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

% **DECIDED ON: 04.01.2016**

+ **FAO (OS) 291/2005**
CM APPL.13465-13468/2005
16344/2008, 2959/2009

D.D.A.

..... Appellant

Through: Mr. Ajay Verma with Ms. Kirti
Parmar and Mr. Vaibhav Mishra,
Advocates.

Versus

ANANT RAJ AGENCIES AND ANR.

..... Respondents

Through: Ms. Biji Rajesh, for Kanth &
Associates

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

S.RAVINDRA BHAT, J. (ORAL)

1. The appellant [hereafter called “DDA”] challenges the judgment and order of the learned Single Judge of 05.04.2005 which had dealt with and disposed of its application, I.A. No.4518/1996, challenging an award dated 23.12.1995. The respondent contractor [hereafter referred to as “the claimant”] was awarded work for constructing flats in Pocket-E, Trilokpuri by an agreement entered into in 1986. At the culmination of the contract, the claimant alleged that DDA had not released full payments in accordance with the terms. The claimant consequently invoked the arbitration clause and demanded amounts towards 15 substantive heads. Claim Nos.16 and 17

related to interest. The Statement of Claim was filed before the Arbitrator on 22.02.1993; the DDA filed its counter statement on 31.07.1993 and an additional counter statement on 01.10.1994. The arbitrator held as many as 25 sittings which included recording the depositions of witnesses and hearing the submissions of parties. Eventually, the award was published on 23.12.1995. Aggrieved by the award - when it was sought to be made *rule of the court* in terms of the Arbitration Act, 1940, DDA preferred its objections. These objections were dealt with elaborately. The learned Single Judge, in the impugned judgment by and large did not interfere with the substantive awards but modified the award of interest.

2. In the present appeal, the DDA has, in the course of oral hearings confined its submissions and grounds challenging the impugned judgment to four issues: (a) arbitrator's jurisdiction by reason of Clause 25B of the contract; (b) award in respect of Claim No. 3; (c) award in respect of Claim No.8 (expenses towards watch and ward staff beyond the date of completion); (d) award pertaining to Claim No.12 – method of measurement of SCI pipes, and (e) rate of interest.

3. The DDA urges that the claims were excluded by virtue of Clause 25B. The said condition reads as follows: -

"The decision of Superintending Engineer regarding the quantum of reduction as well as the justification thereof in respect of rates for sub standard work which may be decided to be accepted will be final and would not open to arbitration".

4. It was urged that the Arbitrator lacks jurisdiction in this regard. Reliance was placed by learned counsel upon the decision in *Vishwanath*

Sood v. Union of India, AIR 1989 SC 952 and *DDA v. Prem Singh*, 97 (2002) DLT 976. It was contended that the decisions in *Prem Singh (supra)* and *Vishwanath Sood (supra)* were not taken into consideration by the learned Single Judge and consequently the impugned order requires to be set aside.

5. As is evident, the exclusion stipulation, i.e., Clause 25B is based upon fulfilment of two conditions, i.e., (a) decision by the Superintending Engineer regarding quantum of reduction and its justification and (b) in respect of rates for sub-standard work. The structure of the condition is such that it applies to a specific fact situation. In this case, the discussion in the Award was that the DDA had never given notice for any sub-standard work. There was no question of any rectification of defects either. The appellant/DDA has sought to rely upon the calculations of the Superintending Engineer who appears to have substituted certain amounts and reduced them on the plea that the said amounts were admissible and sought to recover from bill of quantities/final bill. A discussion of this aspect appears in respect of Claim No.5. The Arbitrator recorded his findings as follows: -

“I have considered the respective arguments/pleadings and the documents placed on record by both the parties in this regard. The clause 14 of the agreement has been perused by me and as per this clause respondent was to give notice in writing for rectification of the defects but no such notice has been found filed on record. In case the claimant would have failed to rectify the defects under those circumstances respondent was to carry out the rectification of defects at the risk and cost of the claimant which is also to be done after the notice is given to the claimant under clause 14. If any of the defect is beyond rectification the

request is to be made by the claimant to treat that item as a reduction item under those circumstances only that item can be treated as reduction item. This procedure is to be followed as per provision of the agreement and is a mandatory requirement. This work was completed on 15.7.89 and respondent action to make this recovery after more than 5-1/2 years is badly barred by time.

The contention of the respondent that decision of S.E. in regard to reduction item is final under clause 25 (B) is also of no avail because for invoking the provision of clause 25 (B), it is a contractual requirement that claimant should request the respondent to accept any item as reduction item, the defect of which cannot be rectified. Under the above mentioned circumstances the claimant had got no occasion to request the respondent to treat any item as reduction items. Moreover no evidence has been filed on record showing that there was any defective work done by the claimant. The RA bills paid by the respondent also clearly shows that the work was done as per provision of the agreement and specifications. In view of the above the respondent could not prove any item to be treated as reduction item as such there was no occasion for the S.E. to exercise power under clause 25 (B) as such clause 25 (B) is not at all applicable in the present case. The entire action of the S.E. in this regard is without jurisdiction and is not in accordance with clause 25 (B), thus it cannot be contended that the said decision is not open to adjudication by the arbitrator.”

