

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Reserved on : 14.03.2013
Date of decision: 21.03.2013

+ **FAO(OS) 350/2011**

M/s MSJ CONSTRUCTION PVT.LTD Appellant
Through :Mr.Sandeep Sharma and
Mr.Vikas Sharma, Advocates.

versus

DELHI DEVELOPMENT AUTHORITY &Anr..... Respondent
Through : None.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MS. JUSTICE INDERMEET KAUR

SANJAY KISHAN KAUL, J.

1. The respondent/DDA invited tenders for providing RCC bored cast-in-situ pile foundation including pile caps and grade beams (Block 1 & 2) for a project for construction of multi-storeyed flats at Motia Khan, for which the petitioner was a successful tenderer, accepted vide letter dated 27.12.1984 at a negotiated amount of Rs.47,04,054/-. The work had to be completed within four months calculated from the 10th day after the date of issue of the award letter. It is a case of the appellant that all necessary arrangements were made for due execution of the work, especially keeping in mind the tight completion schedule. However, the respondent is alleged to have failed to make available the site. Thus, the

appellant called upon DDA vide letter dated 11.02.1985 to do various acts.

“i) To remove the building materials of another contractor lying in the block No.1.

ii) To remove the huge malba filth and other rubbish material lying at the site of both the blocks.

iii) To put restriction on labourers, residents of jhuggies and the people of the trucks for using the site for natural coarses and thus creating the foul conditions, it was even difficult to take up the lay-out work.

iv) The site being highly undulated with heaps of garbage, malba, refuge etc. requests were made to you even during your site inspection for the clearance of the site which was creating obstructions in our work.

v) The discrepancy in the drawing were also pointed out to the Department.”

2. The aforesaid hindrances are stated to have not been removed resulting in a meeting being held on 15.02.1985, the discussions of which were reduced into writing by the appellant in its letter dated 07.03.1986. The time period stipulated for work was expiring and thus the appellant called upon the respondent to compensate it for the losses suffered and in case the work was to be now executed, the same would be at market rate and on the respondent fulfilling the contractual obligations. The respondent vide their letter dated 05.03.1986 informed all the plans being approved by the Urban Art Commission so that the work of piling could be started. The appellant informed that the layout out drawings had still not been issued as per the letter dated 13.03.1986 and despite the appellant installing a test pile at site in January, 1985, the pile load was not

conducted under the directions of the respondent and thus seeking clarifications in that behalf. The respondent, however, sought to put the blame on the appellant vide their letters dated 05.04.1986 and 10.04.1986 which were replied to by the respondent on 10.04.1986 followed by letters dated 13.05.1986 and 18.09.1986.

3. The respondent issued a show cause notice to the appellant dated 21.05.1988 replied to on 25.05.1988 but the contract was ultimately cancelled by the respondent on 14.07.1988. In view of the arbitration clause contained in the agreement *inter se* the parties, the disputes were referred to the sole arbitration of Sh. S.Nagarajan where various claims were made. It appears that an award dated 27.01.1992 was published which was assailed before the Delhi High Court and was set aside and the matter was referred afresh for arbitration to Justice V.S.Aggarwal (Retd.) vide order dated 08.09.2006. The learned Arbitrator made and published the award dated 22.09.2008.
4. There were four claims made by the appellant out of which Claim Nos.1 and 2 were awarded while rejecting Claim Nos. 3 and 4. The counter claims of the respondent were also rejected. Claim No.1 was on account of hiring charges of plant and casting machinery and other accessories from 08.01.1995 to 15.05.1988 on account of the same remaining idle while Claim No.2 was towards payment of Rs.1,75,400/- to the supervisory staff and Rs.1,80,000/- towards cost of extra concrete used in the piling work along with the additional cast used on account of substrata condition. The first claim was allowed for Rs.7,95,000/- while Claim No.2 was allowed for Rs.72,450/-. On the total amount of Rs.8,67,450/-,

interest at the rate of 9% per annum was awarded from 25.01.1992 with the condition that if the amount is not paid within three months, future interest would be at the rate of 12% per annum.

