

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

+ O.M.P. 215/2014

% **Date of Decision: 23rd December, 2015**

SHIV KUMAR WASAL & CO Petitioner

Through: Mr. Sanjay Goswami, Adv.

versus

DELHI DEVELOPMENT AUTHORITY Respondent

Through: Mr. Shashank Garg, Mr.Zaid
Ali, Adv.

With

O.M.P. 297/2014

DELHI DEVELOPMENT AUTHORITY Petitioner

Through: Mr. Shashank Garg, Mr.Zaid
Ali, Adv.

versus

SHIV KUMAR WASAL & CO Respondent

Through: Mr. Sanjay Goswami, Adv.

CORAM:

HON'BLE MR. JUSTICE J.R. MIDHA

JUDGMENT

1. The award dated 07th November, 2013 passed by the learned arbitrator is under challenge by both the parties.
2. Delhi Development Authority, hereinafter referred to as “DDA” awarded a contract for construction of 672 MIG flats at Narela to M/s Shiv Kumar Wassal & Company, hereinafter referred as to “Contractor” on 21st August, 1990. The Contractor completed the work on 22nd October, 1993 and submitted the final bill which was paid by Delhi Development Authority on 21st August, 1998.
3. On 03rd November, 1998, the Contractor raised twenty two

claims on DDA. On 16th November, 1998, the Contractor invoked the arbitration clause for appointment of an arbitrator under clause 25 of the agreement for reference of twenty two claims for adjudication.

4. On 05th April, 2000, DDA referred only nine claims to the arbitrator. However, the competent authority of the DDA did not refer the other claims on the ground that they were not covered in the scope of the agreement.

5. The Contractor filed an application before the arbitrator under Section 23(3) of the Arbitration and Conciliation Act, 1996 for raising additional thirteen claims. However, vide order dated 11th August, 2005, the arbitrator permitted the Contractor to raise nine claims in addition to the earlier nine claims.

6. In the meantime, there was change of the arbitrator. The new arbitrator took the view that he would adjudicate only the nine claims referred to him by the competent authority. The Contractor filed a petition under Section 11(6) of the Arbitration and Conciliation Act which was allowed and the remaining thirteen claims were referred by this Court to arbitration. In the meantime, the learned arbitrator passed an award dated 03rd October, 2006 with respect to the original nine claims.

7. The Contractor has challenged the award of the learned arbitrator in O.M.P.266/2007 for non-consideration of the left out nine claims whereas DDA challenged the award in O.M.P.76/2007 with respect to the nine claims allowed by the learned arbitrator.

8. On 19th November, 2012, both O.M.P. Nos. 266/2007 and

76/2007 were disposed of by this Court. The objections of DDA were dismissed except concessional modification of the award in respect of one of the claims. However, this Court allowed O.M.P.266/2007 by directing DDA to appoint an arbitrator to decide the nine left out claims of the Contractor.

9. Vide award dated 07th November, 2013, the new arbitrator allowed four claims of the Contractor. Both the parties have challenged the said award. The Contractor has challenged the award on the limited ground that learned arbitrator has not awarded pre-suit and *pendente lite* interest in respect of the nine claims under the first award whereas DDA has challenged the four claims allowed by the arbitrator.

10. **Claim No.1/5:**

Item 3.3(ii) of the agreement provides for RCC works in the staircase from second floor to third floor level. The design was later altered by DDA and staircase of second and third floor level was cancelled as a result of which the claimant had to use extra manpower and scaffolding for doing the work on the roof. The Contractor demanded Rs.1,69,000/- against which the arbitrator awarded Rs.46,275/-. The relevant portion of the impugned award with respect to Claim No.1/5 is as under:

“After carefully reading the pleadings, oral arguments and written submissions made by both the parties, I find that due to deletion of staircase floor 2 to floor 3 level, extra arrangements have to be made by providing extra labour for lifting the materials from ground floor to above floor 2 level and for providing additional scaffolding. I am of

the considered view that certainly 20% extra labour should have been deployed by the claimants and the same is payable for lifting the materials through additional labour and for providing additional scaffolding for execution of items such as mud phuska, painting, top of roof with bitumen providing gola, khurras, AC sheets, cement plaster and other sanitary items. The claimants had also notified the respondents to claim extra charges. Accordingly, extra labour involved is 20% of Rs.2,31,378/- which works out to Rs.46,275/-. Therefore, I find that only Rs.46,275/- is justified. I, therefore, award a sum of Rs.46,275/- in favour of the claimants under this claim.”

There is no infirmity in the award of Rs.46,275/- to the Contractor as admittedly DDA altered the plan by deleting the staircase of second and third floor level due to which the Contractor had to use extra manpower and scaffolding for doing the work on the roof.

11. **Claim No.4/13:**

The Contractor completed the work on 22nd October, 1993 as per the completion certificate issued by DDA. The defect liability period expired on 21st April, 1994. However, DDA did not take over the possession. The possession was directly handed over to the allottees in 2003. At the time of handing over the possession, the Contractor had to again do the painting, whitewashing, etc and a sum of Rs.5,57,000/- was allowed by the learned arbitrator.

There is no infirmity in the award of Rs.5,57,000/- to the Contractor under Claim 4/13, inasmuch, as the Contractor, admittedly, completed the work on 22nd October, 1993 but the possession was not

taken over by DDA. The contractor handed over the possession to the allottees in 2003 and the Contractor had to do the work of painting, whitewashing etc. at the time of handing over for which he incurred extra expenditure not covered under the agreement.

