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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 14.02.2017

+ FAO(OS) 43/2016

SHIV KUMAR WASAL & CO

...Appellant

versus

DELHI DEVELOPMENT AUTHORITY

... Respondent

AND

+ FAO(OS) 51/2016

SHIV KUMAR WASAL AND COMPANY

...Appellant

versus

DELHI DEVELOPMENT AUTHORITY

.... Respondent

Advocates who appeared in this case:

For the Appellant
For the Respondent DDA

: Mr Sanjay Goswami with Mr K. Bhimraj Achary
: Mr Dhanesh Relan with Ms Akshita Manocha

CORAM:

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE ASHUTOSH KUMAR

J U D G M E N T

BADAR DURREZ AHMED, J (ORAL)

1. These appeals arise out of the common judgment dated 23.12.2015 delivered by a learned Single Judge of this court in OMP No. 215/2014 and

OMP 297/2014 which were cross petitions under Section 34 of the Arbitration and Conciliation Act, 1996 filed by the appellant and the respondent respectively.

2. Essentially two points were urged before us. The appellant is aggrieved by the fact that the claim no.5/14 which had been allowed by the learned Arbitrator by virtue of the award dated 07.11.2013, was set aside by the learned Single Judge by the impugned judgment. The other point raised by the learned counsel for the appellant is with regard to the issue of pre-suit and pendente lite interest in respect of 9 claims which had been considered by the earlier Arbitrator by virtue of his award dated 03.10.2006.

3. Insofar as the claim no. 5/14 is concerned, this pertains to the watch and ward arrangement that the appellant had provided at the site till the handing over of the same to the respondent.

4. The submissions of the appellant (claimant) and the respondent as also the reasoning behind the award on this claim as noted in the award dated 07.11.2013 are as under:-

“CLAIM NO. 5/14 :-	The claimants claim a sum of Rs. 9,75,800/- on account of expenditure on watch and ward staff and charges for overseeing upto 31-10-1998 plus Rs.8700/- per month from 1-11-1998 onwards.
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Submissions by the claimants:-

The claimants relied on the submissions made under claim No. 4/13. The claimants further stated that the respondents vide letter dated 14-1-1995 desired to draw supplementary agreement for watch and ward of the completed work and also for execution of some finishing items. In the meanwhile a circular was also issued by the Engineer Member (exhibit C-27). The claimants vide letter dated 11-11-1997 (exhibit C-28) informed the respondents that the claimants were incurring expenses on watch and ward for the period since October, 1993. The reminder was also sent vide letter dated 30-7-1998 (exhibit C-29). The respondents vide letter dated 20-8-1998 directed the claimants to continue the watch and ward till an alternative arrangement is made. The claimants vide letter dated 31-8-1998 (exhibit C-31) intimated the respondents that 4 numbers of chowkidars are working on 12 hourly shift duty for watch and ward of flats. The supplementary agreement was drawn on 26-6-1999 (exhibit C-36). The agreement which was upto 4-7-2000 was further extended as intimated by the claimants vide letter dated 1-7-2000 (exhibit C-38). The respondents paid a sum of Rs.6,16,604/- vide cheque dated 28-6-1999 and further paid a sum of Rs.85,888/- on 27-3-2000. The claimants submitted the detail of the claim vide annexure C-5 and stated that they are entitled to payment of Rs.11,51,972/- for a period from 22-4-1994 to 31-3-2003 @ Rs.10,736/- per month which was approved by the respondents vide letter dated 22-6-1999 (exhibit C-35). The claimants stated that out of the sum of Rs.6,16,604/- +Rs.85,888/- =Rs.7,02,492/- the respondents recovered a sum of Rs.3,90,074/- vide letter dated 11-9-2006 (exhibit C-52). Therefore, the claimants are entitled to balance payment of Rs.8,39,554/- i.e. Rs.11,51,972/- (Rs.7,02,492 - Rs.3,90,074) =Rs.8,39,554/- The claimants specifically submit that watch and ward of the completed flats was done by the claimants after 22-

4-1994 till 31-3-2003 for which supplementary agreement was also drawn between the parties and a sum of Rs.7,02,492/- was also partly paid on the basis of supplementary agreement. No proof or details of security men employed by the claimants were ever asked by the respondents during the period because the payments were determined as per letter dated 22.6.1999. Since the respondents have not paid the full amount of watch and ward and have arbitrarily and illegally recovered a sum of Rs.3,90,074/- in October, 2006, the claimants are entitled to balance payment of Rs.8,39,554/- and requested the Ld. Arbitrator to award a sum of Rs.8,39,554/- in favour of the claimants. The claimants restricted this claim to the tune of Rs.8,39,554/- instead of Rs 9,75, 800/- during the hearing held on 23-8-2013 as per the details given in annexure C-5 filed by them.

