

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

Judgment reserved on: 23.10.2013
% Judgment delivered on: 07.11.2013

+ **CS(OS) No. 1152A/2009**

M/S BUMBRAH ELECTRIC CO. Plaintiff

Versus

DELHI DEVELOPMENT AUTHORITY & ANR. Defendants

Advocates who appeared in this case:

For the Plaintiff: Mr Vivekanand, Advocate.

For the Defendants: Mr Sangram Patnaik & Mr Umesh Yadav, Advocates for
defendant no. 1

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER,J

CS(OS) No. 1152A/2009 & 1A No. 15274/2009 (Objections by DDA)

1. In the captioned suit relief is sought by the plaintiff in terms of Sections 14 & 17 of the Arbitration Act, 1940 (in short the Act). It is briefly prayed that a direction be issued to defendant no.2, who is the arbitrator appointed in the matter, to file the original award dated 15.05.2009, along with the record, in this court, and to thereafter, make the said award a rule of the court. A decree is thus sought in terms of the award. Interest at the rate of 12% per annum is sought from the date of the decree till the date of payment. Additionally, cost of proceedings are also sought by the plaintiff.

2. In the suit defendant no.1 has filed its objections under Sections 30

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and 33 of the Act qua the award dated 15.05.2009 by way of the captioned interlocutory application.

2.1 It must be stated at the very outset that even though the award impugned by the defendant no.1 relates to eleven (11) claims, the defendant no.1 by way of the present objections has confined its challenge only to claim no. 6. Claim no. 6 relates to compensation for salary paid by the plaintiff to the engineer and the supervisor employed by it, during the period the contract was unduly extended. The period spans from 01.10.1983 to 24.10.1991.

2.2 I am informed by the counsel for the plaintiff: a fact which is confirmed by the counsel for the defendant no.1, that payments against other claims awarded in favour of the plaintiff has been made by the defendant. Briefly, claim nos. 1, 3, 4 and 10 were partially allowed; Claim nos. 2, 5, 6 and 8 were fully allowed, while claim no. 7 was rejected. Claim no. 9 was not adjudicated upon as the plaintiff chose not to press the same.

3. In these circumstances, I propose to dispose of, in the first instance, the objections filed by the defendant. In order to do so, the following broad facts, need to be noticed.

3.1 The present case is a second round of litigation as between the parties herein. In the first round, defendant had appointed an arbitrator vide communication dated 05.12.1995. The said arbitrator had published his award on 18.09.1997. Based on a petition filed by the plaintiff, this court vide order dated 11.09.2008, set aside the award and directed the defendant no.1, to once again, appoint an arbitrator in the matter for a fresh decision qua the disputes raised by the plaintiff. The arbitrator was granted six (6) months time to adjudicate upon the disputes.

3.2 Accordingly, a fresh appointment was made by the defendant vide communication dated 06.11.2008. The arbitrator entered upon reference on 17.11.2008. After affording full opportunity to the parties herein, which entailed filing of pleadings, evidence and consideration of submissions, the learned arbitrator passed the award, which is assailed, by the defendant no.1.

4. The disputes, which are more than a decade old, arose in the background of the following circumstances.

4.1 The plaintiff was awarded a contract for carrying out electrical work in relation to 256 flats which were to be constructed by the defendant no.1 through the instrumentality of a civil contractor. It is pertinent to note that, the number of flats in respect of which the plaintiff, carried out electrical work stood increased to 320 flats. The aforementioned work was awarded to the plaintiff vide communication dated, 22.09.1982. The said communication pegged the date of commencement as 02.10.1982. The plaintiff was accorded twelve (12) months for completion of work, which expired on 01.10.1983. However, as a matter of fact, the execution of the work was delayed by 108 months, i.e., nearly nine (9) years. The electrical work could be completed by the plaintiff, only on, 24.10.1991.

4.2 According to the plaintiff, the delay in the execution of the work was solely attributable to the defendant no.1. The delay, as per the stand of the plaintiff, before the learned arbitrator, broadly fell under the following heads:

- (i) abandonment of the work by the civil contractor, engaged by the defendant no.1;
- (ii) the delay, of nearly two (2) years in the defendant no.1 awarding a fresh contract to another civil contractor;

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(iii) delay in supply of cement: and

(iv) delay in the provision of niches and or their rectification by the civil contractor.