6. Given the above factual determination, it is apparent that the invocation of Clause 25B was not called for as the appellant did not establish that amounts were reduced on account of sub-standard work performed by the Contractor of which notice was given contemporaneously or at all. Consequently, this submission of the appellant has no merit and is rejected.

7. It is next contended that the Award of ₹1,70,624.10 *vis-a-vis* Claim No.3 (overweight of steel) was not called for. Appellant's counsel relied upon the Award and in this context pointed out that the Arbitrator wrongly appreciated the circumstances. After noticing that according to the prevailing practice, the payment had to be done based on an application of standard coefficients, the Arbitrator fell into error in awarding the amount without any evidence to establish the fact of overweight of steel.

8. The learned Single Judge recorded the following findings on this aspect: -

“35. Pleadings would show that steel was issued by DDA by treating its weight on the basis of standard weight of steel per meter length. Record shows that samples of steel were taken by the respondent when steel was issued. Weight of which was recorded in the over-weight steel register. Learned arbitrator noted that the work was to be executed as per CPWD specifications and as per CPWD circular dated 15.7.1982, weightment of steel was required to be done on the basis of actual weight determined in the context of weight of different samples taken out.

36. In the context of Ex.C-3, C-23, C-24, C-50 and C-51, learned arbitrator determined that the total quantity of steel consumed, including wastage was 5,42,172.913 kgs. Accordingly, learned arbitrator determined the amount payable.

37. Ms. Anusuya Salwan, learned counsel for the DDA could not show any error, much less patent or fundamental error pertaining to claim No.3 and the sum awarded thereunder. I sustain the award pertaining to claim No.3.”

9. As the appellate Court, we are of the opinion that reappraisal of facts based upon what the Single Judge might have independently found is not within our domain. Barring manifest errors in exercise of jurisdiction, or

rendering findings which are so unreasonable that no reasonable individual placed in the circumstances would have arrived at such findings, the Court and especially the Appellate Court would not exercise itself in factually re-appreciating the circumstances. Consequently, this submission too is rejected.

10. The next submission pertains to Claim No.8, i.e, of ₹65,185/- on account of Award for expenses of watch and ward staff beyond the date of completion. DDA complains that the contractor did not lead any evidence in support of this claim. We noticed that the original claim by the contractor was of ₹1,35,700/-. The Arbitrator noticed that six chowkidars, one plumber and one painter were retained at site beyond 14.01.1990 when the defect liability period commenced and ended on 15.12.1991, i.e., for about two years. The DDA took possession of the site later. The date of handing over of possession was undisputed; likewise commencement and the period of defect liability is not disputed. In these circumstances, the Award of ₹65,185/- upheld by the Single Judge cannot be faulted.

11. Learned counsel urged that the Award of ₹68,580/- pertaining to Claim No.12 towards measurement of SCI pipes was wrong and unjustified. Learned counsel highlights that CPWD's specifications had to be taken into account but were ignored by the Arbitrator. We notice that the claim in this regard pertains to the method of measuring the extent of SCI pipes used in the construction. Learned Single Judge noticed the contentions in this regard and found as follows: -

“87. Pleadings of the parties would show that what was actually happening was that since pipes were being fitted into

sockets, segment of the pipe which went inside the socket was being left un-measured when measurements were taken on completion of the work. In this manner, certain segments of the pipe were left un-accounted for purposes of payment.

88. *To any reasonable person with a practical approach, it would be evident that if a pipe segment gets fitted into a socket, length of pipe remains the same. Award pertaining to claim No.12 is legal and valid and is accordingly upheld.”*

12. We find no infirmity in the reasoning of the learned Single Judge in this regard. The contention is consequently rejected.

13. The last claim is with respect to the rate of interest. The Arbitrator had in respect of Claim Nos.6,16 & 17 directed pre-suit and *pendente lite* interest @ 17½ % per annum with quarterly rests. Learned Single Judge clarified that payment of interest would be reduced to 12½ % per annum with quarterly rests for the period 14.01.1990 to 01.04.1993 and thereafter from 02.04.1993 interest would be @ 17½ % as awarded. The post decretal interest awarded was @ 12%.

14. We have considered the submissions of the parties, including the contractor and are of the opinion that the directions to pay interest should be uniformly 12% per annum simple interest. The respondent/contractor has not expressed opposition to this. Accordingly, it is hereby directed that the Award shall stand modified only insofar as interest is concerned – the DDA’s liability to pay interest shall be @ 12% per annum from 14.01.1990 till date of payment (i.e. including pre-Award, *pendente lite* and future interest).

15. The appeal is partly allowed only to the extent of direction to modify the payment of interest.

16. FAO (OS) 291/2005 is disposed of as above. The Registrar shall ensure that the amounts payable to the respondent/contractor are worked out according to the directions issued in this judgment and disbursement made after due adjustments. Any unadjusted balance to which the contractor is not entitled, shall be refunded to the DDA.



S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

JANUARY 04, 2016/vikas/ajk