Submissions by the respondents:-

The respondents stated that there is no provision in the agreement for making payment for watch & ward after completion of the work, The claimants withdraw this claim vide their letter No. SKWC/336 MIG Narela/99-00 dated 26-6-1999 (annexure D). The respondents further submitted that no renewal of supplementary agreement was done and therefore the claimants are not entitled to the claim. Moreover, the claimants did not file any evidence of pay slip, attendance register etc. The respondents also relied on the judgement in the case of MCD V/s Rakesh Bros, 2005 (2) RAJ 17 Delhi in this regard. It is significant to provide for documentary evidence in respect of such watch and ward. The claimants on this account holds no legal merit in the absence of adequate evidence. The respondents also rely on the case in the matter of G,D, Bhutani versus DDA vide which the Hon'ble High Court has held that in the absence of any wage register, no presumption can be drawn

that the contractor had really paid wages to the workforce as wages on this workforce had been employed at site.

The claimants also rely on the judgment in case of GD Tewari & Co. versus DDA reported as 2005(2)Arb. LR 241 (Delhi) in this context. The claimants further stated that the supplementary agreement was drawn between the parties on 26-6-1999 and in the agreement, it was stated that the balance work of white washing, painting, fixing of fittings etc. shall be executed at the time of actual handing over of the physical possession of flats. As per para 2(b), time for completion was 1 year which could be extended from time to time. It is also provided in the supplementary agreement that the original agreement remain in full force. The respondents had fixed the charges for watch and ward of 336 MIG houses at Rs.10,736/- per months. The claimants submit that the respondents had paid a sum of Rs.6,16,604/- on 28-6-1999 for watch and ward from 22-4-1994 for a period of about 57 months i.e. upto 1-6-1999. Further a sum of Rs.85,888/- was also paid on 27-3-2000 for watch and ward of 8 months period. As per details filed in annexure 5, the claimants are entitled to payment of watch and ward upto 31-3-2003 when the completed flats were handed over to the allottees. The respondents vide letter dated 26-5-2003 (exhibit C-49) intimated the claimants about certain discrepancy/defects and the said letter was replied by the claimants vide letter dated June 2003 (exhibit C-50). Regarding contention of the respondents that after expiry of supplementary agreement, no renewal of the agreement was done is factually incorrect, because the time was extended with mutual consent of the claimants were required to continue with watch and ward and to execute the balance items of works till handing over possession of flats. Therefore, there was implied extension of time. Further the contention of the respondents that there is no adequate evidence of pay slip, attendance register etc. is totally

misconceived because the respondents themselves agreed to pay Rs. 10,736/- per month, as such, contention of the respondents is liable to be rejected including the judgment in the case of MCD versus Rakesh Brothers is liable to be rejected.

AWARD:

After perusal of the records and on consideration of the documents, pleadings, submissions. Judgments referred to and arguments advanced by the parties, I find that the claimants were doing watch and ward of the completed flats till 31-3-2003 when the respondents could hand over the flats to the allottees. Whereas the work was actually completed on 22-10-1993 i.e. 10 years back. The contention of the respondents regarding production of evidence, such as pay slips, attendance register etc. at this belated stage is not justified particularly when the respondents had decided that a sum of Rs, 10,736/- per month shall be payable for watch and ward as per the approval of the respondents vide letter dated 22-6-1999 (exhibit C-35). The respondents were also making payments to the claimants without asking for evidence such as pay slips, attendance register etc. in the past. I therefore decide that the claimants are entitled to the claim and award a sum of Rs.8,39,554/- in favour of the claimants under this claim.”

5. It is evident from the above extract that the main point that was raised on behalf of the respondent was that the appellant could not get anything under this head unless and until the appellant provided evidence for the same such as pay slips, attendance register etc. in respect of the watch and ward staff employed at the site. The learned Arbitrator, however, noted that there was an agreement between the parties that a sum of Rs. 10,736/- per month would be payable for the watch and ward staff. In fact, this was part of the

supplementary agreement dated 26.06.1999 and also finds place in Schedule-B to the said agreement. The respondent was also found to have been making payments without asking for evidence such as pay slips, attendance register etc. in the past. Based on these considerations, the learned Arbitrator held that the appellant (claimant) was entitled to the award of a sum of Rs. 8,39,554/- under this head.