4.3 Principally, on account of these delays and rectification work, the plaintiff raised disputes and filed its claims before the arbitrator. As indicated above, eleven (11) claims were filed by the plaintiff.

4.4 After considering record and hearing parties, the learned arbitrator passed the impugned award as noted hereinabove.

5. The learned arbitrator, in the impugned award, has returned the following findings of fact:

(i) The defendant no.1 was solely responsible for the delay in the execution of the contract.

(ii) The plaintiff had requested for closure of contract: a request which was not accepted by the defendant no.1.

(iii) The defendant no.1 had engaged a new civil contractor only in March, 1985. Which was admittedly, two years after the civil contractor originally engaged by the defendant no.1, had abandoned work.

(iv) The plaintiff had demanded a 30% increase in the rates over and above the tendered rates for completion of work during the extended period.

(v) The plaintiff could not have coordinated the work in accordance with condition no. 4 of the additional conditions of the work applicable to the agreement obtaining between the parties, with the civil contractor, as there was no civil contractor available during the original tenure of the contract obtaining between the parties. Similarly, the defendant no.1's defence, based on condition no. 5 of the additional conditions of the contract, and clause 10 of the agreement, was rejected.

(vi) The plaintiff suffered losses and damages due to prolongation of the contractual period, which was required to be compensated.

5.1 It is in this context, that, apart from anything else, the learned arbitrator in the impugned award against claims lodged by the plaintiff, directly relatable to the prolongation of the contract, awarded sums in favour of the plaintiff. These claims being: claim no. 4, which related to increase in the tendered rates. The increase in rates sought was 30% over and above the tendered rates; an aspect which I have referred to above, while noticing the findings returned by the learned arbitrator. Under this head the plaintiff claimed Rs. 2,45,423/-, whereas the arbitrator awarded a sum of Rs.1,28,795/-. The arbitrator adjusted a sum of Rs. 1,16,628/- as the said sum had been awarded under claim no. 10.

5.2 Similarly, in respect of claim no.5, whereunder a sum of Rs.1,15,200/- was claimed qua watch and ward expenses for the period 01.10.1983 to 24.10.1991, the learned arbitrator awarded the entire amount. To be noted, the claim was awarded qua watch and ward expenses at the rate of Rs. 600 per month for the period in issue, which was eight years.

5.3 Under claim no. 6, the plaintiff demanded a sum of Rs. 2,68,800/- towards salary of engineer and supervisor for the period 01.10.1983 to 24.10.1991. This claim was allowed by the learned arbitrator in entirety.

5.4 Claim no. 7, with respect to overhead expenses, like maintenance of site office etc, was rejected, as it was not backed with cogent evidence.

5.5 Under claim no. 8, the plaintiff demanded Rs. 15,000/- towards wages paid to idle labour between March, 1983 to May, 1983. This claim was allowed in full by the learned arbitrator.

5.6 Claim no. 10, was allowed to the extent of Rs.1,16,627.56, in respect

of increase in labour rates in terms of clause 10C of the contract obtaining between the parties. The plaintiff, had sought in the first instance a sum of Rs.2 lacs. in respect of this claim, which was scaled down to Rs. 1,45,321.78-.

6. The reason that I have given a brief description of claims 4 to 8 and claim no. 10 is to demonstrate that these claims arose principally out of the charge levied by the plaintiff that the defendant no.1 was solely responsible for the delay in the execution of the work. As indicated above, the learned arbitrator agreed with this assertion of the plaintiff. A close examination of the reasoning given by the learned arbitrator would show that each of these claims are in the nature of compensation for loss caused to the plaintiff due to the prolongation of the contract, for reasons solely attributable to the defendant no.1.

7. Mr Patnaik, learned counsel for the objector/ defendant no.1, raised two submissions in support of the objections filed.

7.1 First, that there was an overlap in respect of claim no. 6 and claim nos. 4 and 10. It was Mr Patnaik's contention that amounts awarded under claim nos 4 and 10 would cover the claim lodged under claim no. 6 by the plaintiff.

