

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

+ **O.M.P. No. 391/2007**

%

6th August, 2015

DELHI JAL BOARD

..... Petitioner

Through: Mr. Suresh Tripathy, Adv.

versus

M/S V K DEWAN AND ANR.

..... Respondents

Through: None.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

I.A. No.7893/2007 (Exemption)

1. Exemption allowed subject to all just exceptions.

I.A. stands disposed of.

O.M.P. No. 391/2007

2. This is a petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') impugning the Award dated 28.03.2007 passed by the sole Arbitrator. Arbitrator as per the Award has allowed some claims of the respondent no.1 herein, the claimant

under the arbitration proceedings whereas some other claims have been dismissed. I may note that it was desirable that the Arbitrator at the end of the Award ought to have given the net amount awarded in favour of the claimant/respondent no.1, but that has not been done by the Arbitrator.

3. Before me on behalf of the objector, Delhi Jal Board, arguments were addressed for setting aside the Award with respect to Claim no. A under which an amount of Rs. 2,75,096/- is awarded, Claim no. C under which an amount of Rs.45,625/- + Rs.91,000/- is awarded, Claim no. E whereby an amount of Rs.9,67,290.90/- is awarded, Claim no. E-1 awarding Rs.23,996/- with the Counter Claim no. 2 of the objector which has been dismissed by disallowing recoveries as claimed for fixing barbed wire or alleged theft of reinforcing steel and payment of electricity bills by the respondent no.1/claimant for the objector.

4. Before taking each claim it requires to be stated that the disputes which had arisen between the parties were because of a contract awarded by the objector to the respondent no.1/claimant for construction of SW Drainage System for Adarsh Nagar Group of Colonies, Part-IIA, Delhi. Acceptance of the tender was communicated by a letter dated 24.05.2000 to the respondent no.1/claimant. The value of the contract work was fixed at

Rs.2,31,71,691.90/-. The date of start of work was 05.06.2000 and the same was to be completed within a period of 18 months, viz by 04.12.2001.

5(i). The Claim no. A awarded is the amount awarded for interest at 12% p.a. on delayed payment of the 1st to 4th RA bills. Objector challenges this part of the Award by arguing that the respondent no.1/claimant had filed a Civil Writ Petition No.7638/2000 claiming an amount of Rs.68,77,327/- with interest, but that writ petition was withdrawn on the respondent no.1 receiving Rs.68,00,000/-, and therefore, claimant/respondent no.1 cannot now claim interest which was not pressed in the writ petition.

(ii) In this regard it is seen that the Arbitrator has noted that with respect to the running bills for work done, the same were duly cleared by the objector itself for payment, but the payment could not be cleared on account of lack of funds with the objector. Arbitrator then notes that the respondent no.1/claimant was severally handicapped in completing the work on account of delayed payments and it was therefore forced to file the writ petition in this Court when the amount accumulated to over Rs.68 lacs. Arbitrator notes that the objector itself cannot deliberately delay payments and that merely because the claimant/respondent no.1 was forced to file the writ petition for release of the amount cannot mean that the claim of interest was

given up. Arbitrator in view of the admitted position of the claimant/respondent no.1/contractor doing the work, bills having been passed, payment of bills not being released on account of lack of funds with the objector accordingly holds that the respondent no.1/claimant was hence entitled to interest.

(iii) In my opinion, once facts as stated above have been found by the Arbitrator that there was delay only on behalf of the objector to release the funds and hence claimant/respondent no.1 was entitled to interest, this finding cannot be said to be in any manner perverse for this Court to interfere with the interest on delayed payments taking note of the fact that the Arbitrator has referred to the judgment of the Supreme Court in the case of *Mahabir Prashad Rungta Vs. Durga Datt, AIR 1961 SC 990*, and which holds that in commercial contracts, time of payment of moneys is the essence of the contract. The Arbitrator also rightly holds that forcing the claimant/respondent no.1 to give up claims by making the claimant/respondent no.1 write letters dated 04.06.2002 and 30.09.2002, cannot in the facts of the case be held to be a binding action for giving up interest once only and only the objector herein was guilty of delay of payments although the contractor had done the necessary work and the

objector itself had cleared the bills of payment but it did not make the payment under the RA bills to the claimant/respondent no.1. The Arbitrator has rightly held that there cannot be estoppel against the respondent no.1/claimant in the facts of the case on account of it having withdrawn the writ petition and which was filed essentially to get payments released. Accordingly, challenge by the objector to the Award under Claim no. A is dismissed.

6. The next challenge by the objector is to the amount of Rs.45,625/- + Rs.91,000/- awarded to the claimant/respondent no.1 with respect to Claim no. C on account of salaries of staff and watchmen from 07.11.2000 to 01.12.2001. The Arbitrator has allowed these claims by making the following observations:-

- “41. Under sub head (i) the payment of Rs.4,40,000/- is claimed for the period from 07.11.2000 to 30.03.2001 @ Rs.88,000/- per month for staff and watchmen. The claimant stated that in respect of the work executed till 07.11.2000 of the gross value of Rs.68,77,327/- as passed by the respondent payment was made on 30.03.2001 only of Rs.68,00,000/-. The claimant's staff and watchman were at site, though no work could be executed after 07.11.2000. It was submitted that claimant was incurring the expenses and was at site with this expectation that the payments would be made to enable the claimant to execute the further work.
42. The payments for work done were again demanded by the letter dated 12.03.2001 pointing out therein that the work was stand still.

