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

Date of decision: 28th August, 2018

+ **CS (OS) 1549/2014 & I.A. 16253/2015**

PRAMOD GUPTA Plaintiff

Through Mr. Vivekanand, Advocate.
(Mob. 9810149231)

versus

CEMENT CORPORATION OF INDIA & ANR Defendants

Through Mr. Ravi Sikri, Sr. Advocate with Mr.
Kailash Pd. Pandey and Mr. Deepak,
Advocates.

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The present suit has been filed by the Plaintiff under Section 14 and 17 of the Arbitration Act, 1940. The Defendant – Cement Corporation of India, has filed objections to the award under Sections 30 and 31 of the 1940 Act.
2. A contract relating to interior/construction work for the Cement Corporation of India Complex was awarded to the Plaintiff on 4th July, 1988. The work was to be completed within 12 weeks i.e. 3th October, 1988. Extensions were sought and were granted. According to the Defendants, extensions were required because of the Plaintiff's defaults but according to the Plaintiff it was the Defendants who were responsible for the repeated delays as drawings were not supplied in time and the drawings were also modified repeatedly. Finally on 27th July, 1989 the work was halted by the

Plaintiff and on 31st July, 1989 the Defendants had terminated the contract.

3. The Defendants allege that they had called the Plaintiff for joint measurements and on one occasion the Plaintiff joined the said exercise however, thereafter the joint measurement was completed in the absence of the Plaintiff. According to the Defendants a sum of Rs.4,08,343/- was recoverable. However, the Plaintiff claimed that various amounts in the last and final bill were illegally held back by the Defendants, and the Plaintiff then invoked the arbitration clause. In CS (OS) 1015/1992, a sole arbitrator was appointed. However between 1992-2008 various arbitrators who were appointed, had resigned and finally on 13th August, 2008, Sh. Prem Kumar (Retd ADJ) was appointed to adjudicate the disputes between the parties. Ld. Sole Arbitrator passed his award on 15th April, 2014.

4. The various claims, which have been awarded, and the objections raised thereto and analysis in respect thereof are discussed below.

5. **Claim No.1:** Ld. Arbitrator has held that the Defendants are liable for the delays which took place in the execution of the contract and hence the declaration sought by the Defendants cannot be granted. This also resulted in the counter claim by the Defendants being dismissed. Mr. Sikri, Ld. Senior Advocate appearing for the Defendants relies upon the discussion in the award and the clauses in the agreement to argue that time is of essence of the contract and it was the Plaintiff which was responsible for the delays. A perusal of the award, reveals that the Arbitrator has gone into great detail in analysing the various letters, which were exchanged between the parties. On the basis of the same, Ld. Arbitrator has come to the following conclusion.

“31. All this makes it abundantly clear that officials of the respondent who were supervising, and getting the

work done were quite indecisive and were making changes from time to time resulting in the delay in the execution of work. The blame cannot be laid at the door of the claimant in so far as delay in the execution of the work is concerned... ”

6. The finding of the Ld. Arbitrator in respect of the termination is contained in paragraphs 39 & 40. The same are set out below:

39. The notice under clause 47 envisages that the contractor has committed a default in the execution of work and that a seven days notice has to be given by the engineer on behalf of the corporation, to make good the default. It is only when the claimant fails to make good the default and carry on the work to the satisfaction of the engineer that the respondent corporation is only then entitled to give to the contractor forty eight hours notice in writing directly or through the engineer to remove the contractor from whole or any portion or portions of the work. The engineer has not served any such notice on behalf of the respondent corporation, the respondent corporation has also not given forty eight hours notice to the claimant. Contract has been terminated 'forthwith in complete violation of the aforesaid clause.' It is clear that termination of contract of the claimant by the respondent is per se illegal. Even otherwise the reason assigned by the respondent for terminating the contract forthwith is also not tenable. If the claimant had stopped the work on certain dates, the respondent could have initiated the inaction but instead it permitted the claimant to continue with the work. This fact becomes abundantly clear from claimant's letter dated 17.07.89 (C-114) wherein the claimant clearly mentioned that the claimant was starting the work (from today) i.e. 17.07.89 as desired by the respondent in its letter dated 13.07.89. Letter dated 18.07.89 (C-115) from the respondent confirms

this fact. Again letter dated 20.07.89 (C-117) to the claimant is to take up the work of dismantling of ceiling in the duct portion in board room vide letter dated 27.07.89 (C-118) also shows that the claimant started the work on 17.07.89. However, it was on 28.07.89 that the claimant's labourer was not allowed to do the work by the guard. This is evident from complaint of the labourer dated 28.07.89 (C-119) and also by letter dated 29.07.89 (C-170). It is clear that although the formal letter terminating the contract was given on 31.07.89, the claimant was not being permitted to work w.e.f. 27.07.89. It is clear therefore that the respondent's contention vide letter dated 29.07.89 (R-24) that the claimant abandoned the work is baseless. Respondent terminated the contract vide letter dated 31.07.89 (R-25) on the plea that the claimant is not interested in fulfilling the obligations arising out of the contract is incorrect to justify termination of the contract which is otherwise illegal. The claimant has mentioned all these facts in detail in his letter received by respondent on 02.08.89 in response to respondent letter dated 31.07.89.

