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

% **DECIDED ON: 05.01.2016**

+ **FAO (OS) 75/2006,
CM APPL.2240/06, 16345/08
& 2960/09**

D.D.A. Appellant
Through: Mr. Ajay Verma, Advocate.

Versus
M/S ANANT RAJ AGENCIES Respondent
Through: Ms. Biji Rajesh, Advocate.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MS. JUSTICE DEEPA SHARMA
S.RAVINDRA BHAT, J. (ORAL)

The present appeal is directed against an order of the learned Single Judge dated 22.11.2005 rejecting the Delhi Development Authority's ("DDA") objections (I.A.1442/1996) under Sections 30 & 33 of the Arbitration Act. The DDA was aggrieved by an Award published by the Arbitrator on 15.07.1995.

The brief facts are that the respondent (hereafter referred to as "contractor") was awarded the work of laying out water pipes in Rohini, Phase-I, in terms of an agreement. The contract was to be executed within a period of 180 days. Disputes arose after execution with respect to payment. The Engineer member of DDA was appointed as the sole Arbitrator. The Arbitrator published its Award on 15.07.1995. The DDA articulated several

objections to the Award. The learned Single Judge was of the opinion that given the minimal interference rule enunciated in various decisions of the Supreme Court, i.e., *Arosan Enterprises Ltd. v. Union of India* (1999) 9 SCC 449 and *Hindustan Tea Co. vs K. Sashikant Co. and Anr.*, 1986 AIR 1987 SC 81, there was no scope for interference. Learned Single Judge noted *inter alia* that there was a gross delay of 413 days in handing over of a part of the site and consequently the claim of escalation could not be treated as unreasonable.

It is urged on behalf of the DDA by Mr. Ajay Verma that the Award and consequently the impugned judgment required interference on four broad grounds. Learned counsel submitted that so far as Reduction Item Statement (“RIS”) No.1&2 are concerned, the amounts awarded, i.e., ₹1,03,663/- and ₹1,56,334.11 were not justified. He relied upon Clause 25B and submitted that the Superintending Engineering had the authority to exclusively decide whether and to what extent any deductions were to be made towards sub-standard work. Counsel submitted that the Award infers and deduces the facts based upon the contents of 13 Running Accounts (RA Bills). He highlights that the Arbitrator accepted the final bill. Consequently, the measurements indicated by the Superintending Engineer in the final bill could not be examined factually. Given these circumstances, submitted the counsel, the Arbitrator could not have tested the veracity of the assertions of the Superintending Engineer (in fact there was a shortfall of work to the extent of 41 cm. as against the prescribed 1.5 meter depth of constructions.

The learned Arbitrator in the Award observed that there were differences in quantity of general items in the final bill submitted by the claimant and the one prepared by the respondents. It was noticed that up to the 13th bill - which incorporated all the works done - there was no dispute about the quantities. The final bill prepared thereafter which did not include any other input, made variations in the quantities especially with respect to the average depth and claim that there was a shortfall of 41 cm. The learned Arbitrator noticed the terms of the agreement and was of the opinion that the DDA's assertions that there was sub-standard work were not established.

This Court has considered the submissions. Whilst there can be no dispute that Clause 25B empowers the Superintending Engineer to effect the deductions or reduce the quantities in case any work executed is sub-standard or not according to the quality prescribed, the fact remains that his authority to do so is circumscribed by the existence of objective material in that regard. Now if that were to be accepted - which indeed is the position from the record - that all the 13 RA Bills were complete in describing the work done and work executed unreservedly, the Superintending Engineer could not have, virtually on a whim, reduced quantities without any justification. There is no material on the record in the form of pleadings to suggest what impelled the Superintending Engineer to act as he did. In these circumstances, the bald assertions that the deductions were warranted were not based upon material facts or circumstances. The Arbitrator in our opinion was justified in disallowing the deductions. Consequently, the DDA's arguments with respect to RIS Nos.1 & 2 under claim no.2 are to fail.