7.2 The second contention advanced was that claim no. 6 could not have been awarded in favour of the plaintiff, as there was no provision in the contract obtaining between the parties, which accorded a right in favour of the plaintiff to payment of salaries qua the engineer and the supervisor, for the period in issue. In support of his submissions Mr Patnaik placed reliance on two judgments of a single Judge of this court dated 23.07.2009, passed in CS(OS) 4405A 1992, in the matter of: *Verma Construction Co. vs DDA*,

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and dated 13.07.2009, passed in CS(OS) No. 154 1994, in the case titled: ***Republic Construction Co. vs DDA.***

8. On the other hand, Mr Vivekanand, learned counsel for the plaintiff, refuted the submissions advanced on behalf of the defendant no.1. It was submitted by Mr Vivekanand that there was no overlap, as between the amounts claimed under claim no. 6, and those, in respect of which, demand had been made under claim nos. 4 and 10. He also submitted that the amount awarded under claim no. 6 was essentially a recompense made in favour of the plaintiff under a specific head due to injury caused to it on account of undue prolongation of the contract by the defendant no.1. It was Mr Vivekanand's submission that grant of compensation for damages to an aggrieved party by an adjudicating authority was a necessary consequence of breach of contractual obligations by the opposite party. Once breach was established, the adjudicating authority, in this case the learned arbitrator, was empowered to award compensation in terms of Section 73 of the Indian Contract Act, 1872 (in short the Contract Act).

8.1 It was Mr Vivekanand's submission that in awarding damages under claim no. 6, the learned arbitrator, had not strayed beyond the terms of the contract, as was contended by the defendant no.1. In support of his submissions Mr Vivekanand relied upon the following two judgments of two different Division Benches of this court: ***Delhi Development Authority vs S.S. Jetley 2000 VII AD (Delhi) 743***, and the judgment dated 20.01.2009, passed in FAO(OS) No. 122/2005, in the matter of : ***Delhi Development Authority vs M/s Prem Chand Sharma & CO.***

REASONS

9. Having heard the learned counsels for the parties and perused the

record. in my view, the objections preferred by the defendant no.1 have to be rejected for the following reasons. The learned arbitrator having returned a finding of fact that the delay in the execution of the contract was solely attributable to the defendant no.1, the plaintiff was entitled to damages. As noted hereinabove, the damages were awarded under various heads, which were broadly demanded by the plaintiff, under claim Nos.4 to 8 and claim no. 10. Each of the said claims, in my opinion, constituted a separate head. As a matter of fact, while allowing claim no. 4, the learned arbitrator adjusted the amount awarded towards increase in labour rates under claim no. 10.

9.1 A perusal of the finding of the learned arbitrator vis-à-vis claim no. 4 would show that he accepted the contention of the plaintiff that though there was an overall increase by more than 60% in rates of electrical items between 1982 and 1991, the increase of 30% in tendered rates, as demanded, was reasonable. The learned arbitrator also noted that as per DSR 1984, the rates of electrical items had increased between 30-40%. The arbitrator also recorded that the defendant no.1 had not disputed the factum of increase in rates and the cost of execution of electrical work, awarded to the plaintiff.

9.2 Similarly, in respect of claim no. 10, the learned arbitrator, noticed the fact that labour rates had increased, and that, the defendant no.1 having satisfied itself with respect to the increase in the labour rates, had promised to make the payment in respect of the same at the meeting held in October, 1990. Keeping in mind these facts, the learned arbitrator awarded a sum of Rs.1,16,627.56/-; the calculation with respect to which had been verified by the defendant no.1.

9.3 None of the two claims referred to above, i.e., claim nos. 4 or 10, had

incorporated within it a demand for the salary paid to the engineer and the supervisor for the period in issue, i.e., 01.10.1983 till 24.10.1991; which was subject matter of claim no. 6. There was, therefore, no overlap of claims as contended by Mr Patnaik. The learned arbitrator, in respect of, claim no. 6, returned a finding of fact that in the running bills and final bills, a reference had been made to the engagement of the technical staff, i.e., the engineer and the supervisor, which had received the imprimatur of the defendant no.1 by virtue of the fact that the said bills had been certified, by it. There is no dispute raised before me that the engineer and the supervisor were not engaged during the period in issue by the plaintiff. As a matter of fact, the plaintiff in terms of clause 36 of the agreement, as noticed by the learned arbitrator as well, was required to make the technical staff available, at site, whenever required by the engineer-in-charge, to take instructions. A perusal of clause 36 would show that in the event the contractor (i.e., the plaintiff) failed to employ a graduate engineer or a diploma holder, he could be mulcted with a liability of Rs.2000/- and Rs.1000/- for each month, the default continued; depending whether the engineer or supervisor was not made available. Therefore, having regard to the terms of the contract obtaining between the parties, the plaintiff was necessarily required to make available the services of both the engineer and the supervisor during the extended period of the contract. Having done so, in respect of which a finding of fact has been returned by the arbitrator, the plaintiff was entitled to claim reimbursement of the expenses incurred in the form of damages.

