

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

+ **Date of Decision: 06.02.2014**

% **OMP No. 136/2004**

DELHI JAL BOARD

..... Petitioner

Through: Ms. Kanika Agnihotri, Advocate with
Ms. Ravneet Kaur, Advocate

versus

A.P.CONSTRUCTIONS

.....Respondent

Through: Mr. Vivekanand, Advocate

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J. (ORAL)

1. The petitioner has preferred this petition under Section 34 of the Arbitration and Conciliation Act, 1996, to seek the setting aside of Award dated 08.01.2004 read with its correction dated 15.01.2004. The respondent-contractor was awarded the work of construction of SW Drainage of Adarsh Nagar Group of Colonies Part IIB. The agreement was signed on 13.02.1998. The contract was an item rated one, based on the schedule of quantities given in the tender documents. The completion period was 18 months, and the completion date was reckoned from 12.02.1998. The work was not completed on the scheduled date and time for completion was extended. It was completed on 28.06.2000. The extension of time was granted without levy of damages on the respondent-contractor. Disputes having arisen between the parties, they were referred to arbitration.

2. The learned Arbitrator considered the claims of the respondent-contractor. The first claim was for payment due under clause 10CC. This claim was allowed, as not opposed by the petitioner. No objection has been preferred before this Court in respect of this claim.

3. Claim No. 2 was made for Rs. 1,38,156/- towards additional fee for design/drawing. The respondent was obliged to get the design prepared as per the specifications provided by the petitioner and as approved by the IIT. The respondent provided the design on 19.02.1998, got the same checked by IIT and submitted the same for approval on 22.04.1998. On 30.11.1998, the petitioner required the respondent to submit a fresh design. The reason for the same was that the cost of the project as per the earlier submitted design exceeded the estimated cost of the project by 31%. The respondent, accordingly, prepared and submitted a fresh design on 08.10.1999. For undertaking the exercise of designing the drain for second time, the respondent raised its aforesaid claim. The claim was opposed by the petitioner on the basis that the submission of the design for approval on 08.10.1999 was in continuation of the claimant's first submission of 22.04.1998.

4. Learned Arbitrator allowed this claim. The reasoning given by him is that the respondent-claimant submitted the original design as per the instructions and specifications of the petitioner. The petitioner did not point out any defect or deviation in the design as submitted which was duly checked by the IIT. Consequently, the petitioner could have got the work executed as per the design submitted by the respondent-claimant on 22.04.1998. However, the design had to be re-drawn by the respondent at

the behest of the petitioner, who desired that instead of a closed drain - as originally envisaged, the respondent should design an open drain, so as to reduce the cost. The respondent placed reliance on clause (9) of the Special Conditions and Clause (12) of the Conditions of Contract to defend this claim. The learned Arbitrator interprets clauses (9) and (12) in the following way:

“Clause 9 tells that the contractor is to submit designs duly checked by IIT or so for approval, cost for which is to be included in his quoted rates.

Clause 12 deals with changes in the drawings necessary during the progress of the work. Clearly, such necessity arises only when drawing has been approved and put to use. In the particular case, ‘Clause 12 stage’ has not reached. Therefore, contention of Clause 12 is not applicable.”

5. The Arbitrator holds that the respondent crossed the clause (9) stage when the respondent submitted the design on 22.04.1998. So far as clause (12) is concerned, the Arbitrator holds that the stage for the same did not arise, as that stage would arise only during the progress of the work. The work had not commenced by the time the respondent was required to re-submit the design. The learned Arbitrator holds that the petitioner called for the re-design of the drain as an administrative requirement. After comparing the copies of the drawings with the instructions of 19.02.1998(first set of drawings) and 30.11.1998(second set of drawings), the Arbitrator returned a finding of fact that, *“the second submission cannot be considered to be in line with clause (12), as for marginal or incidental changes in the first submission. Second submission has been a fresh submission.”*

6. Ms. Agnihotri, learned counsel for the petitioner places reliance on clause (18) of the General Conditions of Contract. The said clause provides that work is to be executed carefully strictly in accordance with the drawings supplied to the contractor with such modification as may be approved by the Engineer In-charge from time to time. Any addition, amended, revised or detailed drawings that may be issued by the Engineer In-charge of work or approved in writing by him during the progress of the contract are to be considered to form the part of the work and, as such, being included in the contract. No claim whatsoever shall be considered on this account.

