

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

% **Judgment Reserved on: 19th August, 2016**
Judgment pronounced on: 22nd August, 2016

+ **Arb. P. No.398/2015**

KRISHAN MURARI SHARMA & SONS Petitioner
Through Mr.R.Rajappan, Adv. with
Ms.Susmita Mahala, Adv.

versus

NEW DELHI MUNICIPAL COUNCIL & ANR. Respondents
Through Mr.Gaurave Bhargava, ASC

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The petitioner has filed the present application under Section 11 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the "Act") for an appointment of a sole Arbitrator to adjudicate the disputes arisen between the parties.
2. The brief facts of the case as per the petition are that the petitioner had entered into a contract with the respondents through a formal Agreement dated 10th November, 2009 vide Agreement No. 107/EE/BM-III/2009-10 for improvement of Palika Niwas Housing, Complex, Lodhi Complex SH: Renovation of Flats at Palika Niwas Housing Complex, Lodhi Colony.
3. The work was completed on 9th November, 2011. The bill was finalized on 29th August 2013. The case of the petitioner is that the entire payment for extra work was deducted in the alleged final bill and withheld various other dues against the terms of the contract.

4. The petitioner had therefore on 2nd January, 2015 invoked clause 25 of the Agreement raising the claims with the Executive Engineer and to the Superintending Engineer on 27th January, 2015. The matter was also referred to the Chief Engineer on 12th March 2015 putting forth the claims for consideration with a request to settle the same. The respondents in their reply refuted the claims of the petitioner and rejected the same by letter dated 31st March 2015.

5. The matter was referred to the Chairperson, NDMC for appointment of an Arbitrator on 13th April, 2015, however Arbitrator has not been appointed. Therefore, the present petition has been filed by the petitioner.

6. Reply on behalf of the respondents to the petition for appointment of an Arbitrator has been filed who have opposed the prayer very strongly.

7. It is stated in the reply that petition under Section 11 of the Act is not maintainable in terms of Clause 25 of the Agreement between the parties as the claim sought to be enforced by the petitioner/claimant is beyond the limitation stipulated therein. As regards the claim(s), if any, within 120 days from the date of receipt of payment or intimation in that regard, the present claim was made by the petitioner-claimant for the first-time on 2nd January 2015 after almost 1½ years of accepting full and final payment, on 30th August, 2013. As a result, in terms of the said Clause 25, not only is the petitioner deemed to have waived his claims/rights, but also stood discharged and released of all liabilities, under the contract in respect of these claims.

8. It is stated by the respondents that time-schedule specified in the said Clause 25 with respect to raising any dispute arising out of the work-agreement for resolution within the Department was also not strictly adhered to by the petitioner. Clause 25(i) provided for a reference by the contractor against any decision of the Executive Engineer to the Superintending Engineer, within 15 days of such decision. However, the decision dated 23rd January, 2015 of the Executive Engineer was not challenged by the contractor before the Superintending Engineer within 15 days thereof. Moreover, the petition did not appear before the Superintending Engineer on 16th March, 2015 to present his case, despite the same being specifically informed to the petitioner by the Superintending Engineer vide his letter dated 11th March, 2015. Clause 25(i) further provided for challenge to such decision of the Superintending Engineer by the contractor before the Chief Engineer within 15 days therefrom. In the present case, the detailed order having been passed by the Superintending Engineer on 31st March 2015, the same was not assailed by the petitioner before the Chief Engineer within 15 days, despite the Chief Engineer categorically informed the petitioner about issuance of such an order against him by the Superintending Engineer, vide his communication dated 13th April, 2015.

9. The petitioner submits that the work was completed on 9th November, 2011. The bill was finalized on 29th August, 2013 withholding an amount of Rs.31,43,179/- pending sanction of extension of time for the delay caused in the work from 19th February, 2011 to 9th November, 2011 for about 9 months. The extension of time was granted without levy of compensation and the amount of Rs.31,43,179/- was released on 15th May, 2014.

10. The petitioner submits that the acceptance of payment of bill given by the petitioner was under extreme financial duress owing to the dominant position enjoyed by them. The petitioner could not raise the disputes without clearing the extension of time due to the prejudice attitude of the respondent. The extension of time was granted and the amount of Rs.31,43,179/- was released on 15th May, 2014. The disputes for payment under clause 10C i.e. labour escalation was raised during the progress of work on 1st June, 2010, 7th May, 2011, 1st October, 2012, 4th September, 2013, 10th July, 2014, 14th July, 2014, 22nd August, 2014, 6th February, 2015 along with the details of claim of Rs. 35,10,262/-.

