

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

Date of decision: May 15, 2015

+ O.M.P. 81/2015, IAs 949-950/2015
M/S SUKUMAR CHAND JAIN

..... Petitioner

Through: Mr.Sandeep Sharma, Adv.
with Ms.Risha Mittal, Adv.

versus

DELHI STATE INDUSTRIAL & INFRASTRUCTURE
DEVELOPMENT CORPORATION LTD

..... Respondent

Through: Mr.Amiet Andlay, Advocate

CORAM:
HON'BLE MR. JUSTICE V.KAMESWAR RAO
V.KAMESWAR RAO, J. (Oral)

I.A No. 949/2015

Exemption allowed subject to all just exceptions.

Application stands disposed of.

I.A No. 950/2015

This is an application seeking condonation of one day delay in filing the petition.

For the reasons stated in the application, and the learned counsel for the respondent has no objection, the delay in filing the petition is condoned.

Application stands disposed of.

O.M.P. 81/2015

1. The challenge in this petition is to the award dated September 16, 2014 to the extent that the learned Arbitrator has rejected claim Nos. 1,3,5,6 and 7 of the petitioner. The petitioner had raised the following claims before the learned Arbitrator;

(i). Claim No. 1 for Rs 10, 55,00,971/- on account of 1st RA Bill;

(ii) Claim No. 2 for Rs. 55,55,000/- on account of refund of original performance Bank Guarantee;

(iii) Claim No. 3 for Rs. 2, 78,300/- expenses for obtaining the bank guarantee;

(iv) Claim No. 4 for Rs. 15,54,000/- on account of refund of amount of EMD;

(v) Claim No. 5 for Rs. 1,64,40,221.24/- payable towards loss of profit;

(vi) Claim No 6 for interest @ 15 % P.A. on the aforesaid amounts from due dates till the date of payment;

(vii) Claim No. 7 for Rs. 10,00,000/- on account of cost of Arbitration Proceedings;

2. The respondent has also made three counter claims.

3. The learned Arbitrator has framed 10 issues on the claims and three issues on the counter claims. Subsequently, issue no. 3,5 and 7 were re-framed on January 23, 2014. The claim No. 1, 3 and 5 relates to issues No. 3, 6 and 8 respectively. Claim no. 6 is interest and claim No. 7 relates to issue No. 9.

4. The facts as noted by the learned Arbitrator, are, the respondent invited item rates tender for “*Modernization of Community Work Centre (Composite Work) complete including civil development works, internal electrification & allied work at Jahangir Puri Phase-I*”, for the estimated amount of Rs.7,76,98,634/-. The work was to be completed within 24 months from the 10th day of issuing Letter of Acceptance. The Letter of Acceptance was issued to the petitioner on January 16, 2008. The petitioner submitted performance guarantee dated January 22, 2008 for an amount of Rs.55,66,000/-. The total amount of the work was awarded for Rs.11,13,07,724.96/-. The Letter of Commencement was of February 2, 2008. Proceedings were held on November 26, 2007/December 5, 2007 wherein a query was put by one of the bidders seeking clarification “*on the upper limit for the quantity of water to be pumped out*”.

5. The reply to the clarification was that the quantity mentioned in the NIT is the upper limit and if beyond the same, any further pumping is required, the same shall be done by the contractor for which nothing extra shall be paid to him. The quantity shown against dewatering caused by sub-soil water was 87,500 litres and the rate shown was Rs.15/- and the amount was shown as Rs.13, 12, 500/-.

6. On claim no. 1, which is issue no. 3, the learned Arbitrator considered the said issue alongwith issue no. 2. The possession of one-third of the site was taken by the petitioner on July 12, 2008. Before the petitioner could start the actual construction work of the basement and other stories of the building, it was required to dewater and pump out the sub-soil water and thereafter carry out the excavation for which sketch was given and thereafter, only, construction work was to start by laying down the base of the basement. The petitioner has written a letter dated July 30, 2008 to the respondent. By the said letter, the petitioner informed the respondent that the petitioner had started the work of pumping out water caused by sub-soil water on July 29, 2007 before excavation for foundation and basement could be done. The petitioner also informed that it had installed four numbers of water pumps for dewatering and the capacity of each of the pump is 20 litres of water per 18 seconds and that the pumps would run 24 hours in a day, round the clock till subsoil water would go down so that the work of excavation could be started. In the same letter, the petitioner requested for supplying to it the structural drawing as well as architectural drawing so that further plan could be chalked out to complete the work.

