

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

% *Judgment Reserved on: 24th February, 2016*
Judgment pronounced on: 26th February, 2016

+ **O.M.P. No.181/2015, I.A. Nos.3536/2015 & 3538/2015**

PUBLIC WORKS DEPARTMENT Petitioner
Through Mr.Sanjay Dewan, Adv.

versus

M/S SHIV NARESH SPORTS PVT. LTD. Respondent
Through Ms.Anusuya Salwan, Adv. with
Ms.Renuka Arora & Mr.Vikas Kunal
Kohli, Advs.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The petitioner has filed the abovementioned objection petition under Section 34 of the Arbitration and Conciliation Act, 1996 read with Section 151 CPC, challenging the Award dated 18th September, 2014 passed by the Arbitrator.
2. Brief facts of the petition are that the Executive Engineer, CWGD-I, CPWD, Jawaharlal Nehru Stadium, New Delhi invited tenders for similar works at five different locations. The respondent /contractor was awarded the work of "Providing & Laying of IAAF Approved Synthetic Athletic Track Surface at Thyagaraj Stadium".
3. The work was successfully completed by the respondent.

4. Disputes arose after completion of work and the Chief Engineer, PWD, Zone M-4, Government of NCT of Delhi vide letter dated 2nd May, 2012 appointed Mr.S.R. Pandey as Sole Arbitrator.

5. The important dates relating to the contract are as under:-

24.08.2009	Date of submission of Tender.
4 Months	Time required for completion of the project.
29.10.2009	Stipulated Date of Commencement.
28.02.2010	Stipulated date of Completion.
21.05.2010	Extended date of Completion.
21.05.2010	Actual date of Completion.
15.12.2010	Respondent submitted 5 th & final Running Account Bill.
21.05.2010 to 20.05.2011	(12 th Months) Defect Liability Period. No defects notified by the petitioner, PWD upto the completion of the defect liability period.

6. The Sole Arbitrator entered upon reference on 9th May, 2012 and made and published his award on 18th September, 2014.

7. The petitioner has challenged the Award on the findings of Arbitral Tribunal on Claim Nos.1, 4 and 5.

8. Claim No.1: Contractor's Claim Rs.2,00,000/- towards refund of withheld amounts on account of rectification of minor defects.

It was the case of the respondent before the Sole Arbitrator that a sum of Rs.2 lacs had been withheld from the final bill paid on 18th October, 2011 towards rectification of minor defects which stood rectified as confirmed vide Exh.C-20 dated 27th June, 2011.

It was argued that no notice was ever issued during the period of contract or during defect liability period or any expenditure incurred by petitioner for rectification of alleged defects. The defects pointed out had already been rectified and in case the petitioner felt otherwise, it could have taken action within the defect liability period.

9. It is now submitted on behalf of the petitioner that the amount of Rs.2,00,000/- is withheld by the petitioner only with the purpose to rectify the defects by the respondent because work given to the respondent "i.e. Providing and laying, Synthetic Athletic Track Surface" is an expertise work, which only can be rectified by the person who is an expert in this field, hence the same cannot be rectified by the petitioner from the outside. The Arbitrator has ignored the petitioner's acceptance of this withheld amount or rectification of minor defects mentioned in completion certificate which has been annexed as P-4 and the full and final paid bill dated 18th October, 2011, has been annexed as P-5. The Arbitrator committed an error on the face of the award since the Clause 16 of the agreement is not applicable to this withheld amount. As the respondent is only authorized representative of M/s Conica in India whose Synthetic Athletic Track was laid and therefore, the petitioner have no other option but to keep them requesting for rectification of the defects in Synthetic Athletic Track.

10. It is a matter of fact that under Clause-16 of the Agreement, if the work was not done as per specifications, the petitioner-PWD had three options which could be exercised, i.e. remove and reconstruct the work after giving notice to the contractor, reject the work outrightly without any payment or get it removed and get the work re-executed at the risk and cost

of the respondent/contractor but none of the above were ever exercised by the PWD. There were no provisions in the Agreement for withholding of amount in final bill on account of rectification of alleged minor defects. The Arbitrator held that the security deposit lying with the petitioner was released to the respondent implying that petitioner had no claim against the respondent.

11. The Arbitrator after appreciating the above facts made an award of Rs.2 lacs in favour of the respondent. It appears to the Court that there is no infirmity in the said findings. Thus, the challenge of claim No.1 is not sustainable.

12. Claim No.4: Contractor's claim Rs.9,725/- towards illegal recovery made on account of alleged non testing of the materials by way of extra items:-

It was the case of the respondent that the petitioner had illegally recovered an amount of Rs.9,725/-. No notice was given to the respondent affecting this recovery. Respondent carried out all the necessary test as and when required by the petitioner and as per the specifications. It was alleged that the petitioner had wrongly interpreted point No.7 of letter dated 10th September, 2009 that since the respondent did not incur any expenditure on testing charges for deviated quantity therefore, the amount was correctly deducted by way of extra items. It is submitted that the petitioner had not produced any evidence that the said test for which recovery was being sought was conducted by them and the amount sought to be deducted was spent by them.