10. The two judgments relied upon by the defendant no.1 are clearly distinguishable.

10.1 In the case of *Verma Construction Co. vs DDA*, the contractor sought

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for extension of time. The extension of time was granted by the employer. The employer, though, did not state that the extension of time would be without levy of compensation. It is in these circumstances, that the court came to the conclusion that no damages could be accorded in favour of the contractor, unless the contract provided for payment of additional amount for the extended period.

10.2 In the case of *Republic Construction Co. vs DDA*, the learned single Judge did not allow the claim made by the contractor in that case on account of "infructuous expenditure and damages", sustained by him, due to prolongation of the contract based on the broad reasoning that if, the continuation of the contract was not economical then, the contractor had the liberty, not to continue with the execution of the contract, after the initial tenure of the contract had come to an end. The court went on to observe that the contractor in that case, had not indicated that he would execute the work during the extended period of the contract only if, new rates were fixed.

10.3 The facts of the present case are completely distinguishable. The learned arbitrator, in the instant case, has as a matter of fact, noted that the plaintiff vide letter dated 23.04.1985 (EX. C-10) had demanded in clear terms that market rates would have to be paid to it, for material and labour. The learned arbitrator had also returned a finding of fact that, it was the plaintiff, who was desirous of closing the contract, and that, the defendant no.1 persuaded the plaintiff, to continue with the contract. As observed in the impugned award, one of the reasons cited by the plaintiff was that it was engaged in executing other contracts awarded by the defendant no.1; which could perhaps run into rough times.

10.4 In my opinion, what clearly distinguishes the facts of the present case

from those obtaining in the two cases cited on behalf of defendant No.1, is the finding of the learned arbitrator that the report of the defendant no 1 that the internal proceedings of the defendant no.1 qua the request made by the plaintiff for extension of time revealed that the defendant no.1 was of the view that the plaintiff ought to be accorded final extension of time between 02.10.1983 till 24.10.1991, without levy of damages, as there was neither any delay on the part of the contractor nor did the defendant no.1 suffer any losses on that behalf. The internal proceedings of the defendant no.1, as culled out in the award, are extracted hereinbelow for the sake of convenience:

“...Final extension of time from 2-10-1983 to 24-10-1991 is recommended without levy of compensation as there was no delay on the part of the contractor and moreover the department has not suffered any financial loss on account of this delay sd/- dated 21-7-1992 EE/ED-8/DDA; Final extension of time upto 24-10-1991 is approved sd - dated 30-7-1992 SE/Elect. Circle-2/DDA...”

11. Having regard to the above, in my opinion, the contention made on behalf of the defendant no.1 that the learned arbitrator could not have allowed claim no. 6 in the form of damages, in view of, absence of a specific provision in the contract, is misconceived for two reasons. Firstly, as the facts culled out above would show that the plaintiff was obliged to keep an engineer and a supervisor engaged for execution of the work at site, till the completion of the work. Secondly, as rightly contended, on behalf of the plaintiff, an aggrieved party is entitled to claim damages in the event of breach of obligations by the opposite party qua injury suffered by it. Compensation for losses suffered is an implied term of the contract. The power to award such claims would flow from the provisions of Section 73 of

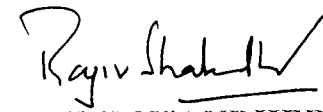
the Contract Act.

12. For the foregoing reasons, I find no merit in the objections filed by the defendant no.1. The objections, which are contained in IA No.15274/2009 are, accordingly, dismissed.

13. In view of the dismissal of the objections, the logical consequences would be that the award would have to be made a rule of the court and a decree would have to be passed in terms of the said award. It is ordered accordingly.

14. The relief sought in the suit for payment of interest at the rate of 12% per annum from the date of the decree till the date of payment is declined. The plaintiff would be entitled to interest at the rate of 10% per annum from the date of decree till the date of payment.

15. In these circumstances, costs shall follow the result. Consequently, the suit and the objections are disposed of in the terms set out above.


RAJIV SHAKDHER, J

NOVEMBER 07, 2013

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