6. The learned single Judge, however, took the view that the appellant had not placed on record any evidence to prove that the watch and ward staff was deployed by the appellant on the site. The learned single Judge also noted that no pay slip, attendance register etc. had been placed on record of the Arbitrator in support of the claim. No invoices were also raised on the DDA and, therefore, in the absence of all this, the learned Single Judge held that the appellant was not entitled to claim no. 5/14 and that the finding of the learned Arbitrator relating to this claim was not based on evidence and was therefore set aside.

7. After having heard the learned counsel for the parties, and examining the award as well as the impugned judgment we find that the learned single Judge ought not to have interfered with the factual finding of the learned Arbitrator. This is so because the payment for watch and ward staff was not

dependent on the appellant producing any record of pay slips, attendance register etc. It was based on the supplementary agreement dated 26.06.1999 and Schedule-B thereof clearly stipulated, *inter alia*, that the watch and ward of the whole housing pocket would be there round the clock by providing chowkidars/ security guards and that the agency would be fully responsible for any theft/ pilferage from the completed housing pockets and would make good the same for which nothing extra would be paid. Against this item, the quantity indicated was 12 months and the unit was shown as 'per month'. The amount under the heading 'rate' was shown as Rs. 10,736/- and the same resulted in a total of Rs. 1,28,832/- for the entire period of 12 months. It is clear that the said supplementary agreement was initially for a period of 12 months and that the same got extended on a year to year basis and there were documents on record for establishing the same. It is, therefore, clear that the appellant was not required to produce any pay slip, attendance register etc. for receiving the payment of Rs. 10,736/- per month. All that the appellant was required to do was to ensure that the entire housing pockets which have been completed were under the watch and ward. And, in case there was any theft or pilferage, it would be the appellant's responsibility and the appellant would have to make good for the same without charging

anything extra for it. This the appellant admittedly did. Therefore, they were to be paid in terms of the supplementary agreement which stipulated monthly payment of Rs. 10,736/-. In view of the foregoing, the finding of the learned Arbitrator could not be held to be without any evidence or perverse in any manner. As such, in our view, the learned single Judge ought not to have interfered with the finding of the learned Arbitrator insofar as claim no. 5/14 was concerned. The finding of the Arbitrator is restored and that of the learned single Judge on this claim is set aside.

8. We now come to the second plea taken by the learned counsel for the appellant and that is with regard to the pre-suit and pendente lite interest in respect of the 9 claims which had been decided by the first Arbitrator by virtue of the Award dated 03.10.2006. It is pertinent to note that by an order dated 19.11.2012 passed by a learned single Judge of this court in OMP 76/2007 and OMP 266/2007 it was specifically provided that the Arbitrator shall look into 9 additional claims. One of the claims being claim no. 8/21 was also included. This claim was specifically with regard to pre-suit and pendente lite interest and future interest @ 18 % per annum. This was an omnibus claim of interest in respect of all the claims which included the earlier 9 claims and the remaining 8 claims before the second Arbitrator. We

may also point out that in the award dated 07.11.2013, out of these 9 claims, claim no. 1/5 was partly allowed, claim no. 4/13 was allowed in full and claim no. 5/14 was allowed to the extent of Rs. 8,39,554/-. In respect of these three claims, while considering claim no. 8/21, the learned Arbitrator by virtue of the award dated 07.11.2013 awarded pre-suit and pendente lite interest alongwith future interest @ 9 %. However, the learned Arbitrator did not grant any pre-suit and pendente lite interest for the claims which had been allowed under the award dated 03.10.2006. According to the learned counsel for the appellant this was a lacuna inasmuch as claim no. 8/21 not only covers the nine (9) additional claims which were referred by this court but also the earlier nine (9) claims which were decided by virtue of the award dated 03.10.2006. On the other hand, the learned counsel for the respondent pointed out that the award of interest is at the discretion of the Arbitrator. He also submitted that it is not the case that the learned Arbitrator did not consider the award of interest insofar as the earlier 9 claims were concerned but that after considering the same he has decided only to grant interest insofar as claim nos. 1/5, 4/13 and 5/14 were concerned.

9. We agree with the submissions made by the learned counsel for the respondent because on going through the award it becomes apparent that the learned Arbitrator considered claim no. 8/21 in entirety, that is, the question of pre-suit and pendente lite interest not only for the nine (9) additional claims but also for the nine (9) claims which had earlier been decided by virtue of the award dated 03.10.2006. Consequently, the finding of the learned Arbitrator on this aspect as also the learned single Judge insofar as claim no. 8/21 is concerned does not call for any interference.

10. The appeals are partly allowed as above. There shall be no order as to costs.

BADAR DURREZ AHMED, J

ASHUTOSH KUMAR, J

FEBRUARY 14 ,2017

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