13. It is the case of the petitioner that the testing charges for synthetic surface were to be borne by the respondent only, as item No.9.1 of the Agreement, which is for Synthetic Athletic Track, includes testing charges and additional completion equipment. These testing charges and equipment are only for One Track in the agreement. However, for the safety reasons the quantity of Synthetic Surface was extended more than it was mentioned in the agreement, which was never required testing separately; hence the respondent did not had to incur extra expenditure, on testing or equipment for the deviated quantity of synthetic surface. As the respondent did not incur any expenditure on this account, hence it is not entitled for extra amount for testing charges etc. Thus, the Arbitrator committed an error on the face of the award, since there was no requirement for testing of deviated quantity of synthetic surface; hence the respondent is not entitled for any amount on this account.

14. The Arbitral Tribunal has referred and rightly held para 5.3 of Special Condition of Agreement which provides for only one lab test for materials and only one field test for the finished work and it was not the case of petitioner that the respondent failed to arrange for these tests. There was no condition in the agreement that if actual area of synthetic surface laid was more than agreement quantity, recovery shall be made proportionately for testing charges for additional quantity even if no additional test was required.

15. Admittedly, it was the petitioner who had extended the area of track for safety reasons. Recovery by way of sanction of minus extra item was not supported by any Clause/condition of agreement. Therefore, the recovery could be made only if there was enabling provisions in agreement or by

giving timely notice to respondent/contractor. Work was completed on 21st May, 2010 and no notice was given to the respondent up till the said date. The petitioner for the first time vide letter dated 12th September, 2011 (R-12) intimated the sanction of minus extra item which does not lend any support to its case. Thus, a sum of Rs.9,725/- was awarded in favour of the respondent.

16. The findings given by the Arbitrator are reasonable. The Arbitral Tribunal has taken the correct possible view. The Award does not require any interference in view of the settled law.

17. Claim No.5: Contractors claim Rs.78,19,172/- towards illegal recovery made on account of alleged FOP visits by way of extra items.

The case of the respondent before the Arbitrator was that the petitioner recovered a sum of Rs.78,19,172/- from the final bill of the respondent on account of alleged non-compliance of visits by the FOP (Field of Play) consultant. The petitioner had wrongly interpreted para-4 of letter dated 10th September, 2009 that the respondent would require seven visits of FOP consultant. Admittedly, no notice was ever issued by the petitioner during contract period that FOP consultant did not make any visit and the petitioner had wrongly made recovery. The petitioner, at no stage, pointed out any deficiency in service rendered by FOP consultant. It is evident that negotiation letter dated 10th September, 2009 nowhere mandated seven visits of FOP consultant.

18. The main purpose of FOP consultant's visit was to ensure that the work is executed properly so as to qualify for Class-2 certificate by the IAAF and admittedly class-2 Facility Certificate was issued by IAAF.

19. It is the admitted position that there was no separate head of payment in the contract for payment towards FOP consultant and no condition/provision in the agreement that recovery would be made for deficit visits of the FOP consultant. While working out the recovery, the petitioner sought to recover amounts on the basis of the rates quoted by the “M/s Conica” who had nothing to do with the contract of the respondent. No evidence on behalf of Conica was produced. Even, no notice was ever given either during the currency of the contract or on completion of the contract.

20. It is now the case of the petitioner that when the work was declared completed on 21st May, 2010, there were several defects in the work executed by the respondent. Those defects which were apparent at the time of recording completion were clearly mentioned in the measurement Books which has been annexed as P-4. The Project Manager also found those defects during his inspection on 12th October, 2010 which was recorded in completion certificate issued by him vide letter No.54(1)/PM/CW-13/PWD/GNCTD/ 696-E dated 12th October, 2010 which has been annexed as P-6.

The respondent in their negotiation letter dated 10th September, 2009, which is the part of the agreement has been annexed as P-7, had specifically mentioned about the visits of FOP Consultant at different phases of the work. The respondent had submitted that it would bear the cost of those minimum seven visits of FOP consultant. Those visits of the consultant would be at the following stages:

- i) Visit for initial survey of all sites
- ii) Visit during the execution of sub-base.

- iii) Visit during execution of sub-base and ancillary work.
- iv) To issue the certificate of acceptance of sub-base
- v) To issue permission for laying of synthetic surface.
- vi) Visit on completion of the track to ensure obtaining of relevant class certification from IMF.
- vii) To conduct necessary visits as & when required at site.