5. The award was filed in the court to which objections were filed by the respondent under Section 30 & 33 of the Arbitration Act, 1940 ('the said Act' for short) as IA No.6404/2010. These objections have been allowed by the impugned order dated 26.05.2011 and the matter has been remanded back to the learned Arbitrator to re-consider Claim Nos.1,2 & 4 and also counter claim Nos.1 to 5. The impugned order is predicated on non-consideration of the relevant evidence *qua* the issue whether or not there were also contributory delays and defaults on the part of the appellant though there was little dispute over the issue of delays and defaults on the part of the respondent.
6. We heard learned counsel for the appellant. None appeared for the respondent even though the matter was listed on the Regular Board and on a day dedicated to hearing of only Regular Matters.
7. Learned counsel for the appellant took us through the award of the learned Arbitrator to emphasize that all material evidence had been considered by the learned Arbitrator in an elaborate award running into 30 pages.
8. After noticing the claims of the appellant, the stand of the respondent was taken note of i.e. that the work progress was slow, the work done had various drawbacks and the respondent had been time and again requesting the appellant to follow specifications of the structural drawings. The lapse on the part of the appellant had resulted in the show cause notice, but despite the same, there was

no remedial action and thus the respondent was left with no option but to rescind the contract on 14.07.1988 and get the remaining work executed at the risk and cost of the appellant. The crucial issue examined was *qua* the aspect whether a clear site was given to the appellant for development. In this behalf, out of the large number of documents placed on record, the learned Arbitrator stated that considering only some of them would suffice. The aspect of obstructions at site had been brought to the notice of the respondent as early as on 11.02.1985 vide a letter of the same date. In a communication of the respondent dated 11.04.1985 while calling upon the appellant to start work, there was an admission that there was an area in Block 1 which was covered by *malba* and efforts were being made to clear the same. Another communication dated 05.04.1986 informed the appellant that the hindrances/problems would be sorted out at the table itself. In Exhibit C-18 dated 13.01.1987 addressed by the respondent to the Assistant Commissioner of Police, a grievance was made that the site vacated by truck parking of Motia Khan was being utilized for the construction of multi-storeyed flats and the site had been assigned to the appellant whose work was being disturbed. The learned Arbitrator thus found as under:

“It clearly shows that the entire site was available free from hindrances when the work was to start is incorrect. The site was not clear of obstructions. If a small portion is given which is clear where work was to start does not mean that the work had to be completed within time. Resultantly the finding is obvious and inescapable that the site was not given without any obstructions in the year 1985 and

necessarily the work could not be completed in this regard within the stipulated time of four months particularly as far back as in January, 1987 the respondent was still writing to Additional Commissioner of Police for removing of the obstructions.”

9. The second question examined by the learned Arbitrator was as to whether the drawings were given to the appellant to start and complete the work. The communications exchanged *inter se* the parties for non-supply of drawings established that though the drawings for Block 1 were given at the initial stage, but subsequently there was a delay in handing over of the drawings pertaining to Block 2.
10. The third aspect analyzed by the learned Arbitrator was *qua* permission to be obtained from Delhi Urban Art Commission. The communication dated 05.03.1986 informed that the plans had been approved by the Urban Art Commission and thus there could not have been the requisite permission available in the year 1985. The approval of such plans was mandatory. Thus the respondent was calling upon the appellant to re-start the work when such permission was still not available. The work had been stopped earlier on account of such lack of permission. This aspect was verified by Ex C-9 being a communication of the respondent stating that the work may be started when approval was received. A further finding of the learned Arbitrator is that there was total lack of evidence on the part of the respondent as to how the respondent had suffered the loss claimed for alleged sub-standard work. The learned Arbitrator, prior to proceeding to examine each of the claims on merits, gave a conclusion as under:

“Net result of this correspondence between the parties clearly shows that between the parties it was the respondent who must be held responsible for the delay. The drawings were given date, the site was not clear and, therefore, to contend that claimant has delayed the matter would travesty of facts and justice. With these findings one can conveniently travel to the claims in this regard.”

11.Learned counsel for the appellant, thus, pleaded that it is not the function of this court, while analyzing the objections, to re-appreciate evidence or weigh the quantum of evidence and seek to arrive at a conclusion different from the one arrived at by the learned Arbitrator.