7. She also places reliance on clause (9) of the Special Conditions which provides that the successful contractor will submit the structural design/details drawings duly checked from IIT, or from any reputed structural specialist duly approved by the Department within 15 days of the work order for approval of the Department. The Contract will include the cost of design and checking in its quoted rates and nothing extra will be paid on this account.

8. She also refer to the communication dated 30.11.1998 issued by the petitioner wherein the respondent was put to notice that the proposed design exceeds the estimated cost by about 35%. In this communication, the petitioner had only proposed that the RCC drain be constructed without roof slab. She also refers to the communication dated 14.07.1999 of the respondent, wherein the respondent agreed to undertake work under the contract, during the extended period, subject to only two conditions, namely, the grant of extension in the contract period by 18 months from October 1, 1999 without any liability on the contractor, and the payment of escalation

under clause 10CC for the work executed after 01.10.1999. She submits that the respondent had not raised the issue of payment of the consultant's fee for preparation of the second set of drawings/designs.

9. On the other hand, the submission of learned counsel for the respondent is that the petitioner is seeking to assail the findings of the arbitral tribunal, as if the present is an appeal. He submits that the Arbitral Tribunal has examined the evidence on record and interpreted the contractual terms which fall squarely within the domain of the Arbitral Tribunal. He further submits that the respondent had raised the claim for charges towards preparation of a fresh design as early as on 04.01.1999 (C-32). The respondent had stated that the designer - on consideration of the aspects mentioned in the petitioner letter dated 30.11.1998, had communicated to the respondent that the design criteria having been changed by the Department substantially, the drain would be required to be re-designed as per the new design criteria, and that the designer would charge separately for any further designing based upon the new design criteria.

10. Having considered the submission of learned counsel for the petitioner, perused the Award and considered the submission of the respondent in the light of the aforesaid documents, I find no merit in the objections of the petitioner. The learned Arbitrator has considered the said claims threadbare and the defence of the petitioner as raised before the Tribunal has also been effectively dealt with by the Arbitrator. Clause (9) of the Special Conditions and (12) of the Conditions of Contract were relied upon by the petitioner, both of which have been taken note of and interpreted. Clause (12) of the Conditions of Contract deals with the

changes in the drawings necessary during the progress of the work. The Arbitrator holds that the change in the drawings was not necessitated during the progress of the work, as that stage had not yet been reached. The change in the design was called for by the petitioner, so as to reduce the cost. There was a substantial change in the design inasmuch, as, in place of a closed or boxed state drain, an open state drain was required to be designed by the respondent. These are findings arrived at by the learned arbitrator upon interpretation of the contractual terms and appreciation of evidence, neither of which can be said to be patently erroneous or perverse. In fact, the view taken by the learned arbitrator is a reasonable and plausible view. It does not call for interference in these proceedings.

11. Reliance placed on clause (18) of the General Conditions is of misplaced. In fact, this clause does not apply in the present content inasmuch, as, this clause deals with a case where the drawings are provided by the department to the contractor, and not the other way around. In the present case, the said special condition No. 9 stipulates that the contractor is required to submit the contractual design and detailed drawings. These special conditions would override the general conditions. Clause (18), in any event, would not apply to a situation where the contractor is required to re-design the structure with fresh specifications, so as to reduce the cost.

12. Reliance placed on the respondent's communication of 14.07.1999 (C-35) is also misplaced. In this communication, the respondent did not give up any of its claims which had already been notified. The respondent had stated that he shall execute the work, only if the conditions mentioned therein are met by the petitioner. This did not mean that the claims already notified

stood waived. Pertinently, vide letter dated 04.01.1999(C-32), the respondent had already put the petitioner put to notice that the fresh designing on new design criteria would entail additional expense. The objections in relation to claim No. 2, therefore, stand rejected.

