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

+ **O.M.P. 264/2011**

CHIEF ENGINEER, DELHI ZONE, DELHI CANTT & ORS..... Petitioners
Through: Mr. Ruchir Mishra, Advocate.

versus

M/s. DAMYANTI BUILDERS Respondent
Through: Mr. Debasish Moitra, Advocate.

CORAM: JUSTICE S. MURALIDHAR

ORDER
% **07.02.2017**

1. The challenge in this petition by the Chief Engineer, Delhi Zone, Delhi Cantonment is to an Award dated 28th October, 2010 passed by the sole Arbitrator in the disputes between the Petitioners and Respondent M/s. Damyanti Builders arising out of a contract awarded by the Petitioners to the Respondent for carrying out repairs to some buildings at Delhi Cantonment. The tendered amount of the work is Rs.19,02,112. The schedule date of commencement of the work was 20th August, 1991 and the stipulated date of completion was 19th August, 1992. The actual date of completion was 30th September, 1997.

2. Before the learned Arbitrator seven claims were filed by the Respondent. Of these only Claim No.3, which was payment for the work actually done was awarded in favour of the Respondent but again only to an extent of Rs.4,45,679. Under Claim No.6 simple interest on the said sum at 9% per

annum for the period 1st October, 1997 to 27th October, 2010 amounting to Rs.5,24,361 was awarded. Further, costs of Rs.40,000 was awarded. The five counter claims of the Petitioners were rejected. In aggregate a total sum of Rs.10,10,040 was awarded in favour of the Respondent against all the claims. The Petitioners were asked to make the payment within two months failing which the Respondent was entitled to simple interest at 12% per annum on the said sum from the date of the Award till the date of payment.

3. The present petition has been filed by the Petitioners to the extent that the learned Arbitrator has partly allowed Claim No.3, interest under Claim No.6 and costs and has rejected all the counter-claims.

4. Mr. Ruchir Mishra, learned counsel appearing for the Petitioners first submitted that despite the fact that the tendered amount was Rs.19,02,112, the learned Arbitrator has proceeded on the basis that the value of the work was Rs.20,97,522 and this amounted to re-writing the contract. Secondly it is submitted that the finding in the impugned Award that the Petitioners were responsible for the delay in the execution of the work was contrary to the record. According to the Petitioners, it was the Respondent which had abandoned the work. It is submitted that before preparation of the final bill, the Respondent was repeatedly invited for the joint measurement but did not turn up. Therefore the figures in the final bill should have been treated as binding between the parties. Lastly, it is submitted that the counter-claims were wrongly rejected by the learned Arbitrator.

5. In reply it is submitted by Mr. Debasish Moitra, learned counsel appearing for the Respondent, that the Award sets out the detailed

calculation by which Claim No.3 was allowed to the limited extent of Rs.4,45,679. This was arrived at after deducting the amount incurred by the Petitioners for getting the left over work done. He submitted that given the limited scope of review of an arbitral Award under Section 34 of the Arbitration & Conciliation Act, 1996 (Act), it was incumbent on the Petitioners to show that the impugned Award was contrary to the fundamental policy of Indian Law. Reliance was placed on the decision in *McDermott International Inc. v. Burn Standard Company Limited* 2006(1) SCC 181 and *J.G. Engineers Private Limited v. Union of India & Anr.* (2011) 5 SCC 758. He further submitted that the delay occurred due to the Petitioners for which the Respondent was entitled to suitable extension of time (EOT). None of the counter-claims were tenable in law and therefore were rightly rejected by the learned Arbitrator.

6. A perusal of the impugned Award reveals that it is a detailed and reasoned one and refers to the evidence led by the parties and the governing law. It is significant that of the seven claims preferred by the Respondent only Claim No.3 has been allowed and that too in part and the corresponding simple interest at 9 % per annum has been awarded under Claim No.6. It is further noticed that in their reply to AA No.113/1998 filed by the Respondent in this Court, the Petitioners had claimed Rs.2,93,807 as counter-claim. They could not have made a counter-claim beyond the said amount.

7. The impugned Award notes that on behalf of the Respondent, two affidavits by way of evidence were filed. Likewise, the Petitioners filed two affidavits, one of them being the Surveyor of Works. Both witnesses were

cross-examined.

8. In the first place the learned Arbitrator concluded that time was not the essence of the contract since the contract itself provided for EOT. The decision in *Hind Construction Contractors v. State of Maharashtra 1979 (2) SCC 70* was referred to. Further it was noticed that the EOT was granted from time to time up to 15th July, 1994. A cancellation order issued on 25th January, 1995 was revoked on 25th November, 1995. The contract was finally cancelled by the Petitioners on 29th February, 2000.

9. As regards the question as to who was responsible for the delay in the completion of the work, the learned Arbitrator examined the records and the evidence led by the parties and came to the conclusion that it was the Petitioners who were responsible for the delay as they failed to supply Schedule B materials as and when demanded by the Respondent. The site of the work was situated in a restricted area of the Defence Department and there was no possibility of the Respondent removing such material outside the said area nor was there any allegation by the Petitioners to that effect. The learned Arbitrator examined the correspondence exchanged and held that both parties contributed to the delay. It is on this basis that the claims of the Respondent, except Claim Nos.3 and 6, have been rejected by the learned Arbitrator. Under Claim No.3, against the claimed amount of Rs.10,28,108 being the unpaid amount of the final bill, the learned Arbitrator has awarded only Rs.4,45,679.

10. The criticism that the learned Arbitrator has re-written the contract does not appear to be justified. Although the Respondent claimed that the value of

the work was Rs.21,42,155, after credit for old material and Rs.2,17,506 towards value of the left over work got done by the Petitioners, the value arrived at by the learned Arbitrator was Rs.18,79,994. The learned Arbitrator then examined the value of each of the items of work completed and allowed deductions in the total sum of Rs.14,34,337 being the aggregate of Schedule B stores, rent, cost of dismantled stores and amount paid against Running Account (R/A) Bill. It is only thereafter that the amount payable to the Respondent as Rs.4,45,679 has been arrived at by the Arbitrator.

11. In the considered view of the Court the above determination by the learned Arbitrator cannot be said to be contrary to the terms of the contract or to the evidence on record. In fact, the entire amount under Claim No.3 were not awarded by the learned Arbitrator.

12. As rightly pointed out by Mr. Moitra, none of the grounds under Section 34 of the Act have been made out by the Petitioners. As held in ***McDermott International Inc. v. Burn Standard Company Limited*** (*supra*) intervention of the Court is envisaged “in few circumstances only, like, in the case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators.”

13. As regards, who was responsible for the delay the learned Arbitrator has undertaken a detailed analysis of the evidence and rendered a factual finding in that regard. As pointed out in ***J.G. Engineers Private Limited v. Union of India & Anr.*** (*supra*), once the Arbitrator recorded a factual finding on consideration of the evidence/material that the Contractor was not responsible for the delay and that the termination was wrongful and that the

Petitioners were liable for the delay, the question of the Petitioners claiming any sum from the Respondent Contractor does not arise. Voluminous records were submitted by the parties and examined by the learned Arbitrator. The Award gives a detailed analysis of each claims with reference to issues framed.

14. None of the grounds under Section 34 of the Act have been made out by the Petitioners warranting interference with the impugned Award.

15. The rejection of the counter-claims of the Petitioners by the learned Arbitrator has also not been shown to be contrary to law.

16. For the aforementioned reasons, the Court does not find any ground made out for interference with the impugned Award.

17. The petition is dismissed but in the circumstances no orders as to costs.

S. MURALIDHAR, J.

FEBRUARY 07, 2017

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