12.Learned counsel, while dealing with the specifics, has referred to the discussion in the impugned order qua Claim No.1. The learned Arbitrator fixed the rate of Rs.555/- per day for idle machinery and the finding of the learned single Judge is that though the award stated that the formula for working out the rate of Rs.555/- per day is worked out below, however, there is no formula worked out by the learned Arbitrator. In this behalf, learned counsel has drawn our attention to Exhibit C-40, which are the details of Claim No.1. As to how the figure of Rs.555/- has been arrived at, is set out below the said claim which is as under:

“Cost of one set Rs.3.00 lacs. The maximum utilization of the same is for a period of three years. Soper year it comes to Rs.1000 lacs. In a year on an average the utilization of the plan can be considered for 180 days. So per day it works out to Rs.555/-. The plant consists of 40 Horse Power. Engine, 40 KVA Generator, Winch, Mixer, Bailor, Casin etc.”

Learned counsel thus submits that the finding of the learned single Judge that the basis has not been given is thus incorrect, which is held to be an omission and not non-application of mind by the learned Arbitrator.

13. We do find force in the aforesaid contention of learned counsel for the appellant and it appears that what we have extracted aforesaid has escaped the attention of the learned single Judge. The working out of the figure has been given and it has not been shown how, given limited domain of the court, this is liable to be interfered with. The appellant had, in fact, claimed a sum of Rs.1,000/- per day against which this amount was awarded. The only misconduct attributed is that no formula for fixing the rate of Rs.555/- per day per plant as idling charges was available from the award, while it is to the contrary.

14. Another aspect which has weighed with the learned single Judge is that the idling charges in respect of the second machine have been awarded even though as per Annexure R-9 dated 13.04.1987, there was only one machine/plant for boring piles deployed as on 13.03.1987. In this behalf, learned counsel has invited our attention to the response to the aforesaid letter by the appellant dated 05.05.1987 where it has been stated as follows:

“In reference to last para we have to point out that we have already kept 3 machines in position but we are not in a position to utilize them due to pending decisions.”

15. That there were three plants actually working is sought to be established by the communication of the appellant dated 17.08.1987 where in para 1 it is stated as under:

“1. As per our commitment made to you we had commissioned one extra plant at site of work in the 4th week of June, 1987. Now total of three plants are working at site. “

- 16.If the aforesaid aspects are analyzed, it is found that there is, no doubt,a controversy *qua* the aspect of the machinerybeing deployed, but the communications of the appellant do seek to suggest that there was actual deployment.
- 17.On a conspectus of the evidence before the learned Arbitrator, the findings have been arrived at. It is thus not a case of the arbitrator ignoring the evidence as is found by the learned single Judge. The findings *qua* non-consideration of relevant evidence by the learned Arbitrator is thus not borne out from the record. The aforesaid aspect is also to be taken into consideration on account of lack of material evidence by the respondent on aspects of defect of work or the work being completed at the cost of the appellant through a third party agency.
- 18.We are of the view that the learned single Judge has traversed a path which is not permissible while considering the objections to an award i.e. seeking to weigh the material evidence and endeavouring to come to the conclusion different from the one arrived at by the learned Arbitrator.The legal principles are well settled in view of the various judicial pronouncements including in Ispat Engineering & Foundry Works, B.S.City, Bokaro v. Steel Authority of India Ltd., B.S.City, Bokaro (2001) 6 SCC 347. The arbitrator is a chosen judge of the parties and even if two views are possible, the award of an arbitrator cannot callfor interference as

the expression “error apparent on the face of the record” does not imply closer scrutiny on merits by the court. (Arosan Enterprises Ltd. V. Union of India and Anr.(1999) 9 SCC 449.

19.The result of the aforesaid is that the impugned order cannot be sustained and is set aside and the award dated 22.09.2008 of the sole Arbitrator Justice V.S.Aggarwal (Retd.) is made rule of the Court.

20.The appellant is also entitled to costs of Rs.5,000/-.

21.The appeal is allowed in terms aforesaid.

SANJAY KISHAN KAUL, J

INDERMEET KAUR, J

MARCH 21, 2013/dm