13. The petitioner then assails the Award made on claim No. 9. This claim had been made by the respondent for “overheads staff and establishment expenses for additional period of 18, and 6 months”. 18 months’ was the period by which the contract got prolonged. Six months’ period was stated to be the period when the respondent did not take over the project, even after its completion. The claim for the second period of six months has been rejected by the learned Arbitrator. The learned Arbitrator has partially allowed this claim for Rs. 4,70,400/-. The learned Arbitrator has rejected the respondent’s claim that the respondent had fully mobilized on day-one itself. He accepts that team of engineers, supervisors, foremen, munshi, labour and watch and ward were engaged by the respondent-claimant even before physical start of the work, as the respondent had put up the site establishment and engaged in activities, in preparation of starting the work. He proceeds on the basis that, on submission of the design as duly checked by the IIT, it could be safely assumed that the respondent would, in anticipation, increase the deployment of staff at the site. He has admitted the costs of deployment of staff as follows:

*“1 x Engineer : For 8 months @ Rs. 7500.00 pm i.e. Rs. 60,000.00
1xSupervisor: For 18 months @ Rs. 6,000.00 pm i.e. Rs. 1,08,000.00
1xMunshi: For 12 months @ Rs. 4500.00 pm i.e. Rs. 54,000.00
2xUnskilled labour For 18 months @ 4800.00 pm i.e. Rs.86,400.00
3xWatch & Ward Staff For 18 months @ 9000.00 pm i.e. Rs.
1,62,000.00
Total Rs. 4,70,400.00”*

14. The submission of learned counsel for the petitioner is that, clause (5) of the Special Conditions stipulates that the arrangement for watch and ward of work, materials and diversion of traffic for closing of roads, providing necessary caution-cum-information boards, red flags and red lamps for night etc., shall be made by the contractor at his own costs. Therefore, no amount would have been awarded towards watch and ward to the respondent.

15. I see no merit in this submission. The said clause would have no application for the delay caused in the execution of the work. The said clause would have application only during the stipulated period of contract when the work was in progress. The Arbitrator being a retired Engineer-having experience in the field, is entitled to some amount of assumption and guess work. The yardstick adopted by him appears to be reasonable. This Court does not sit in appeal over an arbitral award, and if the view taken by the learned Arbitrator is a plausible one - even if a different conclusion may have been reached by the Court, is no ground to interfere with the Award. The Award made on claim No. 9, is therefore, sustained.

16. The petitioner next assails the award made on Claim No.3, 4, 5, 6, 7 & 8. All these claims pertained to grant of interest on the other claims considered and allowed by the learned Arbitrator in the impugned Award. The submission of learned counsel for the petitioner, firstly, is that there was no agreement for grant of interest. She further submits that what was relevant was date of commissioning, and not the date of completion for computation of the time when the interest could begin to run. Learned counsel submits that interest could have been awarded, if at all, under the Interest Act. She submits that the Arbitrator has awarded an exorbitant rate

of interest @ 20% per annum.

17. So far as the power of the Arbitrator to award interest is concerned, the same is conferred by Section 31(7) of the Act. Interest can be awarded at such rate as it deemed reasonable for the whole, or any part of, the period between the date on which the cause of action arises and the date on which the Award is made.

18. The submission with regard to the computation being made from the date of commissioning, and not from the date of completion, was never raised before the Arbitral Tribunal, and even in the objections raised before this Court. No such plea has been taken to say that the Arbitrator has not considered this aspect, despite it being raised. Therefore, the said plea cannot be accepted.

19. However, I find merit in the petitioner's grievance that the rate of interest awarded is on a much higher side. The reasonable rate of interest, at the relevant time, would be 12% per annum. To that extent, the Award stands modified.

20. With the aforesaid modification, the objections stand dismissed.

VIPIN SANGHI, J.

FEBURARY 06, 2014

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