11. The petitioner states that the alleged bill as finalized on 29th August 2013 cannot be treated as final bill as huge amount of Rs. 31,43,179/- was withheld. For the purpose of clause 25 of the Agreement, the last payment can be treated as final payment which was made on 15th May, 2014.

12. The petitioner has given the details of their claims with the respondents as per letter dated 2nd January, 2015 and 6th February, 2015 after the alleged bill was finalized but before the release of the amount withheld therefore, the entire claims are within limitation and are also raised in time.

13. The petitioner no doubt had approached the respondent-NDMC on 10th July, 2014, i.e. after almost a year of receipt of final payment, making a claim of Rs.35,10,2621/- (present claim is for Rs.95 Lacs + 18% interest) under provision of Clause 10(c) which provided for payment on account of statutory increase in wages of labour etc. Though such claim was not supported by any documentary proof. Vide its communications dated 23rd July, 2014,

22nd August, 2014, 5th September, 2014, 3rd December, 2014 and 23rd December, 2014, the respondent-NDMC categorically informed the petitioner that the claim filed by it was beyond the stipulated limitation period, and thus, was time barred.

14. On 2nd January 2015, the petitioner again wrote to the Executive Engineer, made an enhanced claim for Rs.95 Lacs plus interest @ 18% and raised a fresh dispute in this regard. The Executive Engineer replied to the same on 23rd January, 2015 stating therein that the claim so made by the petitioner is beyond the stipulated limitation period of 120 days, thus not maintainable.

15. Despite the Executive Engineer having replied to the petitioner on 23rd January, 2015, a letter dated 27th January, 2015 was sent by the petitioner to the Superintending Engineer to look into the matter claiming that no action was taken by the Executive Engineer in respect of the claim made by the petitioner on 2nd January, 2015.

16. The petitioner has also filed an additional affidavit along with documents. Counsel for the petitioner submitted that the petitioner did raise its grievance after 29th August, 2013 within the prescribed period of time and the said letter was delivered by hand against receipt. Counsel for the respondents disputes the same and submitted that these documents filed along with affidavit are not genuine.

17. The petitioner has relied on the following documents in support of their claims by filing of an affidavit on 2nd May, 2016:-

- a. Letter dated 1st June, 2010: This letter was given to the junior engineer to Mr. Manoj Kumar Gupta, whose signature is affixed on the letter, who has marked this letter to the

Asst. Engineer. The copy of the said letter was obtained from the office of the respondent.

- b. Letter dated 7th May, 2011: This letter was given to the junior engineer to Mr. Manoj Kumar Gupta, whose signature is affixed on the letter, who has marked this letter to the Asst. Engineer. The copy of the said letter was obtained from the office of the respondent.
- c. Letter dated 1st October, 2012: This letter was given to the junior engineer to Mr. Manoj Kumar Gupta, whose signature is affixed on the letter, who has marked this letter to the Asst. Engineer. The copy of the said letter was obtained from the office of the respondent.
- d. Letter dated 4th September, 2013: This letter was given to Executive Engineer and dairy number 2-1905(E.E) B.M-III dated 4th September, 2013.
- e. Letter dated 10th July, 2014: This letter was given to office of the Executive Engineer received on 14th July, 2014 vide dairy no. R-1450/ (EE), BM-III.
- f. Letter dated 6th February, 2015: This letter was given to office of the Executive Engineer received on 6th February, 2015 vide dairy no. R- 336/ (EE), BM-III.

18. The respondent may have good case on merit about the challenge of genuineness of the document filed by the petitioner as well as on the issue of limitation. The said issues are the disputed question of facts which are to be decided by the Arbitral Tribunal.

19. Therefore, the prayer made in the present petition is liable to be allowed. The disputes raised by the petitioner in para 7 of the petition is to be adjudicated by the Arbitrator. Mr. S.K. Sarvaria,

retired District & Sessions Judge (Mobile No.9910384642) is appointed as the sole Arbitrator to adjudicate the disputes between the parties. The arbitration proceedings shall be conducted under the aegis of Delhi International Arbitration Centre ('DAC').

20. The Arbitrator to adjudicate the disputes arising out of the agreement in question between the parties including their claims and counter-claims.

The arbitration shall take place under the aegis of DAC. The Arbitrator shall ensure the compliance of the provisions of Arbitration and Conciliation (Amendment) Act, 2015 before commencing the arbitration. The fees of the learned Arbitrator shall be in terms of schedule of amended Act.

21. The petition is accordingly disposed of.

22. Copy of this order be given *dasti* to the learned counsel for the parties and a copy thereof be communicated to the learned sole Arbitrator and a copy be sent to the Additional Coordinator, DAC forthwith.

(MANMOHAN SINGH)
JUDGE

AUGUST 22, 2016