DDA, was adjusted against the deduction items and these were made due to higher rates sanctioned by the competent authority for various reduction items. The learned Arbitrator found that no such adjustment could have been done without proper adjudication by the competent authority, as

was mandated by Clause 29 of the agreement. Even after the payment of final bill, the DDA continued to adjust Rs.1,46,469, which was not justified. Accordingly, the Contractor was awarded a sum of Rs. 2,07,999.

18. The objection by the DDA to the aforementioned Award was that the Reduction Item Statement ('RIS') was approved by the competent authority in terms of Clause 25(B) of the agreement and the decision of the competent authority was final. The DDA failed to point out why it did not follow the requirement of Clause 29 which required adjudication by the competent authority where adjustments were continued to be made even after the payments of the final bill. In that view of the matter, the decision of the learned Arbitrator was justified.

19. The next objection of the DDA is to the Award in respect of Claim No.11, under which the Contractor sought payment of escalation under Clause 10-CC. The case of the DDA is that since the Award in respect of Claim Nos.1 to 3 was liable to be set aside, the payment of escalation under Clause 10-CC did not arise.

20. This Court has upheld the Award in respect of Claim Nos.1 to 3, and the allowing of escalation under Claim No.11 by the learned Arbitrator is held to be justified. Moreover, the learned Arbitrator has applied the formula under

Clause 10-CC and awarded only Rs.1,01,778 under Claim No.11. The said decision does not call for any interference.

21. The next objection to the Award is in respect of Claim No.16 and additional Claim Nos.3 and 4. This concerns the award of interest. This Court is not persuaded to interfere with the impugned Award under which the Contractor has been awarded simple interest @ 10% per annum on additional Claim Nos.17 to 20 and additional Claim No.2.

22. Under additional Claim No.18, the Contractor sought Rs.12,00,000 towards salary of Engineer, staff etc. which was required to meet the machinery, countering and shuttering after stipulated date of completion. The learned Arbitrator has not awarded the sum as claimed by the Contractor, but has held that the Contractor would be entitled to Rs. 19,000 per month for one Engineer, one storekeeper, two *Chowkidars* and one clerk. Further, the Contractor was held entitled to compensation of Rs. 46,000 per month in respect of two concrete mixers and two vibrators, centering and shuttering in the total sum of Rs. 4,94,000. The view taken by the learned Arbitrator is not shown to be erroneous or unreasonable in the facts and circumstances of the case. The Award of Rs. 4,94,000 to the Contractor under additional Claim No.18, therefore, does not call for interference.

23. The Award of Rs.2,46,048 towards watch and ward staff from 15th November 1999 to 15th November 2000 under additional Claim No.2 also does not call for interference. The learned Arbitrator has found, as a matter of fact, that the Contractor was required to maintain the watch and ward staff till such time the flats were not taken over by the DDA. This was consistent with the supplementary agreement drawn up by the DDA as well as the circular. There is a very detailed discussion in the impugned Award in this regard and this Court is unable to find any error apparent on the face of the Award in this regard. The rejection of Counter Claim Nos.1 and 2 of the DDA had to correspondingly follow and, therefore, that too does not call for any interference.

24. For the aforementioned reasons, this Court does not find any merit in the objections of the DDA to the impugned Award. The objections are, therefore, rejected.

25. The Award dated 29th October 2007 is made rule of the Court.

26. Decree sheet be drawn up accordingly.



S. MURALIDHAR, J.

NOVEMBER 01, 2012

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