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

% Judgment delivered on: 10.12.2015

+ **FAO (OS) No. 365/2015 & CM No. 11963/2015**

UNION OF INDIA Appellant

versus

M/S NIDHI BUILDERS Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Sanjay Jain, ASG with Mr Jaswinder Singh, CGSC, Mr Arnav, Mr Rajul Jain, Mr Sumit Misra and Ms Aastha Jain, Advocates.

For the Respondents : Mr Arvind Sharma with Mr M.K. Jha, Advocates

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

1. This appeal is preferred against the judgment dated 25.03.2015 delivered by the learned Single Judge of this Court in OMP No. 233/2015, which was a petition filed by the appellant under Section 34 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the said "Act") in respect of an award dated 30.12.2014 passed by the Sole Arbitrator.

2. The disputes had arisen between the parties out of the contract for the provision of married accommodation for OR (Other Ranks) (196 dwelling units) and for JCOs (Junior Commissioned Officer) (53 dwelling units), including allied external services at Kabul Lines, New Delhi. The respondent

had made several claims and the respondent's claims had been partly allowed by the award dated 30.12.2014. That award had been upheld by the learned Single Judge.

3. On going through the impugned judgment, we get the impression that the main point argued before the learned Single Judge was whether time was of the essence of the contract or not. This is particularly evident from paragraph 19 thereof where the learned Single Judge has noted that the crux of the issue is whether the repeated extensions of time granted to the respondent without the levy of any compensation by the appellant (respondent therein) points to the fact that time was not of the essence of the contract. It is further observed by the learned Single Judge that this in turn would lead to the examination of the validity of the termination of the contract by the appellant herein.

4. The learned Single Judge has concluded as under:-

“20. The conclusion drawn by the learned Arbitrator was that by their own conduct the parties had made it appear that time was not the essence of the contract. Merely stating that the time was the essence of the contract is without any legal or factual basis. The Petitioner failed to fix any new date for completion of contract. The analysis of the evidence by the learned Arbitrator is a detailed one and he has examined each and every contention of the parties. The Award makes its reference to the contractual provisions and wherever applicable to the relevant case law. The Court is unable to find any infirmity in the Award to be perverse and contrary to the law of India or to the evidence on record. Reasons have been given in respect of each of the claims and counter claims. Consequently, the Court is inclined to hold that no grounds have been made out to call for interference with the impugned Award. Even as regards the rate of interest which has been allowed *pendent lite* at simple interest @ 9% p.a.

from 1st January, 2013 and future interest @ 12% p.a. from 2nd April, 2015 cannot be said to be excessive or arbitrary.

21. The petition is accordingly dismissed but in the circumstances with no order as to costs.”

5. We were initially of the opinion that this matter does not require any further consideration as the Arbitrator has, on an examination of the terms of the contract and the conduct of the parties, returned a finding that the time was not of the essence of the contract and this has been accepted by the learned Single Judge also. However, Mr Sanjay Jain, the learned ASG appearing on behalf of the appellant submitted that whether the time was of the essence of the contract or not was not the relevant consideration and, in fact, the main point that ought to have been considered was with regard to Condition 48 of the General Conditions of Contract (GCC) and in particular sub-clause (B) thereof. Condition 48 of the GCC reads as under:-

48. Cancellation of Contract in part or in full for Contractor's Default.

If the contractor:-

- (a) makes default in commencing the Works within a reasonable time from the date of the handing over the Site, and continues in that state after a reasonable notice from P.M; or
- (b) in the opinion of the P.M. at any time, whether before or after the date or extended date for completion, makes default in proceeding with the Works, with due diligence and continues in that state after a reasonable notice from P.M.: or
- (c) fails to comply with any of the terms and conditions of the Contract or after reasonable notice in writing with orders properly issued thereunder; or

(d) fails to complete the Works, Work order and items of Works, with individual dates for completion and clear the Site on or before the date of completion.