43. The respondent argued that there was no hindrance in continuing further work. The claimant was responsible for stopping the work. Only 5 Nos. chowkidars remained at site till this period and there was no other staff, labour as this was diverted to other project.
44. The respondent argued that the claimant under this claim claimed the amount @ Rs.88,000/- per month whereas in the letter dated 07.05.2001 the payment is demanded @ Rs.36,350/- per month from 1.11.2000 to 1.4.2001.
45. The Claimant's own case is that because of respondent's failure to make the payment the work was stopped on 7.11.2000. This being so there was no question of continuing with the staff at the work in question. The claimant is thus not entitled for any payment for the staff.
46. Apart from the staff the payment is also claimed for watchman. The respondent in the reply stated that only 5 Nos. chowkidars were at site. The claimant in support of the payment demanded referred pages 94 & 95 of (Vol-I). Amount of Rs.2550/- for each watchman is considered. For 5 watchmen it comes to Rs.12,750/- per month for the period from 7.11.2000 to 30.3.2001. The amount thus comes to Rs.45,625/-. So the amount of Rs.45,625/- is awarded to the claimant under item (i) of this claim.
47. Under sub head (ii) again salary of watchmen w.e.f 1.4.2001 to 1.12.2001 @ Rs.19,000/- per month is claimed. The claimant submitted that even on 31.3.2001 the full payment was not made. Escalation amount payable under the contract was not made at all. In these circumstances the work could not be executed but the claimant continued to incur the expenses on watch and ward.
48. The respondent's plea to this claim again is that no hindrances were on their part and there were no chowkidars, labour etc. at the site. The respondent further pointed out that in the statement of claims amount of Rs.19,000/- per month is claimed whereas in the letter dated 7.5.2001 the payment is demanded @ Rs.17,100/- per month.

49. In view of the discussions and findings under item (i) hereinabove the claimant is entitled to payment of Rs.91,000/-. This is calculated @ Rs.2575/- per month for each chowkidar. This is considered for 5 chowkidars and for the period claimed. Thus an amount of Rs.91,000/- is awarded to the claimant.”

7(i). In my opinion counsel for the objector is justified in arguing that the Award under Claim no. C is perverse inasmuch as the Arbitrator could not have accepted the self-serving letters of the claimant/respondent no.1 that it had incurred expenses towards salaries of watchmen. Surely for the salaries of watchmen; and which total amount also depends upon the number of watchmen and as to the specific payment made to them; the claimant/respondent no.1 was bound to file necessary documentary proof evidencing payment to the watchmen, however, no documents were filed evidencing the payment to the watchmen by the claimant/respondent no.1. In my opinion self-serving statements or letters cannot be a substitute of proof of payment, more so in the facts of the present case when the case of the objector is that except a few watchmen, the respondent no.1/claimant had removed all its personnel to its other sites.

(ii) Accordingly, objection petition under Section 34 of the Act is allowed to the extent of dismissing the claims awarded under Claim no. C for the sums of Rs.45,625/- and Rs.91,000/-.

8. The next argument urged on behalf of the objector is with respect to Claim no. E whereby escalation in terms of the contractual Clause 10 CC was claimed by the claimant/respondent no.1 and awarded by the Arbitrator. The relevant observations by the Arbitrator in this regard read as under:-

- “58. It was submitted by the claimant that in the claims statement dated 14.10.2002 under claim No.E the escalation payable was claimed in respect of 1st and 2nd RA bills amounting to Rs.5,37,020.65. Thereafter the claimant prepared the 3rd escalation bill for the amount of Rs.4,61,426.10 and submitted the supplementary statement of claims dated 11.11.2002 praying therein for awarding the amount of Rs.9,98,446.75 towards escalation under clause 10 CC of the agreement. With this supplementary statement of claims the claimant also enclosed the detailed calculations including the Whole Sale Price Indices (pages 121 to 128 Vol-II).
59. It was submitted that the respondent filed the reply dated 13.12.2002 to the statement of claims of the claimant. With this reply respondent annexed Annexure-B i.e. counter claims and Annexure-A giving the details of outstanding dues. In this annexure at page 95 (Vol-IV) at Sr. No.1 an amount of Rs.9,67,290.90 is stated payable to the claimant in respect of the all the three escalation bills.
60. As per the respondent the amount of Rs.9,67,290.90 (page 95 vol-IV) is payable towards escalation to the claimant but the only plea taken by them is that this is adjustable against the counter claims of the respondent.
61. The amount payable has been admitted by the respondent. Thus the amount of Rs.9,67,290.90 is awarded to the claimant.”

