

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

Date of Decision: October 10, 2017

+ **FAO(OS) (COMM) 173/2017 & C.Ms. 34005-06/2017**

DELHI DEVELOPMENT AUTHORITY Appellant
Through: Mr. Rajiv Bansal, Senior Advocate
with Ms. Kanika Singh, Ms. Vasudha Trivedi &
Ms. Kanika Singhal, Advocates

Versus

M/S N.N BUILDCON PVT LTD. Respondent
Through: Mr. V.K. Jhanji, Senior Advocate
with Ms. Jyoti Mendiratta & Ms. Deeksha
Kakkar, Advocates

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE SUNIL GAUR

S. RAVINDRA BHAT, J. (OPEN COURT)

1. The Delhi Development Authority (DDA) in this appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (*hereinafter referred to as 'the Act'*) challenges the decision of the learned Single Judge rejecting its petition under Section 34 of the Act. The petitioner had challenged the legality and correctness of the Award of the arbitral tribunal dated 02.02.2017.

2. The DDA had awarded the contract to the respondent (*hereinafter referred to as 'the Contractor'*) for construction of 920 EWA Houses at Siraspur (*hereinafter referred to as 'the work'*) on 29.12.2009 for a total negotiated sum of ₹40,12,33,062/-. The dispute arose on account of the

contractor's inability to continue with the work, which could not be performed on account of hindrances on the part of the DDA to hand over the entire site to it. The original period of contract for completion of the work was 30 months. It is a conceded fact that extension resulted in additional period of another 25 months for constructing 240 flats. The Contractor claimed additional amounts towards escalation/damages for the work done during the extended period. DDA cited a condition in the Contract- Clause 10CC as a bar for admissibility of such demand and rejected them. The Contractor therefore invoked the arbitration clause and proceeded for adjudication through the sole Arbitrator. The Tribunal by its Award directed DDA to pay the Contractor/ respondent a sum of ₹7,14,12,740/- with interest.

3. Aggrieved by the Award, DDA preferred a petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter "the Act") which was rejected by the Single Judge, who took note of the bar cited by the DDA i.e. Clause 10CC - "*no escalation shall be paid for the for work executed in extended Contract period even if extension of time is granted without any action under Clause-2.....*". The DDA cited judgments including *Ramnath International Construction (P) Ltd. Vs. Union of India* (2007) 2 SCC 453 and *Rajasthan State Mines & Minerals Ltd. Vs. Eastern Engineering Enterprises & Anr.* (1999) 9 SCC 283. It was principally contended that Clause 10CC contained a specific bar for grant of any additional amounts for extended periods and the Award was vitiated. The learned Single Judge analyzed those decisions but relied upon a decision cited by the Contractor- rendered by a Division Bench of this Court and upheld the Award granted by the Arbitrator. It was

substantially ruled by the learned Single Judge that the interpretation of the Contract is within the domain of the Arbitrator and the Court shall not ordinarily substitute its interpretation of the terms of the contract with that of the Arbitrator. Two decisions of Supreme Court in *Swan Gold Mining Ltd. Vs. Hindustan Copper Ltd.*, (2015) 5 SCC 739 and *National Highway Authority of India Ltd. Vs. Cementation India Ltd.*, (2015) 14 SCC 21 were relied upon for this purpose.

4. Learned Senior Counsel for DDA urges that the Single Judge fell into error in re-writing the contract. He pointedly referred to the observations in para 44 (g) of *Rajasthan State Mines (Supra)* to state that where the Tribunal proceeds to overlook or ignore the terms of the contract, which impinges the claims of the rival parties, it proceeds without jurisdiction, entitling the Court to interfere with that part of the Award. Learned Senior Counsel for DDA relied upon paragraph No.4.16, 4.17 and 4.18 of the Award to submit that despite the bar in Clause 10 CC, the Tribunal has virtually in this case read into the terms of the contract, something which was never contained in it and in fact never intended to be awarded by the DDA. In other words, submits learned Senior Counsel for DDA, that when the parties expressly agreed to the escalation claims for the extended period other than those permitted in the contract, the Tribunal could not have proceeded to dissect the condition with respect to performance of essential and non-essential items and grant damage with respect to one of them i.e. failure to adhere to the essential condition.

5. Mr. V.K. Jhanji, learned Senior Counsel for Contractor submitted that what was essentially claimed for the extended period- which was

almost equal to the logically contracted period, was only the claims towards escalation in price of raw materials and statutory increase in labour wages during that period. The relevant part of the Award in this regard was relied upon, which reads as under:-

“2.6 The claimant is claiming reimburse of expenditure incurred by the claimant due to prolongation of the contract duly approved by the respondent towards the escalation on account of rise in the prices of material and the statutory increase in labour wages during the extended period of contract. There is no denial of the fact that there is no delay attributable to the claimant, therefore, the claimant is entitled to payment towards escalation during the extended period of the contract. The claimant has written various letters towards payments for escalation by quantifying the damages in accordance with the well accepted formula provided by CPWD i.e. "the escalation can also be calculated by means of any other formula”.

