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

Date of decision: 9th March, 2018

O.M.P. (COMM) 108/2018

GOVERNMENT OF NCT OF DELHI & ANR. Petitioners
Through Ms.Hetu Arora Sethi, ASC

versus

K.B.G. ENGINEERS Respondent
Through Nemo.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

IA No.3302/2018 (Exemption)

Allowed, subject to all just exceptions.

IA No.3301/2018

This is an application seeking summoning of the Arbitral Record. As the petition is itself being disposed of, the application is dismissed as infructuous.

O.M.P. (COMM) 108/2018 & I.A. Nos.3300/2018, 3299/2018

1. The petitioner has filed this petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') challenging the Arbitral Award dated 01.11.2017 passed by the Sole Arbitrator in the arbitration proceedings between the parties.
2. The disputes between the parties arose out of the contract for "Revamping of wall along both sides of the Najafgarh Drain from Kakraula

to Basaidarapur Bridge, i.e. RD 30180M to RD. 45316M”. The schedule date of completion of the work was 03.08.2008, however, the work was foreclosed on the alleged account of delay and deficiency in service by the petitioner on 03.12.2009.

3. The petitioner challenges the Arbitral Award whereby the levy of liquidated damages by the petitioner has been held to be not maintainable. Relying upon the Clause 2 of the Agreement between the parties, the learned counsel for the petitioner submits that the decision of the Superintending Engineer on the issue of delay and the consequential levy of liquidated damages was prescribed to be final and binding on the parties and therefore, could not have been made a subject matter of arbitration.

4. I am afraid that I cannot accept the said argument of the learned counsel for the petitioner. While it is true that Clause 2 of the Agreement prescribed that the decision of the Superintending Engineer shall be final and binding, it would always be subject to a challenge in an appropriate proceedings, and in this case the arbitration.

5. In *KSS KSSIPL Consortium v. Gail (India) Limited*, (2015) 4 SCC 210, the Supreme Court held that merely because a decision of the Superintending Engineer is said to be final and binding in the agreement, the same cannot foreclose the right of the party to the contract to challenge the same by way of an appropriate proceeding. It is not the contention of the learned counsel for the petitioner that the decision of the Superintending Engineer was presented as an ‘excepted matter’ for arbitration in the agreement. It is also of some significance to note that though the contract had been foreclosed on 03.02.2009, the Show Cause Notice for levy of damages was issued by the petitioner to the respondent only on 11.02.2015

after the disputes had arisen and the respondent had also filed its claim before the Arbitral Tribunal. The Arbitrator, in the Impugned Award has also considered the various reasons for the delay in the work and held that the petitioner had failed to prove the reasonability or rationality of the amount of extension of 169 days arising out of an admitted delayed decision on its part. The Arbitrator has further relied upon the correspondence addressed by the respondent to the petitioner pointing out the delay in handing over of the site, delay in making available required drawings/designs etc. and held that these complaints remained unresponded by the respondent and it is also not shown by the petitioner that these delays were considered by it while deciding the quantum of extension of time, except for the delay in giving the decision about the raising of wall by Hollow Blocks.

6. The Arbitrator concludes that the delay till the date of foreclosing was primarily attributable to the petitioner. This being a finding of fact, this Court cannot sit on appeal over the same as held by Supreme Court in *Associate Builders v. Delhi Development Authority*, (2015) 3 SCC 49. In any case, the learned counsel for the petitioner has been unable to show how any of these finding can be said to be perverse or unreasonable.

7. The second challenge of the petitioner to the Impugned Award is under Claim Nos. 2 and 3 in favour of the respondent.

8. Claim No. 2 is with respect to the payment of the amount on account of escalation in rates of labor notified by Delhi Government under Clause 10-C of the Agreement. While granting this claim, the Arbitrator has held that significant amount of extra work was executed by the respondent under the contract. The Arbitrator has also taken note of the fact that the petitioner

has considered the claim of the respondent for escalation only uptill 11th RA Bill, which is corresponding to the work done within original stipulated date of completion, whereas such payment should have been considered for the work executed upto 07.02.2009. The Arbitrator has awarded a sum of Rs.4,22,347/- in favour of the respondent on this claim.

9. As far as the Claim No.3, which was for payment under Clause 10-CA of the agreement due to increase in the cost of cement and steel on the rates notified by the Government of India, the Arbitrator records that the petitioner itself has considered such claim to be Rs.1,70,899/-, which it had sought to adjust against the liquidated damages that are levied on the respondent. The Arbitrator further records that the petitioner had allowed such claim only till the original stipulated date of completion, however, it has been held that the respondent was entitled to an extension of time, and consequently for further escalation. The Arbitrator accordingly has awarded an amount of Rs.3,63,182/- in favour of the respondent, with regard to this claim.

10. I do not find the finding of the Arbitrator to be incorrect in any manner. As noted, the Arbitrator has based his finding on the calculations given by the petitioner and the basic challenge of the petitioner that the respondent was entitled to such claim only till the original date of completion of the work and not for the extended period, was found to be incorrect by the Arbitrator.

11. The findings of the Arbitrator on the respondent's entitlement to extension of the work has been found to be justified and challenge thereto has been rejected by the herein above. Consequently, I find no merit in the objection raised against the grant of Claim Nos. 2 and 3 as well.

12. Accordingly, I find no merit in the petition and the same is dismissed.
13. As the petition has been considered on merit, I have not gone into the question of sufficiency of cause or otherwise claimed by the petitioner for the delay in filing of the present petition.
14. There shall be no order as to cost.

NAVIN CHAWLA, J

MARCH 09, 2018/Arya