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

\+ **O.M.P. 106/2008**

M/S MEHAR SINGH SAINI ..... Petitioner

Through: Mr. Vivekanand, Advocate. (M:9810149231)

versus

DELHI JAL BOARD & ANR. ..... Respondents

Through: Mr. Amit Sharma, Advocate for R-1. (M:9811138858)

CORAM:
JUSTICE PRATHIBA M. SINGH

<u>O R D E R</u>

% **02.08.2018**

1. The present petition has been filed challenging the corrected award dated 19th December, 2007 passed by the Ld.Sole Arbitrator. The case has a long chequered history. Initially, award dated 5th May, 2007 was passed, in which Claim No.1 was allowed by the Arbitrator in the following terms.

> "........................
> *Hence under Claim No.1 for value of work done and recorded in the MB at page 085 of MB 13987, I award the following amount to the claimant.*
> *Value of work as recorded in VI RA bill*
> *Rs.49,38,842/-*
> *Add for deductions made but awarded by me.*
> *20% of item 19 Rs. Nil*
> *10% of item 32. Rs. 37,819/-*
> *Third party inspection Rs.10,29,951/-*
> *Finalising various items Rs.3,00,000/-*
> *Deductions for deviations Rs.44,539/-*
> *Total Rs.14,12,309/-*
> *I therefore award a sum of Rs.14,12,309/- (Rupees Fourteen lacs twelve thousand three hundred nine only) against the deductions shown in the VI running bill. <u>The final value of the bill after adding the amount</u>*

> *of Rs.49,38,842/- for work done as recorded in the MB will now amount to Rs.63,51,151/- which becomes payable to the claimant for the work done by him.* "

2. Thus, the entire amount of Rs. 49,38,842/- was awarded as part of Claim no.1. Claim No.8, which related to interest, was also allowed in the following terms.

> "*I therefore award the claimant Rs.27,15,320/- (Rupees twenty seven lacs fifteen thousand three hundred and twenty only) as interest at 12% from 16/05/04 upto date of award on the sum of Rs.76,47,317/- awarded to the claimant. I also award the claimant future interest at 14% (as interest rates are now higher) on the awarded amount from date of award till actual date of payment or decree whichever is earlier in case payment is delayed by the respondent beyond 75 days from date of award.*"

3. A review petition was moved by the Delhi Jal Board on 15th May, 2007 wherein it was pleaded that there was a computational error and that some amounts had been paid. In this review application, correction of Claim No.8 was sought by the Delhi Jal Board. The said review application was disposed of by the Sole Arbitrator on 17th May, 2007 in the following terms.

> "*There is no doubt that amount legitimately due to the claimant is with the department. Besides delay in making timely payments during the progress of work, payments have been kept pending even after the completion of the work and till the start of arbitration proceedings. The claimant is therefore entitled to damages by way of interest. After rescinding the contract on 16/02/04, the respondent should have finalized the amount of withheld items and completed all formalities of payment within three months.*

I therefore award the claimant Rs.9,61,693/- (Rupees nine lacs sixty one thousand six hundred ninety three) as interest at 12% from 16/05/04 upto date of award on the sum of Rs.27,08,475/- awarded to the claimant under claims 1, 2 & 4). I also award the claimant future interest at 14% (as interest rates are now higher) on the awarded amount from date of award till actual date of payment or decree whichever is earlier in case payment is delayed by the respondent beyond 75 days from date of award."

4. Thus, the Ld. Arbitrator had deducted the amount of Rs.49,38,842/- from the sum awarded earlier in Claim no.1. By the Review order, in effect, claim no.1 was modified, though only modification of claim no.8 was sought by Delhi Jal Board. The Petitioner was aggrieved by the reduction of Claim No.1 from Rs.76,47,317/-to Rs.27,08,475/-. This came to be challenged by the Petitioner in OMP No.452/2007. In the said OMP, submission of the Petitioner was that in the review application, the Arbitrator could not have changed the amount awarded in Claim No.1. The said matter came to be remanded by this Court vide order dated 6th November, 2007. Vide the said order, the petition was allowed to file a reply to the review application and the Arbitrator was to consider the review afresh. Finally, in the review application, the learned Arbitrator reiterated the correction in the following terms.