12. **Claim 5/14:**

The Contractor raised a claim of Rs.9,75,800/- towards the expenditure of watch and ward staff for the period from 27th April, 1994 up to 31st October, 1998 @ Rs.8700/- per month and from 01st November, 1998 to 31st March, 2003 @ Rs.10,736/- per month against which the learned arbitrator has awarded Rs.8,39,554/- to the Contractor.

13. Learned counsel for DDA submitted that the contractor did not lead any evidence to prove that the security guards for watch and ward were actually employed by the contractor. It is submitted that the award of Rs.8,39,554/- in the absence of any evidence whatsoever is perverse and liable to be set aside. Reliance is placed on *Sunder Lal Khatri v. Delhi Development Authority* MANU/DE/1899/2009 and *Kamal Construction Co. v. Delhi Development Authority* MANU/DE/2884/2015 in which this Court has held that the arbitrator cannot allow the claim in the absence of record of employment, vouchers and books of accounts. Reliance is also placed on *MCD v. Rakesh Bros.* 2005 (120) DLT 186 in which this Court held that a finding based on no evidence is a perverse finding.

14. Learned counsel for DDA further submitted that vide letter dated 26th June, 1999, the Contractor had withdrawn this claim. The

relevant portion of the said letter is reproduced here under:

“Date :26.6.1999

To

*The Executive Engineer
Northern Division-2
Motia Khan, Jhandewalan
Delhi Development Authority
New Delhi*

Name of work. *C/o 672 MIG (incremental) houses at Narela.
C/o 336 MIG (incremental) houses pkt. 1, Group-
1, Sector B-4, Narela.*

Dear Sir,

We had demanded payment for watch and ward in the arbitration case vide our claim No.14 which has not been referred to the arbitrator by the Chief Engineer, (North Zone), DDA.

We, hereby withdraw our claim No.14 related to watch and ward of the houses and undertake not to claim it in future as the same has been paid to us by your office.

Thanking you and assuring you best co-operation as always.

Yours faithfully,

For Shiv Kumar Wasal & Co.

Sd/-

Partner”

15. Learned counsel for the contractor submitted that a supplementary agreement was executed for watch and ward between the parties for a period of one year on 26th June, 1999. It was further submitted that DDA released a sum of Rs.6,16,604/- to the contractor for watch and ward charges for the period 22nd April, 1994 to June, 1999 and Rs.85,888/- on 27th March, 2000. It was further submitted that DDA deducted a sum of Rs.3,90,074/- which was objected to by the contractor. It was further submitted that letter dated 26th June, 1999 withdrawing the claim does not pertain to the claims for the period 26th June, 1999 to 31st March, 2003.

16. Learned counsel for the Delhi Development Authority submitted that supplementary agreement dated 26th June, 1999 was for a period of one year and therefore, the assumption drawn by the learned arbitrator to apply this agreement to the period prior thereto as well as thereafter is not justified. The learned counsel for Delhi Development Authority submitted that the Contractor did not place on record any document such as the salary slip and attendance register to show that the Contractor had deployed any watch and ward staff.

17. Learned counsel for the contractor did not dispute that the contractor did not produce the salary slips, attendance register or any other evidence to prove that the watch and ward staff was deployed by the contractor. Learned counsel for the claimants also did not dispute that the contractor did not raise invoices for the watch and ward charges. Learned counsel however sought to justify that the contractor was entitled to watch and ward charges in terms of the supplementary agreement dated 26th June, 1999.

18. This Court is of the view that the contractor has not placed on record any evidence to prove that the watch and ward was deployed by the petitioner on the site. The contractor has not placed on record salary slips, attendance register etc in support of the claim. The contractor also did not raise any invoice on the DDA. In the absence of any such evidence, the contractor is not entitled to claim No.5/14. The finding of learned arbitrator relating to claim No.5/14 is not based on evidence and is therefore, set aside.

19. **Claim No.8/21:**

The Contractor claimed pre-suit, *pendent lite* and future interest on the previous nine claims as well as nine claims of the second arbitrator. The arbitrator allowed the interest @ 9% per annum on the three claims allowed by him but no interest was awarded on the previous nine claims adjudicated by the first arbitrator.

Learned counsel for Delhi Development Authority submitted that the award of interest is in the absolute discretion of the learned arbitrator. Merely because the learned arbitrator allowed interest on the three claims does not mean that he should award the interest on the previous nine claims adjudicated by the first arbitrator. Reliance is placed on *McDermott International Inc. v. Burn Standard Co. Ltd. & Ors.* 2006 (6) SCALE 220 and *Hyder Consulting (UK) Ltd. v. Governor, State of Orissa* (2015) 2 SCC 189.

This Court finds no infirmity in the discretion exercised by Id. arbitrator not to award interest to the claimant in respect of the previous nine claims.

20. **Conclusion**

On careful consideration of the rival contentions of the parties, this Court is of the view that there is no infirmity in the findings of the learned arbitrator with respect to Claim No.1/5, 4/13 and 8/21. OMP 215/2014 is dismissed. OMP 297/2014 is partly allowed. The findings of the learned arbitrator with respect to the claim No.5/14 are perverse and are hereby set aside.

J.R. MIDHA, J.

DECEMBER 23, 2015/ak