7. In response to the said letter, attention of the petitioner was drawn to the upper most limit of the quantity of water to be pumped out and also

the fact, in terms of the agreement if any, further pumping is required, the same has to be done by the Contractor i.e the petitioner for which nothing extra than stipulated shall be paid to the Contractor. The learned Arbitrator referred to various letters written by respondent to the petitioner. The petitioner was also informed that despite the fact, dewatering work was being carried out for the last one month, no satisfactory result has been achieved so far, as the subsoil water had still not achieved the desired depth. The petitioner was called upon to speed up the dewatering process and show the result to the department. A sketch showing the depth upto which excavation has to be done was handed over to the petitioner. The stand of the petitioner all along has been that it had not been supplied with the structural drawing and architectural drawing despite repeated requests.

8. It was the case of the petitioner that it had pumped out 1,80,59,480 litres of subsoil water which was recorded in the log book and duly signed by the Junior Engineer. It had made a claim for Rs.10,55,00,971/- . The said amount was not paid. The respondent offered Rs.1,08,281.25/- which was not accepted resulted in filing of a claim. The learned Arbitrator was of the view that the petitioner is entitled to receive Rs.1,08,281.25/-. The same was on the basis of the calculations made keeping in view 1/3 of the total area was given in possession to the

petitioner and 1/3 of 87,500 being 28,875 which is multiplied by Rs.3.75, which is 25% of Rs.15/-. The total amount payable for the aforesaid work therefore comes to Rs.1,08,281.25. The conclusion of the learned Arbitrator is justified. There is a clear stipulation in the contract that the petitioner cannot claim and as admitted by the petitioner's witness No. CW 1, beyond 87,500 litres for the entire area. The aforesaid conclusion is on the basis of the provisions in the contract. With regard to the upper limit of the dewatering work of 87,500 litres having been fixed by the Government, the conclusion cannot be faulted.

9. I note, that the learned Arbitrator has considered all the relevant aspects before coming to such a conclusion. Suffice to state, the petitioner could not completely dewater the subsoil water. The pace of work was very slow. There is a conclusion that he did not engage sufficient motors to accelerate the work. I have been informed that he remained at the site for around 29 days. The dewatering could take place till one feet only. The bogey of structural and architectural drawings sought for, by the petitioner had no connection with the dewatering of the subsoil water. In any case, till such time, the subsoil water was pumped out, there was no question of excavation and construction. It is a conceded position that after the 29th day, the petitioner had abandoned the work. Even though, the contract was to be completed in 24 months,

a consideration of all the facts would show that there has been a delay on the part of the petitioner to start the work as was awarded to it. The learned Arbitrator had considered the relevant facts, I do not think, that the conclusion of the learned Arbitrator against this claim needs to be interfered.

10. Insofar as issue No. 6 is concerned, which relates to claim No. 3, the learned Arbitrator was of the following view;

ISSUE NO.6

44. Issue No.6 framed in the proceeding relates to payment of expenses to the extent of Rs.2,78,300/- incurred by the claimant for obtaining the aforesaid bank guarantee. The bank guarantee furnished by the claimant was not renewed by the claimant and, therefore, by operation of the time factor, the validity of the same has lapsed. The said bank guarantee has not been enforced and ordered to be refunded and therefore, no such order for payment of bank charges would be justified. The respondent could not be made liable for payment of expenses for obtaining the aforesaid bank guarantee. This claim of the claimant, therefore, stands rejected.

11. There is no dispute, that in terms of the Contract, the bank guarantee was to be furnished. Having furnished and not renewed, by the petitioner, and has been ordered to be refunded. I am of the view that the learned Arbitrator is justified in rejecting the claim.

12. Insofar as claim No. 5 is concerned, the same was towards loss of profit of Rs.1,64,40,221.24 and the same relates to issue no. 8 framed by

the learned Arbitrator. The learned Arbitrator on this issue has held as under;

ISSUE NO.8 AND ISSUE No. 1

47. I am, however, unable to accept the aforesaid contention for the stage for starting the construction was not arrived at. There is no denial of the fact that a sketch for the excavation work was handed over to the claimant. The said sketch indicates as to how far the excavation work was to be done and to what depth it had to go. The desired depth upto which excavation was to be made would have been the base for the basement where construction work was to be started. Therefore, the claimant was initially required to first dewater the subsoil water and also had the sketch ready for doing the excavation work which the claimant failed to do at all. Subsequently, in the month of September, structural and architectural drawings, as approved by IIT, were furnished to the claimant and even after that the claimant had not completed the work of pumping out the subsoil water even to the extent of 1/3rd of the site not to speak of the rest 2/3rd of the site. It has also not done and has not even started the work of excavation at all on completion of which only the construction work could have been started for which only drawings are necessary. It is also proved from the evidence on record that any machinery meant for construction was brought to the site.

