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

\+ **O.M.P. 198/2008**

GOVT. OF N.C.T. OF DELHI ..... Petitioner
Through: Mr. Gurman Chahal, Advocate.

versus

M/S ARIES CONSTRUCTION CO. PVT. LTD. & ORS. A+ ..... Respondents
Through: Ms. Tannya Sharma, Advocate for Respondent No.1. (M-9643781288)

CORAM:
JUSTICE PRATHIBA M. SINGH

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

% **31.07.2018**

1. Pursuant to a tender dated 10th March, 2003 floated by the Petitioner, Respondent No.1 submitted its bid for work relating to *"Construction of Fire Station & Residential Qtrs"* at Dwarka, New Delhi. The estimated cost of the work was Rs.2,15,35,826/-. The bid of Respondent No.1's tender was accepted and the time for completion of the work was 15 months. Due date was stipulated as 19th October, 2004.

2. It is averred by the Petitioner that Respondent No.1 failed to achieve the pace of work as stipulated, due to which there was delay in completion of the work, and it could only be completed on 28th February, 2005. The Respondent No.1, on the other hand, claimed that it was all throughout ready and willing to carry out the work expeditiously, and was in fact endeavouring to earn the bonus for early completion as prescribed in the contract. It alleges that it was in fact, the Petitioner who failed to perform its

periodic obligations under the contract, and hence the delay in completion was attributable to the Petitioner. Moreover, after the completion of work, the Petitioner unilaterally prepared the final bill, without considering the amounts payable to Respondent No.1. Accordingly, Respondent No.1 invoked the arbitration clause under the agreement.

3. The Ld. Arbitrator, in his award dated 17th October, 2007 and additional award dated 3rd November, 2007, granted various claims in favour of the Respondent. Each of the claims and the objections relating thereto are discussed hereinbelow:

a) **Claim No.1:** The Ld. Arbitrator granted interest @10% p.a. on Rs.40,000/- from 4th March, 2006 to 9th February, 2007 and on Rs.90,000/- from 4th March, 2006 to 2nd March, 2007. The Ld. Counsel for the Petitioner submits that no interest is payable as the amount of Rs.1,30,000/- was withheld from the proposed final bill with the consent of Respondent No.1, which was later released to him on finalisation of Q.C. Admittedly the amount of Rs.1,30,000/- was withheld while making the payment of the final bill on 4th March, 2006. The payment of Rs.1,30,000/- was made in two tranches i.e. Rs.40,000/- on 9th February, 2007 and Rs.90,000/- on 2nd March, 2007. The Arbitrator has merely awarded interest for the period during which the payment was incorrectly withheld. Thus, there is no error in award of claim No.1.

b) **Claim No.2:** This claim relates to award of bonus under clause-2A of the agreement. The admitted position is that the stipulated date of completion was 19th October, 2004 and the actual date of completion was 28th February, 2005. However, during the execution of the work, additional work to the tune of Rs.70,93,286/- was awarded to the contractor, which constitutes almost an additional 36% over the original contracted amount. Thus there was substantial additional work that was awarded. The Ld. Arbitrator has accordingly proportionately calculated the time by which the completion ought to have been done and held that the contractor is entitled to additional time and if the original work plus additional work is considered together, the work has been executed in fact ahead of time. Accordingly, under clause-2A, the Arbitrator awarded a sum of Rs.4,20,073/- which is completely justified and warrants no interference.

c) **<u>Claim No.3:</u>** The allegation of the Petitioner is that the contractor had not made a claim as per clause 12.2 and only if he had made a claim, the engineer was supposed to apply the market rate. The contractor had not to merely make claims but also give the proper analysis for the work which he had carried out. The submission of the Petitioner is that as recorded in the award of the arbitrator, the contractor had not demanded the market rates and, therefore, the claim relating to market rates ought not to be granted. Learned counsel for the Respondent No.1, on the other hand, argues that the Petitioner has, blown hot and cold as, on the one hand, adopted reduced market rates where it suits it, and where the market rates have gone up, has raised an objection unnecessarily. Clause 12.2 reads as under:

> *"In the case of extra item (s), the <u>contractor may</u> within fifteen days of receipt of order or occurrence of the item(s) claim rates, supported by proper analysis, for the work and the engineer-in-charge shall within one month of the receipt of the claims supported by analysis, after giving consideration to the analysis of the rates submitted by the contractor, <u>determine the rates on the basis of the market rates and the contractor shall be paid in accordance with the rates so determined</u>.*

> *<u>In the case of substituted items, the rate for the agreement item (to be substituted) and substituted item shall also be determined in the manner as mentioned in the aforesaid para</u>.*
> *(a) If the market rate for the substituted item so determined is more than the market rate of the agreement item (to be substituted), the rate payable to the contractor for the substituted item shall be the rate for the agreement item (to be substituted) so increased to the extent of the difference between the market rates of substituted item and the agreement item (to be substituted).*
> *(b) If the market rate for the substituted item so determined is less than the market rate of the agreement item (to be substituted), the rate payable to the contractor for the substituted item shall be the rate for the agreement item (to be substituted) so decreased to the extent of the difference between the market rates of substituted item and the agreement item (to be substituted).*
> *In the case of contract items, substituted items, contract cum substituted items, which exceed the limits laid down in schedule F, the contractor may within fifteen days of receipt of order or occurrence of the excess, claim revision of the rates, supported by proper analysis for the work in excess of the above mentioned limits, provided that if the rates so claimed are in excess of the rates specified in the schedule of quantities, the Engineer-in-Charge shall within one month of receipt of the claims supported by analysis, after giving consideration to the analysis of the rates submitted by the contractor, determine the rates on the basis of the market rates and the contractor shall be paid in accordance with the rates so determined".*