21. It is stated by the petitioner that when the defect in Synthetic Athletic Track was found by the petitioner, the respondent was requested by the Engineer-in-Charge vide letter No.54(15)/EE/CW-131/GNCTD/201 dated 16th May, 2011 to provide documents related to the visit made by the FOP consultant. By this document, it was reviled that the FOP Consultant Mr.Reiner Earnest had visited the site twice only. These visits were between 10th December, 2009 to 14th December, 2009 and 2nd March, 2010 to 5th March, 2010. However, there is no such record to show that at which stage of the work these visits were conducted.

It is also submitted that less visits of FOP consultant from seven to two is clear violation of the agreement and the letter of negotiation hence amounts to providing inadequate and improper services in laying Synthetic Athletic Track in this stadium. The letter of negotiation has been annexed as P-8.

Therefore, the Arbitrator has given a wrong finding that the recovery of this amount by the petitioner, based on assumption that FOP consultant was required to make exclusive visit at the given stages of the work.

22. The Arbitrator while dealing with the said plea has held that on assuming that FOP consultant was required to make exclusive visits at

different stages of work which does not stand to the reason in view of the fact that the respondent/ contractor was simultaneously executing five similar works in Delhi itself and all these works needed services of the FOP consultant. The consolidated tender was called by Executive Engineer, CWGD-I, CPWD, Jawahar Lal Nehru Stadium New Delhi for similar works at five different locations. The respondent's negotiation letter dated 10th September, 2009 was common to all the five works. The assumption of the petitioner that the letter of negotiation implies that the FOP consultant was required to make 35 visits in period of six months is highly irrational. The main focus of FOP consultant could be gathered from Sl. No.(V) of the negotiation letter "to ensure obtaining of relevant class certificate from IAAF". Admittedly, the said certificate was obtained. The said recovery by way of sanction of minus extra item was not supported by any of the clauses/conditions of the Agreement. The action of the petitioner does not have backing of the contractual provisions. Therefore, it is rightly held that the recovery made is held as beyond the terms of the agreement.

23. It is a matter of fact that at no stage during the contract, did the petitioner point out that the FOP consultant did not visit as was required. Even if the contention of the petitioner that FOP consultant did not visit five out of the seven stages is to be accepted, the obvious conclusion is that the petitioner consciously and repeatedly waived the requirement of the remaining visits of the FOP consultant. Therefore, it appears that the raising of issue of the deficit visits of the FOP consultant is an afterthought and the same was raised at a belated stage. The petitioner has made a general statement that the FOP consultant did not render proper services. The

petitioner has not brought out any specific instance on record to establish that the work suffered in any manner due to the alleged deficit visits of the FOP consultant. The game was successfully completed. There was grievance on behalf of the petitioner of any nature or defect which is now pointed out by the petitioner but it did not issue any notice to the respondent in course of execution of the work. This clearly amounts to acquiescence and waiver on the part of the petitioner and according to the doctrine of estoppel, the petitioner, thus, has no legal right to make recovery. There is no provision in the agreement that for each deficit visit of the FOP consultant, a particular sum would be recovered. No rate of recovery has been laid down in the agreement and recovery made is beyond the conditions of the agreement. On the other hand, the work done is completely satisfactory and relevant class certificate has also been issued by IAAF.

Thus, the Arbitrator has rightly awarded an amount of Rs.78,19,172/- in favour of the respondent.

24. Ground of challenge to an arbitration award under Section 34 of the Arbitration & Conciliation (Amendment) Act, 2015 is limited and the grounds are not covered by Section 34 of the Act, as this Court would not sit as a Court of appeal over an Arbitrator's award. Reliance is placed on the following decisions:

- (i) ***P.R. Shah, Shares & Stock Brokers Pvt. Ltd. v. B.H.H. Securities Pvt. Ltd. & Ors.***, 2012 (1) SCC 594 (para 21)
- (ii) ***Associate Builders v. DDA***, 2015 (3) SCC 49

25. It is settled law that the Award is not open to challenge on the ground that the Arbitral Tribunal has reached a wrong conclusion or that the interpretation given by the Arbitral Tribunal to the provisions of the contract is not correct.

26. The Arbitral Tribunal is the final arbiter of the disputes between the parties referred to it. The Supreme Court has expounded on the principle as to the sanctity of the decision of the Arbitrator in the case of **Markfed Vanaspati and Allied Industries v. Union of India** (2007) 7 SCC 679, where in paragraph 17 of the said judgment it was observed as under:

“17. Arbitration is a mechanism or a method of resolution of disputes that unlike court takes place in private, pursuant to agreement between the parties. The parties agree to be bound by the decision rendered by a chosen arbitrator after giving hearing. The endeavor of the court should be to honor and support the award as far as possible”.

27. After having gone through the award passed by the sole Arbitrator, I find that there is no error therein. The Arbitrator has given its correct findings of the facts and circumstances of the present case, as the said findings are in consonance with the contract between the parties. The objections of the petitioner are thus without any merit. The same are accordingly dismissed. No costs.

(MANMOHAN SINGH)
JUDGE

FEBRUARY 26, 2016