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

% *Date of Judgment:03.4.2013*

\+ FAO(OS) 35/2008

DELHI DEVELOMENT AUTHRITY ..... Appellant
Through: Mr. Pawan Mathur, Adv.

versus

M/S ANANT RAJ AGENCIES ..... Respondent
Through: Ms. Biji Rajesh, Adv.

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

INDERMEET KAUR, J.

1 The appellant (DDA) is aggrieved by the impugned order dated 13.3.2007 wherein the objections filed by it under Section 30 and 33 of the Indian Arbitration Act, 1940 (hereinafter referred to as the said Act) against the Award dated 02.11.1998 of the sole Arbitrator Mr.L.R.Pahwa had been modified only to the extent that qua item No.29 of Claim No.1 an amount of Rs.1,88,220/- was ordered to be deducted. The remaining amounts awarded under the three heads were sustained.

2 Record shows that the appellant and the respondent had entered into a contract whereby the respondent had undertaken construction of 8314 houses in Sector-XV, Rohini as also construction of 448 EWS

Houses in Pocket 16,17,19 and 20 of Block F in terms of an agreement No. 6EE/RPD-5/DDA/85-86.

3 Disputes arose between the parties and in terms of the arbitration clause contained in the said agreement, Mr. L.R.Pahwa was appointed as the sole learned Arbitrator. Numerous hearings were held before the Arbitrator as is evident from the record. Claims were raised before him. The learned Arbitrator awarded a total amount of Rs. 28,54,700.41 in favour of the claimant under three separate heads. An amount of Rs.14,28,544.96 was awarded under the Claim No.1 on account of work done but not paid. A second sum of Rs.13,68,755.45 was awarded towards damages under item no.32 of Claim No.1. Under the third head i.e. item no.33 of Claim No.1 a sum of Rs.57,400/- was awarded which was towards watch and ward for a period of seven months i.e. from 15.5.1992 till 14.12.1992. Interest on the aforesaid amounts @ 12% from the date of the payment was also granted.

4 Detailed and lengthy arguments have been addressed by the learned counsel for the appellant. He has attacked the Award primarily qua four claims; submission being that these claims have been wrongly adjudicated upon by the learned Arbitrator:

i- The sum of Rs.1,41,653.57 not subtracted by the learned Arbitrator on account of reduction items was an illegal finding as clause 25B of the agreement specifically stipulated that the decision of the Superintending Engineer qua this position would be final and this would not be an arbitral claim; this was not considered by the learned Arbitrator.

ii- Double payment of 10 CC has been awarded and the recovery of Rs.1,46,716/- sought by the appellant has been wrongly rejected; submission being that this sum of Rs.1,46,716/- had already been paid against the 11th, 12th and the 13th running bills to the respondent; this sum was thus liable to be deducted from the total 10 CC amount of Rs.5,32,848/- payable.

iii- Items No.8, 9 and 10 of Claim No.1 vide which the appellant sought recoveries on account of the material claimed by the contractor at additional rates, the difference in the price of the fittings, and interest on the secured advances were incorrectly refused as there was no evidence on record to show that the contractor had in fact consumed the material that had been issued to him; clause 42 of the agreement was also not examined.

iv- Item No.32 of Claim No.1 which was a claim of Rs.13,68,755.45 awarded to the respondent as losses suffered by him was based on a misapplication of the cost index method; it was incumbent upon the respondent to have proved the actual loss and damages incurred by him and having failed to adduce any such evidence this claim was wrongly allowed.

5 Record shows that the Arbitrator appointed is a technical person being an Engineer Member of the Department. He has penned down an Award running into more than 40 pages. It was noted that both the parties i.e. the appellant and the respondent had filed their respective final bills; discrepancies in measurement of the certain quantities of items were also noted; since the respondent had not filed on record any verification of the aforesaid measurements, the quantities recorded by the appellant in the final bill were accepted as the correct quantities.