A perusal of clause 12.2 shows that the contractor is not obliged to make a claim and the word used is "*may*". This would however not mean that if there is no claim, the arbitrator cannot apply the market rates. The principle of applying market rates in respect of additional work, deviations and extra items cannot be given a go-by. The Arbitrator has analysed the various items individually and has considered the quantities that have deviated beyond the deviation limits and thereafter reduced the sum of Rs.27,51,033/- to Rs.24,84,260/-. The analysis of the Arbitrator is logical, cannot be faulted with and no interference is called for.

d) **Claim No.4:** This is a claim relating to increase in the wages paid to labour. Admittedly as per clause 10-C, the contractor had to give notice of any change in the wages payable to labour. The Arbitrator has recorded at page 10 of the award in point no.6 under claim No.4 that no notice was given by the contractor. Clause 10-C is set out herein below: -

> *"If after submission of the tender the price of any material Incorporated in the works (not being a material supplied from the Engineer-in- Charge's stores in accordance with Clause 10 thereof) and/or wages of labour increases as a direct result of the 'Coming into force of any fresh law, or statutory rule or order (but not due to any changes in sales tax) and such increase in the price and/or wages prevailing at the time of the last stipulated date for receipt of the tenders including extensions if any for the work, and the contractor thereupon necessarily and properly pays in respect of that material (Incorporated in the works) such increased price and/or in respect of labour engaged on the execution of the work such increased wages, then the amount of the contract shall accordingly be varied and provided further that any such increase shall not be payable if such increase if such increase has become operative after the stipulated date of completion of the work in question.*

If after submission of the tender, the price of any material incorporated in the works (not being a material supplied from the Engineer-in-charge's stores in accordance with Clause 10 thereof) and/or wages of labour is decreased as a direct result of the coming into force of any fresh law or statutory rules or order (but not due to any changes in sales tax) and such decrease in the prices and/or wages prevailing at the time of receipt of the tender for the work, Government shall in respect of materials incorporated in the works (not being materials supplied from the Engineer-in-Charge's stores in accordance with Clause-10 thereof) and/or labour engaged on the execution of the work after the date of coming into force of such law statutory rule or order be entitled to deduct from the dues of the contractor such amount as shall be equivalent to the difference between the prices of the materials and/or wages as prevailed at the time of the last stipulated date for receipt of tenders including extensions if any for the work and the prices of materials and/or wages of labour on the coming into force of such law, statutory rule or order.

The contractor shall, for the purpose of this condition, keep such books of account and other documents as are necessary to show the amount of any increase claimed or reduction available and shall allow inspection of the same by a duly authorised representative of the Government, and further shall, at the request of the Engineer-in-Charge may require any documents so kept and such other information as the Engineer-in-Charge may require.

The contractor shall, within a reasonable time of his becoming aware of any alteration in the price of any such materials and/or wages of labour, give notice thereof to the Engineer-in-Charge stating that the same is given pursuant to this condition together *with all information relating thereto which he may be in position to supply".*

4. Point No. (vi) under Claim 4 of the Arbitrator's award is also set out below: -

> "*(vi) It is also a fact that as per clause 10-C of Agreement, contractor has to give notice to Engineer-in-charge for such claim. Claimant has not produced any document indicating that he made any such reference, although he has made statutory payments to labour and submitted Labour Clearance Certificate.*"

5. As per the above clause, the Contractor had to not only give notice of such increase in wages as also give inspection to establish that the increased wages have been actually paid. Since no claim was made by the Contractor and no notice was gien, which was a pre-condition under the above clause, the award of Rs.1,50,000/- as an ad hoc amount, as against the claimed amount of Rs.5,78,000/- is not justified. The same is accordingly set aside.

e) **Claim No.5:** The challenge is not pressed.

f) **Claim No.6:** This is a claim in respect of watch and ward of the building for a period of 7 months. The total claim for the same is Rs.92,400/-. In respect of watch and ward services, the claim was to the tune of Rs.92,400/- between the period 1st March, 2005 to 1st October, 2005. The contractor claims that he had to keep the watch and ward services as the Department was not taking over the site due to lack of power connection. The Arbitrator awarded 1/3 of the claimed amount i.e. Rs. 36,200/. Admittedly, the date of completion is 28th February, 2005 and the completion certificate was issued on 10th October, 2005 after which the

Department took over the site. The Arbitrator's award is quite reasonable and does not warrant any interference.

g) The Petitioner submits that the nil awards in respect of claim Nos.7, 8 and 9 are challenged in the present petition but not pressed as the same are nil awards.

h) **Claim No.10**: This is a claim for interest to be granted for all the aforementioned claims @18% p.a. w.e.f. 28th August, 2005 i.e. from due date of the Final Bill. The Ld. Arbitrator awarded interest on the total sum of Rs.31,23,382, at 10% p.a. from 1st July, 2006 i.e., from date of reference to Chief Engineer, PWD, Zone I for appointment of an Arbitrator, to the date of payment. The interest amount is modified to 8% simple interest per annum from date of filing of claims before the Ld. Arbitrator till date. The amount shall be payable within 12 weeks. Upon the expiry of 12 weeks, 6% simple interest per annum would be payable on the entire decretal amount.

i) **Claim No.11**: Legal costs have been granted for an amount of Rs. 35,000/-. Considering the fact that the tender was floated and works were awarded almost 13-14 years ago and the award is more than ten years old, the costs are justified and are not liable to be interfered with.

6. The petition is disposed of in the above terms, with no order as to costs. All pending applications also stand disposed of.

PRATHIBA M. SINGH, J.

JULY 31, 2018

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