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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
R-303

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OMP 77/2010

**AZAD HIND COOPERATIVE GROUP HOUSING
SOCIETY LTD.**

..... Petitioner

Through: Mr P.S. Singh, Mr Pankaj Kumar Karan,
Advocates

versus

M/S HARCHARAN DASS GUPTA

..... Respondent

Through: Mr Virender Kumar Sharma, Advocate

CORAM: JUSTICE S.MURALIDHAR

ORDER

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14.02.2017

1. The challenge in this petition under Section 34 of the Arbitration & Conciliation Act, 1996 ('the Act') by the Petitioner Azad Hind Cooperative Society ('hereafter the Society'), is to the impugned Award dated 4th March, 2009 and the amended/corrected Award dated 14th September, 2009 passed by the learned Sole Arbitrator.

2. The disputes between the Petitioner Society and the Respondent M/s Harcharan Dass Gupta (hereafter 'the Contractor') arose out of an Agreement dated 12th September, 1996 between the parties whereby the Contractor was awarded the contract for construction of a housing complex comprising 104 dwelling units. The time for completion of the work was 27 months i.e. on or before 18th December, 1998. The value of the contract was

Rs.4,53,06,176. Mobilization charges of Rs.5 lakhs was given to the Contractor.

3. The disputes arose on account of the failure by the Society to make full payment of the 18th Running Account (RA) Bill of the Contractor for a sum of Rs.17 lacs. The 21st RA Bill was paid after 8 months and the 22nd RA Bill was not paid. In the circumstances, the parties entered into a Memorandum of Understanding ('MoU') on 19th July, 2002 wherein it was agreed that for the balance work, the Society would pay a sum of Rs.80,75,000 to the Contractor with no escalation.

4. In terms of the MoU, the work was to be completed by 18th November, 2002. However, the work continued even thereafter and was ultimately completed on 27th June, 2003.

5. The Contractor alleged that breaches were committed of the MoU by the Society. It was contended that the work was executed by the Contractor despite non-payment of the 22nd and 23rd RA Bills. The Contractor submitted the 24th RA Bill to the Architect who is stated to have returned it on the ground that the contract already stood terminated.

6. The disputes that arose between the parties came to be referred to the Sole Arbitrator. After completion of pleadings i.e. the claims, reply to the claim and the counterclaim and the reply thereto, the learned Sole Arbitrator framed as many as 11 issues of which Issue Nos. 7 and 8 were decided against the Society and in favour of the Contractor by directing that the Society should pay the Contractor a sum of Rs.22,33,593/-. The challenge in

the present petition by the Society is to the findings in respect of the Issue Nos. 1,7 and 8 which were considered together by the Sole Arbitrator.

7. Issue Nos. 1, 7 and 8 read as under:

“1. Whether the Claimant is entitled to the payment of 24th Final Bill in the sum of Rs.2,89,37,100 or other amount ?

...

7. Whether the MOU dated 19.7.2002 has ceased to exist, if so from what date and to what effect?

8. Whether the claimant did the work as per the MOU and, if so to what extent and what are the consequences?”

8. In the impugned Award the learned Sole Arbitrator came to the following conclusions on the aforesaid 3 issues:

- (i) After discussing various clauses of the MoU, it was held that the Contractor had received as many as 18 payments after the MoU was signed starting from 3rd August, 2002 till 21st April, 2003.
- (ii) The contention of the Contractor that the Architect advised him to send RA Bills not as per the MoU but the original Agreement was disbelieved as it appeared to be an afterthought. The Architect, had in fact, clarified by the letter dated 12th November, 2002 that the amounts certified for payment on 26th September, 2002 was not against the 23rd RA Bill but was to be adjusted against the final bill under the Agreement.
- (iii) The reading of paragraphs 2, 4 and 5 of the MoU harmoniously

left no matter of doubt that “the amount settled was inclusive of the work executed after the 22nd R/A bill i.e. what was to be claimed in 23rd R/A Bill.”. As per the terms of the contract, the Society was to pay only that amount which was certified by the Architect.

- (iv) After analyzing the documents placed on record, it was concluded that “the claimant received under the MoU a sum of Rs.48,41,407”.

9. Having answered the above issues in favour of the Society, in paragraph 21 of the Award, the learned Arbitrator observed as under:

“21. Having said that MOU did not cease to exist it remained alive, there is no question of claimant claiming 24th RA bill. As regard 23rd R/A bill that stood settled vide the MOU. At the same time we cannot lose sight of the fact that the claimant did execute the work at site till 10th July, 2003 i.e. till the contract was terminated. According to claimant, he completed the balance work as indicated in Annexure-1 of MOU, he would have got Rs.70,75,000/-, as against that he has been paid Rs.48,41,407/-. Thus, he would be entitled to the balance amount of Rs.22,33,593/- which will be subject to adjustment against the amount, if any, incurred by the respondent in purchase of material and for getting the work done at the risk of the claimant, if any. Order accordingly.”

10. By the impugned Award dated 14th September, 2009, the learned Arbitrator clarified that the amount to which the contractor was entitled to under the MoU was Rs.80,75,000. After adjusting the amount already paid to the Contractor, he was held entitled to Rs.32,33,593/-.

11. Mr P.S. Singh, learned counsel for the Society, assailed the above conclusion of the learned Arbitrator, which according to him was based on no evidence at all. After having held that the payment could be made to the Contractor only upon certification of the bills by the Architect, the learned Arbitrator simply deducted the amount already paid from the amount due under the MoU and granted the balance amount as such to the Contractor.

12. Mr Virender Kumar Sharma, learned counsel for the Contractor, on the other hand, pointed out that although there were RA Bills raised after the MoU which were certified by the Architect, the MoU itself entitles the Contractor to Rs. 80,75,000 for the balance work and, therefore, no error was committed in directing that after the adjustment of the amount already paid, the balance amount should be paid to the Contractor.

13. Having considered the above submissions and having examined the impugned Award, the MoU dated 19th July, 2002 and the other evidence on record, the Court is of the view that the crucial and operative part of the Award, as set out hereinbefore is based on no reasons whatsoever. There is no discussion of evidence on the basis of which the learned Sole Arbitrator came to the conclusion that the Contractor was entitled to the difference between the amount under the MoU and the amount already paid. Having concluded, on a proper analysis of various clauses of the MoU that the payments could be made even under the MoU only up to certification of the Bills of Contractor by the Architect, there was no question of learned Arbitrator simply awarding a sum of Rs.32,33,593/- without there being any material placed on record to certify the value of the work done by the

Contractor beyond 18th November, 2002 i.e. the original stipulated date of completion of work.

14. While it is true that contractor continued after 23rd July, 2003, it is another thing that the Contractor would be entitled to only such amount as was duly certified by the Architect. In the absence of such certification of the Architect, the question of awarding entire amount under the MoU was being paid to the contractor did not arise. This part of the Award is, therefore, based on no evidence whatsoever. This is apart from the fact that no reasons have been given by the learned Arbitrator for awarding the amount.

15. This Court, therefore, has no hesitation to set aside the impugned Award in respect of Issue Nos. 1,7 and 8. The corresponding award of interest on the said amount is also accordingly set aside.

16. The petition is disposed of accordingly but in the circumstances with no orders as to costs.

S.MURALIDHAR, J

FEBRUARY 14, 2017
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