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IN THE HIGH COURT OF DELHI AT NEW DELHI

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O.M.P. (COMM.) 427/2016 & IA 11843/2016 (for stay)

GOVT. OF NCT OF DELHI IRRIGATION AND FLOOD
CONTROL DEPARTMENT

..... Petitioner

Through: Mr. Sanjay Dewan, Advocate.

versus

RAM KUMAR & ANR.

..... Respondents

Through: Mr. R. Rajappan, Advocate.

CORAM: JUSTICE S. MURALIDHAR

ORDER

21.10.2016

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1. The Irrigation and Flood Control Department of Government of National Capital Territory of Delhi has filed this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') to challenge an Award dated 4th March, 2016 passed by the sole Arbitrator in the disputes between the Petitioner and the Respondents arising out of an award of work in favour of Respondent No. 1 by the Petitioner on 20th September, 2008 for the development of a park at Khasra No. 548, 539 of Village Hiran Kudna for an amount of Rs.42,73,000.

2. In terms of the agreement between the parties, the work was to commence on 5th October, 2008 and was to be completed by 4th April, 2009. On 9th April, 2009, the scope of the work was enhanced and a revised scheme was sent to the Rural Development Department for obtaining revised sanction.

Admittedly, the sanction was delayed by over three years and was received, even according to the Petitioner, on 18th July, 2012.

3. While the case of the Petitioner is that Respondent No. 1 by a letter dated 17th September, 2012 requested to rectify the defects pointed out in order to enable the Petitioner to make payment of the balance sum, the Respondent refused to do so. According to the Petitioner, by a letter dated 9th January, 2013, Respondent No. 1 sought foreclosure of the work and finalisation of the accounts.

4. By a letter dated 1st January, 2013, Respondent No. 1 invoked arbitration clause and sought the appointment of an Arbitrator. Subsequently, he filed Arbitration Petition No. 222 of 2013 in this Court and by an order dated 20th March, 2014 the sole Arbitrator was appointed.

5. There were six claims made by the Respondents before the Arbitrator. By the impugned Awardrder dated 4th March, 2016, the learned Arbitrator allowed Claim Nos. 1, 2 and 3 partially and Claim No. 5 in favour of Respondent No. 1 and against the Petitioner. The Arbitrator decided to proceed on the basis of the affidavits and dispensed with the recording of evidence.

6. Claim No. 1 was for a sum of Rs.10,23,430 being the balance payment for the work done. Claimant supported its claim with a measurement book ('MB') No. 1024. Discussing this claim, the learned Arbitrator noted that the only ground on which the claim has been denied was that the Respondent had refused to remove the defects pointed out by the Petitioner. The learned

Arbitrator pointed out that in terms of Clause 17 of the General Conditions of Contract for C.P.W.D Works ('GCC'), the Petitioner had to indicate the defects to Respondent No. 1/Claimant within 12 months from the date of completion. However, they sent a letter only on 17th September, 2012 i.e., after a lapse of about two years. The learned Arbitrator also noted that although the photocopy of the MB filed by the Claimant was not signed/certified by either of the parties, the Petitioner herein did not deny the said MB. On the other hand, by a letter dated 17th September, 2012 the Petitioner itself admitted that the work was held up due to want of approval of revised scheme/revised administrative approval on account of the balance additional work. Further, the defects were communicated more than two years after it was completed. In the circumstances, the learned Arbitrator considered it appropriate to allow Claim No. 1.

7. The allowing of Claim Nos. 2 and 3 related to returning of performance guarantee amounting to Rs. 2,30,000 and security deposit and earnest money of Rs. 2,80,000 was found by the learned Arbitrator to be consequential to the Respondent/Claimant having completed the work according to the tender. It was noted that in the absence of any counter-claim by the Petitioner herein, the Petitioner could not take advantage of the performance guarantee submitted by the Claimant. Accordingly, Claim Nos. 2 and 3 were allowed.

8. The learned Arbitrator rejected Claim No. 4 being a claim for payments due under Clauses 10C and 10CA of the GCC amounting to Rs. 2,25,000 on the ground that Respondent No. 1/Claimant did not file any document to

show that he gave any notice to the Petitioner herein regarding alteration in the price of materials or price variation either during the stipulated period or the extended period.

9. As regards claim of interest in Claim No. 5 as against 18% claimed by the Respondent, the learned Arbitrator awarded only 9% interest from 30th January, 2012 till the passing of the Award and at 18% from the date of the Award till the date of payment.

10. Claim No. 6 being a claim on account of the arbitration proceedings was also not granted by the learned Arbitrator and the parties were directed to bear their own costs.

11. This Court has heard the submissions of learned counsel for the parties.

12. The principal submission of learned counsel for the Petitioner was that the learned Arbitrator erred in allowing Claim No. 1 particularly since the Respondent had declined to remove the defects pointed out by the Petitioner. It is stressed that it was the responsibility of the Respondent Contractor to have cured the defects and, therefore, it violated Clause 17 of the GCC.

13. What the learned counsel for the Petitioner fails to explain is how for a period of more than two years after the Respondent completed the work, the Petitioner did not point out any defects. As held by the learned Arbitrator, in terms of Clause 17 of the GCC, defects have to be pointed out within a period of 12 months. Secondly, the Petitioner has no answer to the observation of the learned Arbitrator that if, indeed, there were defects in the

completion of the work, the Petitioner ought to have filed a counter-claim before the learned Arbitrator. The Petitioner is unable to explain why this was not done. Thirdly, there is no explanation for the delay in according sanction for the extra work. This simultaneously took over three years. Fourthly, as far as the MB is concerned, although it is now sought to be contended that what was produced was an unsigned and unverified MB, there was no such objection taken to the production of such document before the learned Arbitrator. There is a categorical factual finding by the learned Arbitrator that said copy of the MB, as produced by the Respondent, was not denied by the Petitioner. The Court is, therefore, unable to be persuaded to hold that the impugned order is vitiated by any perversity in the factual findings as regards Claim No.1.

14. Claim Nos. 2 and 3 relating to the return of the performance guarantee, security deposit and earnest money were only consequent upon the determination of Claim No. 1. Here again, the Court finds absolutely no error having been committed by the learned Arbitrator in allowing these two claims. As far as Claim No. 5 for interest is concerned, the learned Arbitrator has allowed only 9% interest which cannot be said to be unreasonable.

15. Consequently, no grounds have been made out for interference under Section 34 of the Act. The petition and the application are dismissed.

S. MURALIDHAR, J

OCTOBER 21, 2016

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