The Accepting Officer may, without prejudice to any other right or remedy which shall have accrued or shall accrue thereafter to Government, cancel the Contract as a whole or only such Work Order(s) or items of work in default from the Contract. Whenever the Accepting Officer exercises his authority to cancel the contract as a whole or in part under this condition he may complete the Work by any means at Contractor's risk and cost, provided always that in the event of cost of completion or after alternative arrangements have been finalised by the Government to get the Works completed, estimated cost of completion (as certified by P.M.) being less than the Contract cost the advantage shall accrue to the Government. If the cost of completion or after alternative arrangements have been finalized by the Government to get the Works completed, estimated cost of completion (as certified by P.M.) exceeds the moneys due to Contractor under this Contract, the Contractor shall either pay the excess amount ordered by P.M. or the same shall be recovered from the Contractor by other means. The Government shall also be at liberty to hold and retain in their hands materials, tackle, machinery and stores of all kinds on Site, as they may think proper and may at any time sell any of the said materials, tackle, machinery and stores and apply the proceeds of sale in or towards the satisfaction of any loss which may arise from the cancellation of the Contract as aforesaid.

The Government shall also be at liberty to use the materials, tackle, machinery and other stores on Site of the Contractor as they think proper in completing the work and the Contractors will be allowed the necessary credit. The value of the materials and stores and the amount of credit to be allowed for tackle and machinery belonging to the Contractor and used by the Government in completing the work shall be assessed by the P.M. and the amount so assessed shall be final and binding.

In case the Government completes or decides to complete the Works or any part thereof under the provision of the Condition, the cost of such completion to be taken into account in determining the excess cost to be charged to the Contractor under this Condition shall consist of the cost or estimated cost (as certified by P.M.) of

materials purchased or required to be purchased and/or the labour provided or required to be provided by the Government as also the cost of the Contractor's materials used with an addition of such percentage to cover superintendence and establishment charges as may be decided by the P.M., whose decision shall be final and binding.

6. Referring to Clause (b) of Condition 48, Mr Jain submitted that it was within the right of the appellant to have cancelled/terminated the contract, because even after repeated requests and opportunities granted to the respondent/claimant, there was default on the part of the respondent in proceeding with the work with due diligence. According to Mr Jain, this aspect of the matter has been completely overlooked by the learned Single Judge and also by the Sole Arbitrator.

7. We are afraid of that we cannot agree with the submissions made on behalf of the appellant because, from the award, we find that the issue of termination of the contract was specifically considered in the context of Condition 48 of GCC and the issue whether time was of the essence of the contract was also considered. This is evident from paragraphs 68 and 69 of the impugned award. In fact, in paragraph 70 of the award, there is a clear finding that the contract was not cancelled when valid reasons existed with the appellant on at least three occasions instead the contract was cancelled when the respondent had worked for over six years and the work had been virtually completed. In point of fact, the learned Arbitrator held on the basis of evidence before him that there was no doubt about the completion of five blocks i.e. JCO-1, JCO-2, OR-1, OR-2 & OR-3 which were under the occupation of the appellant since February-March, 2011 as per the Appellant's own document Ex. GP93. Based on this, the learned Arbitrator in paragraph 75 of the award concluded that the five blocks were completed in March 2011 and therefore

the cancellation of this part of the contract by invoking Condition 48 of the contract was, in any event, not sustainable. As regards the remaining three blocks also, after detailed discussion, the learned Arbitrator, in paragraph 84 of the award, came to the conclusion that Block Nos. OR-4, OR-5 & OR-6 had been fully constructed and were fit for occupation after some repairs. Thus the learned Arbitrator has returned conclusive findings that all the eight blocks had been completed and because the cancellation of the contract, which took place on 30.03.2012, was done after the works had been completed, the same was not valid.

8. These are factual findings based upon the evidence on the record and on interpretation of the relevant provisions of the contract. It is well settled that the interpretation of clauses of the relevant contract falls within the domain of the Arbitrator and the factual findings are also not liable to be disturbed in a petition under Section 34 until and unless some clear cut perversity is pointed out. This is not the case here.

9. Consequently, even *de hors* the issue whether time was of the essence of the contract or not and, based on the entire arguments advanced by Mr Jain on Condition 48, there are clear findings against the appellant. We do not see any reason to interfere with the same. The appeal is dismissed.

BADAR DURREZ AHMED, J

DECEMBER 10, 2015
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SANJEEV SACHDEVA, J