6. It was further emphasized that the claimant had in fact led evidence in the form of letters and claims that were verified by the DDA official. It was further submitted that as against all the heads of claims made, the Arbitrator selected only some claims as essential and proceeded to award damages in respect of quantification towards those amounts. Learned Senior Counsel for the contractor relied upon a recent decision of the Supreme Court in *Assam State Electricity Board & ors. Vs. Buildworth Private Limited* 2017 8 SCC 146 in support of the contention that despite existence of a prohibited condition barring any escalation claim, if the Tribunal decides to grant an award on appreciation of individual facts, the Court would decline to interfere with that. Learned Senior Counsel for contractor also pointed out the Supreme Court's judgment in *P.M.Paul*

Vs. Union of India 1989 Supp (1) SCC 386.

7. It is apparent that the scope of the present appeal is narrow. It is to be decided as to whether the Award of approximately ₹7.2 crores to the Contractor, who had claimed that amount towards extended period of contract, is just and right in the context of DDA's submission that it flies in the face of Clause 10CC of the contract. Clause 10CC was noted and interpreted by the Tribunal; even the impugned order sets out that stipulation. It reads as follows:-

“10CC. If the prices of material (not being materials supplied or services rendered at fixed prices by the Department in accordance with clause 10 & 34 thereof) and/or wages of labour required for execution of the work increase, the contractor shall be compensated for such increase as per provisions detailed below and the amount of the contract shall accordingly be varied, subject to condition that such compensation for escalation in prices shall be available only for the work done during the stipulated period of the contract. No escalation shall be paid for work executed in extended contract period even if extension of time is granted without any action under clause-2 and also no such compensation shall be payable for a work for which the stipulated period of completion is 18 months or less. Such compensation for escalation in the prices of materials and labour, when due shall be worked out based on the following provisions.

(i)

(ii) ”

8. The relevant part of the Award, which deals with Clause 10CC and then proceeds to hold DDA liable, is extracted as under:-

“4.7 The Clause 10CC of Agreement stipulates that no escalation shall be paid for work executed in extended contract period even if extension is granted without any

action under Clause -2. The Claimant vide his letter dt. 19/11/2012 (exh-C-54) informed the Respondent that since the sites have been handed over late, they will not be able to continue with work (because of abnormal rise in cost of men & materials) beyond the stipulated period unless escalation is paid till actual completion. The Claimant further mentioned that if his request is not acceptable to department, he will be left with no other option but to stop the work on stipulated date-of completion and requested for closure of contract. It is observed that neither the Respondent closed the contract nor the Claimant stopped the work on stipulated date of completion presumably because case for payment of escalation beyond stipulated date of completion was under consideration with department. The Respondent vide letter dt.27/11/2013 (Exh-C-63) in reply to Claimants letter dt. 7/11/2013 informed that the case (escalation beyond stipulate period) is under consideration with higher authority and final outcome shall be intimated in due course. The case was finally rejected as intimated vide Respondent letter dt. 28/1/15 (Exh-C-95).

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4.15 As mentioned earlier, the Respondent sanctioned extension of time upto actual date of completion i.e. 15/11/2015 (involving total delay of 1063 days) without levy of compensation. Before sanctioning this extension of time an undertaking was given by Claimant that they will not claim liquidity damages for prolongation of contract, if extension is time is granted without levy of compensation (Exh - R-38). I find that in the performa for extension of time there is no such Clause requiring a Contractor to give any such undertaking. I find that this undertaking has been taken under coercion and is normally taken by officers of the department to save their own skin.

4.16 Clause 10CC of the Contract specifies that "No escalation shall be paid for work executed in extended contract period even if extension of time is granted without any action under Clause 2". The provision of this Clause is quite appropriate in a normal course where delay has taken place in some of the non-critical activities such as say structural drawing of one component of work such as staircase is not available when in such a case other works such as laying of roof or casting of RCC columns can be executed. On the other hand if a critical activity like site of works is not made available to contractor, the entire work comes to halt. It is a well established principle that no person can take advantage for non- fulfillment of a condition, the performance of which has been hindered by himself. It was the primary responsibility of the Respondent to handover the encumbrance free site to enable the contractor to execute the work. A delay of couple of months (say 2-3 months) is quite tolerable but a delay of more than 25 months for a contract period of 30 months is alarming and unjustified. It is the Respondent who committed breach of contract and in the process, the Claimant suffered losses on account of non-fulfillment of fundamental obligations by the respondent which resulted in extension of contract stipulated time and accordingly, I find that aforesaid Claim is admissible.

4.17 Reliance is also made on the Judgment on Civil Appeal No. 4906 of 2000 (Supreme Court) between K.N. Sathyapalan (dead) by LRS Vs State of Kerala and Anr. Which reads as

"20. Ordinarily, the parties would be bound by the terms agreed upon in the contract, but in the event one of the parties to the contract is unable to fulfil its obligations under the contract which has direct bearing on the work to be executed by the other party, the Arbitrator

is vested with the authority to compensate the second party for the extra costs incurred by him as a result of the failure of the first party to live upto its obligations....."