The next submission is a common one with respect to claim nos.3&4. The contractor had demanded ₹27,88,900/- towards damages on account of delay and consequent extension of contract during which the costs of labour and material had escalated and ₹17,00,000/- was claimed towards infructuous (sic)/unwarranted expenditure on staff and establishment for 34 months between 16.04.1984 and 16.04.1987 @ ₹50,000/- . The Arbitrator awarded ₹3,85,321/- for claim no.3 and ₹1,36,000/- for claim no.4.

It is submitted that these claims could not have been awarded given the condition in the contract that no amounts could be claimed towards delay in the handing over of the site. This Court notices that the DDA had relied upon general condition no.1. At the same time, the claimants had relied upon a special condition. The Arbitrator reasoned that as between the two, the special condition governing the contract of the parties had to prevail. Significantly and more fundamentally, the Arbitrator was of the opinion that given the extent of the delay, i.e., 413 days' delay in handing over part of the site (and also noticing other delays such as communicating the decision of loop lines and on diameter of the pipelines which were to the tune of 92 and 245 days), the claim was justified. Learned Arbitrator relied upon the decision of the Supreme Court in *Hind Construction Contractor vs. State of Maharashtra* AIR 1979 SC 720 as well as the decision of this Court in *N.D.R. Israni v. Delhi Development Authority*, 1989(2) Arb LR 349 (Del) in this regard. It was lastly urged that the DDA was not allowed to lead evidence.

The Court is of the opinion that the DDA's submissions cannot be accepted. As noticed in the earlier part of the judgment, the total contract

period itself was 180 days within which the Contractor had to mobilize its resources, deploy manpower and execute the work. However, the entire site itself was not handed over for a considerable period of time. A part of it was withheld for as much as 413 days. Now, in a work of the kind that was awarded, i.e., laying of pipelines, it could not reasonably have been urged by the DDA that some part of the same could have been completed till the entire site or the plot were handed over. Consequently, the original assumptions on the basis of which the contract was negotiated could not apply and bind the contractor in the circumstances or justify claiming the escalation on account of costs of labour, material and also the deployment of staff for 34 months between 16.04.1984 and 16.04.1987 given that the claim was of ₹27,88,900/- and ₹17,00,000/- and the Award was only marginal to the extent of ₹3,85,321/- and ₹1,36,000/-, we find no unreasonableness in the factual determination of the Arbitrator.

As far as the last aspect, i.e., the loss of profitability (additional claim no.1) goes, learned counsel urged that the Award of ₹13,34,136.56 is a duplication. Since the contractor was entitled to - under the contract - rise of certain components and had also successfully claimed escalation towards items not covered, the question of award of any other amount did not arise.

Counsel for the DDA relied upon the Division Bench judgment of this Court in *DDA v. M/s Nav Bharat Const. Co.* (FAO (OS) No.90/1998, decided on 20.04.2009) wherein it was held as follows: -

“3. We are satisfied qua claim No.8 that the judgment of the learned Single Judge is contrary to the position of law one such judgment is reported as Anant Raj Agencies Vs. DDA, 2005 (5) Arb LR 590. The

reasoning in another judgment of the Division Bench of this court in Delhi Development Authority Vs. U. Kashyap, 1999 (1) Arb LR88 also in effect is also the same that once increase as per clause 10(CC) is awarded then additional sums for increase in cost cannot be granted. Thus, in our view, the affirmation of the grant of additional sums in addition to the payment under Clause 10 CC for increase in cost by the Single Judge was not justified.”

We notice that the decision relied upon is inapt in the circumstances of this case. What is claimed is not additional sums; that was of the kind that was rejected in *Nav Bharat*. What the contractor claims here was loss of profit which the Supreme Court had recognized in *Hind Constructions* matter as warranted in somewhat similar circumstances. Again, to recapitulate, as against the total contract period of six months, the delay caused by the DDA resulted in time and cost overrun which undoubtedly was compensated in the Award. However, with respect to loss of profitability on account of loss of opportunity which is a head of damages recognized in *Hind Constructions* matter, the award of ₹13,34,136.50 cannot be termed excessive or unreasonable, much less beyond the scope or authority of the Arbitrator.

In view of the above findings, there is no merit in this appeal; the same is accordingly dismissed. The amount deposited in the appeal shall be released to the contractor with accrued interest.

S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

JANUARY 5, 2016/vikas/