9. In my opinion there is no illegality or perversity in the aforesaid findings of the Arbitrator because there is a contractual Clause 10 CC with respect to escalation of cost towards labour and material etc during the period of contract, and the claimant/respondent no.1 had successfully shown the escalation in terms of the Whole Sale Price Indices. Once the claimant/respondent no.1 was successful in showing the increase of prices during the period of work, in my opinion, the Arbitrator was justified in awarding escalation, more so because as already stated above it is noted that for the period of 1st and 2nd RA bills, inspite of work having been completed and the bills having been passed by the objector, yet illegally no payment was released to the claimant/respondent no.1 by the objector.

Objection to allowing of Claim no. E is therefore dismissed.

10. That takes us to Claim no. E-1 and which is an award for a sum of Rs.23,996/- and which is because as per Clause 26(1) of the Contract, if the claimant/respondent no.1 fails to get its own water but it uses the water of the objector, then objector is entitled to recovery of 1% of the bill amount every month towards water charges. It is noted that the Arbitrator himself refers to the reply of the objector dated 23.05.2001 written in response to the letter of the claimant/respondent no.1 dated 07.05.2001 and it is specifically

noted in this letter that the objector has stated that the claimant/respondent no.1 had used the Delhi Jal Board's water (i.e objector's water supply) during the relevant period and hence recovery of water charges was justified. The Arbitrator however in spite of such facts on record, for some strange reason had disallowed the recovery made by the objector towards water charges. Such a rejection therefore in the face of Clause 26(1) of the Contract and the letter of the objector dated 23.05.2001, is clearly a perverse finding and conclusion, and hence this conclusion is accordingly set aside by holding that the objector was entitled to recovery of Rs.34,851/- and the Arbitrator was not justified in awarding a sum of Rs.23,996/- to the claimant/respondent no.1 under this head of claim.

11. This takes us to the Claim no. H of the claimant/respondent no.1 of Rs.3,41,884.55/- and the corresponding Counter Claim no. 2 of the objector. This issue pertains to whether recoveries made by the objector under three heads, and which are stated in para 76 of the Award are justified. The said recoveries are as under:-

“The amount of Rs.3,41,884.55 is claimed by the claimant as the same is recovered by the respondent from 9th RA bill. (page 95 & 96 Vol-IV). The claim is in three parts:

- i) Rs.1,45,737.70 for providing barbed wire fencing at the risk and cost of the claimant.

- ii) Rs.1,39,760.85 stating towards theft of reinforcing steel, already paid to claimant and butting out of the structure.
- iii) Rs.1,00,000/- towards non-payment of electric bills by the claimant.”

12. In my opinion so far as the recovery of amount of Rs.1,45,737.70/- under sub-Claim no. 1 of this Claim no. H is concerned, the Arbitrator has rightly allowed a recovery of only Rs.15,000/-, inasmuch as, it was not the case of the objector that the barbed wire is a consumable item and it no longer remained or it completely lost its value after the contract. The Arbitrator was hence justified in disallowing the recovery of the total cost of the barbed wire as claimed by the objector and allowing only the claim with respect to cost of fixing of the same by the objector.

13. So far as theft of reinforcing steel from the work undertaken by the claimant/respondent no.1 is concerned, merely because the contract states that the claimant/respondent no.1 will provide watch and ward does not mean that the claimant/respondent no.1 also had to insure the site with respect to theft. It was the duty of the objector to insure the work done at the site, and if there is a theft, objector was not justified in recovering a huge amount of Rs.1,39,760.85/- from the claimant/respondent no.1. The

Arbitrator in my opinion therefore rightly disallowed the recovery under this head.

14. So far as the payment of the electricity bills is concerned, it is noted that the Arbitrator has by referring to the pleadings of the objector allowed only a specific recovery of an amount of Rs.43,614/- . It may be noted that as per para 30(H)(III) of the reply filed by the objector to the claim petition, the objector itself stated outstanding dues of Delhi Vidyut Board of Rs.43,614/-, and therefore, for such amount recovery was rightly allowed by the Arbitrator and not for an amount of Rs. 1,00,000/- as claimed by the objector herein.

15. So far as the rate of interest is concerned, I note that the Arbitrator has awarded interest at 12% p.a. simple and therefore there is no reason to interfere with the said reasonable rate of interest noting that if the claimant/respondent no.1 had wanted to take a loan from any financial institution, it would not have paid interest at less than 12% p.a. simple. I may also note that the contention of the objector is misconceived that no pre-reference interest can be awarded by the Arbitrator, as it has already been held in a catena of judgments that an arbitrator can award pre-reference

interest, post-reference interest and *pendente lite* interest as well as future interest on the amount which is due or payable under an award.

16. In view of the above, this objection petition is dismissed except to the extent of setting aside the Award under Claim no. C and Claim no.E-1 as discussed above. In view of the above, Award of the Arbitrator dated 28.03.2007 is upheld except rejecting the Award made under the same for Claim no. C for Rs.45,625/- + Rs.91,000/- and for Claim no. E-1 for a sum of Rs.23,996/-. No costs.

AUGUST 06, 2015
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VALMIKI J. MEHTA, J.