4.18 The current dispute has cropped up basically because Respondent, DDA was unable to fulfill its obligation of handing over encumbrance free site of works for 25 months, in a contract period of 30 months. Therefore the Claim of Claimant for escalation in the prices of materials and Labour during the extended period of contract is held justified. The quantum of Claim can be worked out by different methods such as Hudson formula or Eichleay formula. Financial effects for delay in completion can also be worked out by methods specified in the FIDIC, PWD or CPWD contracts. The procedure followed in CPWD contracts is quite popular and is followed by DDA under Clause 10CC in the current contract also. I therefore rely on the Clause 10CC of the contract for working out escalation in prices of materials and labour during the extended period of contract. "

9. DDA has emphasized in these proceedings that the observations in para 4.18 are to the effect that the procedure followed by CPWD is quite popular and it is also followed by DDA. It is a constant refrain that when the parties agreed upon a bar, there was no question of the Tribunal awarding escalation costs. The phraseology adopted by the Tribunal might lead one to conclude that what was awarded was something beyond the contract. However, it is not merely a conclusion in para 4.18 or some sentences that are to be considered. What is apparent from the extracted paras of the Award is that the Tribunal was aware that small delay, having regard to the overall extension of time agreed (3 months) was something within the contemplation of the parties as an extension under

Clause 10CC. However, when the delay was almost equivalent to the initial contract period, as in the present case, the understanding of the parties that such a bar would operate *ipso facto*, would break down. In this case, what circumstances indicate, which is undisputed, is that the claims were confined to escalation in wages and rise in price material for the extended period of time. Rise in wages is something that can be reasonably construed, which is not within the contemplation of the parties, because it occurs periodically in two to three years. So viewed, the arbitral tribunal's understanding that the extension upto three months or six months, as in the present case, was something that could be contemplated within the understanding of the parties is irreproachable. However, to accept that one of the parties should bear the cost of rise, beyond that period, especially when the rise of wages or other prices, could be significant, would not only be inequitable but would also be doing violation to the understanding or consensus *ad idem*.

10. In this context, the judgment cited by the Contractor in *Assam State Electricity Board (Supra)* is apt. In that decision, parties had agreed upon a quantitative cap, for satisfying any claim for escalation. The Tribunal had awarded a sum in excess to that amount. The Supreme Court upheld the Award observing as follows:-

13. The arbitrator has taken the view that the provision for price escalation would not bind the claimant beyond the scheduled date of completion. This view of the arbitrator is based on a construction of the provisions of the contract, the correspondence between the parties and the conduct of the Board in allowing the completion of the contract even beyond the formal extended date of 6-9-1983 up to 31-1-1986. Matters relating to the construction of a contract lie

within the province of the Arbitral Tribunal. Moreover, in the present case, the view which has been adopted by the arbitrator is based on evidentiary material which was relevant to the decision. There is no error apparent on the face of the record which could have warranted the interference of the court within the parameters available under the Arbitration Act, 1940. The arbitrator has neither misconducted himself in the proceedings nor is the award otherwise invalid.

14. The view which has been adopted by the arbitrator is in fact in accord with the principles enunciated in the judgments of this Court. In P.M. Paul v. Union of India [P.M. Paul v. Union of India, 1989 Supp (1) SCC 368], a Bench of two learned Judges of this Court has held that: (SCC p. 372, para 12)x

“12. ... Escalation is a normal incident arising out of gap of time in this inflationary age in performing any contract. The arbitrator has held that there was delay, and he has further referred to this aspect in his award. ... After discussing the evidence and the submissions the arbitrator found that it was evident that there was escalation and, therefore, he came to the conclusion that it was reasonable to allow 20% of the compensation under Claim I, he has accordingly allowed the same. This was a matter which was within the jurisdiction of the arbitrator and, hence, the arbitrator had not misconducted himself in awarding the amount as he has done.”

This Court held that the contractor was justified in seeking price escalation on account of an extension of time for the completion of work. Once the arbitrator was held to have the jurisdiction to determine whether there was a delay in the execution of the contract due to the respondent, the latter was liable for the consequence of the delay, namely, an increase in price.

11. Having regard to the above discussion, this Court is of the opinion that the Award of ₹7,14,12,740/- with interest is not contrary to the terms of the contract and that Clause 10CC was properly interpreted. Furthermore, this Court is in agreement with the Single Judge's observation with respect to the interpretation of contract by the Tribunal as well as extremely narrow and limited jurisdiction available under Section 34 of the Arbitration and Conciliation Act, 1996, which is further circumscribed by the terms of appellate jurisdiction inferred under Section 37 of the Act.

12. For the above reasons, this appeal is not merited and is therefore dismissed.

13. The appeal and pending application also stand disposed of.

**S. RAVINDRA BHAT
(JUDGE)**

**SUNIL GAUR
(JUDGE)**

OCTOBER 10, 2017

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