6 As per the bills filed by the appellant it had admitted that a sum of Rs.4,18,165/- was payable to the respondent. However, it had made certain deductions.

7 Qua the first submission made by the learned counsel for the appellant the deduction of Rs.1,41,653.57 on account of reduction items

was negatived by the learned Arbitrator. This deduction was sought for the first time during course of the arbitration proceedings. In fact the appellant had himself recorded that the work had been executed by the respondent as per the specifications and the nomenclature of the items; it had been noted that while releasing payments in the running bills the appellant had failed to place on record any communication showing deficiency on the part of the respondent in the execution of any particular item for which reduction has been sought which was even otherwise raised for the first time in the course of the arbitration proceedings. Clause-14 of the agreement had also not been followed by the appellant before making a resort to the reduction. This claim of Rs.1,41,653.57 was accordingly disallowed. The submission of the learned counsel for the appellant that Clause 25 B of the contract was not adhered to may not have been expressly noted by the learned Arbitrator but a perusal of his reasoning on this count negatives this submission.

8 For a better appreciation of this argument it would be relevant to extract Clause 25 B of the contract which reads as under:

"The decision of Superintending Engineer regarding the quantum

of reduction as well as justification thereof in respect of rates for substandard work which may decided to be accepted will be final and would not be open to arbitration."

9 Learned Arbitrator had noted that not only did the appellant not raise any objection about the execution of the work as per the specifications during disbursement of payments of the running bills but the appellant had also failed to place on record any document showing the deficiency in any particular item. The body of the appeal makes a reference to a letter dated 20.02.1995 purported to have been sent by the appellant to the respondent but the learned counsel for the appellant has failed to point out any such document from the record. Non-adherence to the provisions of Clause-14 has also not been disputed. The disallowance by the learned Arbitrator of this deduction was accordingly based on cogent reasoning.

10 Qua the second figure of Rs.1,46,716/- which as per the appellant was a double payment qua 10 CC amount; the appellant has again failed to give any details for seeking a deduction of this amount. It has been argued before us that at the time of the payment of the 11th ,12th and the 13th running bill this sum of Rs.1,46,716/- already stood paid to the

respondent and as such this amount was clearly liable to be deducted from the final 10 CC amount payable to the respondent. It has been put to the learned counsel for the appellant that it appears that no such argument had been propounded either before the learned Arbitrator or before the learned single Judge to which he has no answer. The Award of the learned Arbitrator as also the impugned order of the learned single Judge shows that not only no such argument was addressed before them but even today before this Court the learned counsel for the appellant concedes that there was no such document filed before either of the two fora to substantiate this submission. Being only an oral argument, addressed before this Court, the learned Arbitrator had rightly noted that this amount was not a justifiable deduction from the final bill. This view was rightly endorsed by the learned single Judge.

11 The attack on the third claim relates to the items no.8, 9 and 10 of Claim No.1. Under item no.8 a sum of Rs.1,26,462.06 was awarded to the respondent. This was towards recovery of additional rates on account of the material used in the work. Learned counsel for the appellant on this count submits that this was a case of no evidence; Clause-42 of the agreement has also not been followed; Clause- 42 has

been read over in the Court; learned counsel for the appellant, however, has failed to show as to how and in what manner this clause is either applicable or was not followed by the learned Arbitrator. It is an undisputed fact that the work order was delayed and the delay was attributable by and large to the appellant. Admittedly, no notice had been issued by the appellant to the respondent for any wastage or any pilferage of material by the respondent or that the respondent had not consumed the entire material in the course of the work or even misused it. In the absence of any such proof the claim of the department to deduct this amount of Rs.1,26,462.06 was rightly negated. This amount which was ordered to be refunded to the respondent was endorsed by the learned single Judge. It was not a case of no evidence.