Merely placing of a bill of purchase for batching plant on record does not prove and establish that the batching plant was actually brought to the site by the claimant. There is no evidence of site overhead expenses nor the number of tools, plant and machinery brought and stationed at the site for starting the construction work. Therefore, it cannot be said by any stretch of imagination that the respondent has committed any breach of contract as contended herein. The respondent has not terminated or rescinded the contract but it was the claimant who

unilaterally stopped working at the site. The respondent also did not prevent or put any obstruction in claimant carrying out work at the site.

There is one more angle in this issue. Reference is already made to the provisions of clause 3A of the Agreement which provides the circumstances under which a contract is closed by a party to the contract. In that eventuality, earnest money deposit and the Performance Bank Guarantee of the contractor are refunded but no payment on account of interest, loss of profit or damages would be payable. In this case, referring to the said provision earnest money deposit and Performance Bank Guarantee deposit by the claimant are ordered to be returned and, therefore, the claimant cannot claim for any loss of profit in the present case. The claimant cannot seek for double benefit to which it is not otherwise entitled to.

48. The award in Rama Construction Co. vs. DSIDC, which was relied upon by the claimant, is totally distinguishable on facts. In that case, structural drawings were not supplied at all although construction work was ready to be started after excavation for the basement for the available site had been done. In the present case, the same was not the position and, therefore, on facts, the said case is clearly, distinguishable. The other cases relied upon by the counsel appearing for the claimant, namely, M/s JG Engineers Pvt. Ltd vs. U.O.I. &Anr., JT 2011 (5) SC 380; DDA vs. S.S.Jetley, 2011 (2) Arb. LR 213 (Delhi), and Mohd. Salamatullah and others Vs. Government of Andhra Pradesh, AIR 1977 SC 1481, are also distinguishable on facts for I am of the considered opinion that in the present case, no breach was committed by the respondent of any of the stipulations of the contract and, therefore, the respondent was not required to pay any amount to the claimant towards loss of profit. All these cases relate to breach committed by the party awarding the contract and are distinguishable. Therefore, I answer Issue No.8 and also Issue No.1 holding that no amount is required to be paid towards claim of loss of profit by the respondent to the claimant. I also hold that none of the parties could be

said to have committed breach of contract for the contract has come to an end with the disputes arising between the parties with regard to the nature of work done at the site. The issue is answered accordingly.

13. I agree with the aforesaid conclusion of the learned Arbitrator. The challenge with regard to conclusion of the learned Arbitrator to claim No. 5 is rejected.

14. Claim No. 6 relates to interest which has been denied by the learned Arbitrator on the ground that the respondent had offered an amount of Rs.1,08,281.25/- but was not collected by the respondent. The learned Arbitrator is justified in denying the interest.

15. The claim No. 7 relates to issue No. 9. The learned Arbitrator has granted cost of Rs. 50,000/- towards expenses incurred by the petitioner in pursuing the arbitration proceedings. Suffice to state, award of cost was purely discretionary, the same would not like to be interfered by the Court.

16. Mr. Sandeep Sharma, learned counsel for the petitioner would submit that the written submissions alongwith judgments relied upon by the petitioner have not been considered/dealt with by the learned Arbitrator. I note, that the learned Arbitrator has in para 8 referred to the judgments relied upon by the petitioner. That apart, in para 13, the learned Arbitrator has referred to the fact that the final arguments of both the counsels appearing for the parties were heard extensively for six days

is a sufficient proof that proper opportunity was given to the parties and reasoned award has been passed which in the facts is justified. Even otherwise, no new facts have been pointed out by Mr. Sandeep Sharma, which would have a bearing on the conclusion arrived at by the learned Arbitrator.

17. Further in view of the limited jurisdiction, this Court has under Section 34 of the Act, the petition is accordingly dismissed.

18. No order as to costs.

(V.KAMESWAR RAO)
JUDGE

MAY 15, 2015/ak