"…….

The respondent had prepared a bill amount to Rs.49,38,842 payable to the claimant after withholding amounts for some items and had paid the bill after making deductions as required. I had awarded an additional amount of Rs.14,12,309/- for the withheld items as indicated in Claim No.1 (making a total of the bill to Rs.63,51,151/-). Thus the claimant is entitled to

payment of interest on unpaid amount of Rs.14,12,309/- in addition to other amounts decreed by me (total Rs.27,08,475/-) and not on Rs.76,47,317/- (Rs.49,38,842 + 27,08,475).
After hearing both parties, my decision is that the corrigendum issued by me in respect of the computation error in Claim no.8 is correct and justified."

5. The entire confusion seems to have been arisen because of the fact that the amount of Rs.49,38,842/- which was awarded, was not fully paid by the Respondent. The said amount included various taxes and penalty, which was imposed by the Respondent No.1 on the Petitioner. Computation of the same is contained in the reply filed by the Respondent No.1 at page 43. Paras 2 & 3 of the said reply clearly clarify the position.

"2. *The respondent say that Rs.49,38,842/- has been paid vide MB No.13987 on 28.07.2004. The details are given on the bottom left side of MB 13987 at Page 085, Annexure R1. However the details are reproduced as under*
1. Security:- Nil
2. 2% Income tax 4938,481.65 98777.00
3. 5% surcharge on 98777.00 4939.00
4. 2% w.c. tax on 49,38,841.65 98777.00
5. N.S.L.R. 18/05/06 to 16/02/04
18X50 900.00
6. Penalty under clause – 2@ 10%
of estimate cost 3,12,30,579.00 31,23,000.00
33,26,393.00
3. After making the deductions of Rs.33,26,393/- from Rs.49,38,842/- the balance amount of Rs.16,12,449/- was paid to the petitioner on 28.07.2004 vide cheque no.451221."

6. Thus, according to the Respondent, the amount of Rs.49,38,842/- was

not payable as several amounts were deducted due to taxes, statutory dues and penalties. Further the sum of Rs. 16,12,449/- was payable which was already paid. Learned counsel for the Respondent No.1 submits that imposition of penalty under clause 2 was never challenged by the Petitioner and hence the deduction made by the Respondent No.1 was accepted and cannot be reopened by the Arbitrator or by this Court in the present section 34 petition.

7. The only question is therefore the amount of Rs.33,26,393/- was correctly withheld. There is no dispute that Rs.16,12,449/- has in fact been paid. In the said amount of Rs.33,26,393/- the withholding made in respect of taxes, statutory dues etc., is not disputed. The dispute has narrowed down to the withholding of the penalty amount of Rs.31,23,000/-. It is the admitted position on record that the penalty of Rs.31,23,000/- was imposed due to delay in the execution of work. Ld. Arbitrator in the original award dated 5th May, 2007 has come to the conclusion that there was no delay on behalf of the contractor and the delay is attributable to the Respondent. Relevant portion of the said award is as under:

> *"I therefore agree with the claimant, that there has been default on the part of the respondent in not giving necessary sites for starting the work in the initial stages, which resulted in delay in execution"*

It is clear that if the delay is not due to the Petitioner, no penalty could have been imposed on the Petitioner on this count.

8. No other ground has been argued before this Court justifying non-payment of the sum of Rs.31,23,000/-. In fact, out of Rs.49,38,842/-, Rs.16,12,449/- stands paid. Thus the outstanding amount is Rs.31,23,000/-. Since the finding of the arbitrator that the delay is due to the defaults by the

Respondent is not under challenge, withholding of the amount of penalty is untenable.

9. In conclusion, the amount of Rs.31,23,000/- is added to the sum of Rs.27,08,475/-. With this modification, the award is upheld.

10. Petition is disposed of in the above terms. All pending IAs are disposed of. No order as to costs.

PRATHIBA M. SINGH, J.

AUGUST 02, 2018/*dk*