12 Under item no.9, the appellant had sought recovery of Rs.32,381/- on account of difference in cost of fittings at market rate and as per the rates agreed to in the contract. Record shows that the work was finally completed by the respondent on 15.11.1991; at that time it was never pointed out to the respondent that any fitting was missing or that they had not been provided for by the respondent; there was no justifiable reasons for the appellant to seek deduction on this count either.

13 Qua item no.10, the appellant had sought a deduction of Rs.38,102/-which was recovery on account of interest on secured advances. In terms of the agreement between the parties the secured advance was to be given by the appellant to the respondent for material brought by the respondent at the site; this was to be adjusted by the appellant at the time of making payment of the bills. Admittedly, there was a delay in adjusting this secured advance. Thus, the respondent was rightly entitled to interest on this amount. Recovery on this count was also rightly rejected.

14 Under item no.32 qua Claim No.1 a sum of Rs.13,68,755.35 was awarded to the respondent. This was towards the loss suffered by him. The cost index method was taken into account by the learned Arbitrator to determine this loss; cost indices were published by the Government of India and had also admittedly been taken into consideration by the appellant while calculating justification rates for accepting tenders submitted in respect of building works; these cost indices are published by the Government of India on a monthly basis. It is not the case of the appellant that this cost index does not depict the actual escalations coming into the work; it is also admitted that they are

published by the Government of India. It is further not disputed that the appellant himself has relied upon these cost indices for calculating its justification rates. This evidence was thus rightly considered and acted upon by the learned Arbitrator to determine the loss suffered by the respondent qua the prolongation of the work. Actual proof of damages in these circumstances was not called for. Amount awarded under this head also suffers from no irregularity. It was rightly upheld by the learned single Judge.

15 The scope of interference while dealing with objections under Sections 30 and 33 of the said Act are limited. It is only in the eventuality of the Award being totally perverse or absurd that an interference is called for by the higher court. This court is not sitting as a court of appeal. Merely because two views are possible, and the higher court may have come to a different conclusion on the material available before the Arbitrator, would not by itself be a ground to re-appraise and re-appreciate the evidence led before the learned Arbitrator.

16 This court is sitting in the second hierarchy, the objections filed against the Award have been dealt with in detail by the learned single

Judge. All except one have been upheld. It is not within the domain of this Court to re-examine each item clause by clause and to hold that it was either sustainable or not sustainable and especially so when the learned Arbitrator himself was an experienced man being a technical expert i.e. an Engineer Member of the Department. It is also not the case of the appellant that there was no evidence before the learned Arbitrator; by and large the submission being that the evidence and the clauses of the contract were not appreciated correctly.

17 In *Gujarat Water Supply & Sewerage Board v. Unique Erectors (Gujarat) (P) Ltd. and Anr.* AIR 1989 SC 973 the Supreme Court has held that the Arbitrator is the final arbiter of the dispute inter se the parties and the award is not open to challenge on account that the Arbitrator had reached a wrong conclusion and had failed to appreciate the facts. The Apex Court has in fact repeatedly cautioned the Courts that unless an Award is contrary to law or the Arbitrator has mis-conducted himself which mis-conduct is either related to a personal mis-conduct of the Arbitrator or a mis-conduct of law; an Award ought not to be interfered with. In *State of U.P. v. Allied Constructions* (2003) 7 SCC 396 the Supreme Court has again reiterated that Section 30 of the

said Act is restrictive in its operation. The higher court is precluded from re-appreciating the evidence. An error apparent on the face of the record does not imply a closer scrutiny on the merits of the documents and material on record. If the view of the Arbitrator is plausible the court should refrain from interfering.

18 On all these parameters, the test applied to the Award as also the order of the learned single Judge shows that in no manner does the impugned order warrant any interference.

19 We thus find no merit in the appeal and the same is dismissed leaving the parties to bear their own costs.

20 The amount deposited in court with interest accrued thereon be released to the respondent.

INDERMEET KAUR, J.

SANJAY KISHAN KAUL, J.

APRIL 03, 2013
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