40. Admittedly the drawings and designs including those provided on 26.7.88 were changed 3 times and were in process of revision even upto the end of July 1989 when the contract was illegally terminated. The complete work fronts and sites were not made available even till July 1989. The decisions were being taken and changed even till end of July 1989. No show cause notice or opportunity of hearing was given before termination and as such the same is contrary to the terms of contract is of no consequences and validity. The respondent cannot be allowed to take benefit of its own wrong as the work prolonged and could not be completed even upto 31.7.89 for the reasons attributable to the respondent.

7. A perusal of the above findings shows that the Arbitrator has analysed a large number of exhibits and has come to the conclusion that even as on July, 1989, the designs and drawings were being changed and 7 days notice as per the agreement ought to have been given, which was not done. In view of this, Ld. Arbitrator held that the delay is not attributable to the Plaintiff. This Court has perused the discussion in the impugned award. Considering the analysis of the facts and evidence on record as also the legal position, it is clear that the Defendants did change the drawings on more than three occasions and the letters also show that decisions were being made even till the end of July, 1989. Thus, the finding of the Ld. Arbitrator cannot be faulted with. No interference is called for.

8. **Claim No.2:** As against the claimed amount of Rs.7 Lakhs on account of the balance amount due towards the execution of the contract as also security deposit, the Ld. Arbitrator has allowed the claim of Rs.5,38,187/- which was including the security deposit of Rs.1,90,880/-. The Ld. Arbitrator has calculated the said amount as per the letter of the architect, who had made the necessary measurements and the certificate of payments as per the letter dated 1st September, 1989. This is a clear factual analysis, which has been gone into by the Arbitrator. The Ld. Arbitrator has arrived at a finding that the final bill has been certified by the architect M/s. Rakesh Sahni and Associates and the Defendants had not commented on the details of the items in the letter dated 12th August, 1989. This claim having been awarded on an appreciation of the facts, no interference is warranted.

9. **Claim No.3:** The Plaintiff had claimed a sum of Rs.4,71,494/- on account of the balance payment towards extra items. The said claim includes 34 items out of which the amounts have been awarded for item

Nos.2, 5, 7, 9, 13, 14, 15, 17, 18, 20, 27 & 29. Again, the Ld. Arbitrator has gone into great detail in each of the items under which the claims have been made and after looking into the letters on record, has awarded the said claim. No serious error has been pointed out in the analysis of the Ld. Arbitrator and hence the total awarded amount of Rs.4,71,494/-is upheld.

10. **Claim No.4:** The Plaintiff has claimed a sum of Rs.1,73,838/- in respect of the cost of material left by him at the site at the time of termination. It is noticed that the Ld. Arbitrator has accepted the entire amount as claimed by the Plaintiff. However, as per the Defendants, the accepted cost is only Rs.43,866/-, as per the rates, which were passed by the Defendants/CCI. As there is no basis for the rates accepted by the Ld. Arbitrator, the claim as allowed by the Ld. Arbitrator is restricted to Rs.43,866/- as admitted by the Defendants. The rates awarded by the Ld. Arbitrator have no basis and thus the awarded amount is liable to be restricted.

11. **Claim No.5** - This claim relates to the cost of material for which secured advance of 75% was already paid by Defendants. The Ld. Arbitrator has merely allowed the claim to the extent of Rs.1,42,527/- which is the remaining 25%. Since 75% of the amount is already paid and 25% is merely the outstanding, there is no error in award of the same.

12. **Claim No.7:** Insofar as the Claim No.7 is concerned, this relates to escalation of costs due to delay. The Ld. Arbitrator has gone by the price suggested by the Defendants for July, 1989 for determining escalation at Rs.457.70. Relevant portion of the award is set out below:

“126. According to the respondent the claimant should have taken the figure of July, 1989 and not August,

1989 and the average price Index for July, 1989 is Rs. 457.70. Accepting the figure of Rs. 457.70 for July, 1989 the figure of Vm comes to $33,41,878 \times 100 / 100 \times 457.70 - 441 / 441 = \text{Rs. } 1,28,067$. Hence claimant is entitled to the amount of Rs. 1,28,067 and not Rs. 2,11,424 as claimed by him."

13. Thus, against the claim of Rs.2,11,424/-, the Ld. Arbitrator has awarded Rs.1,28,067/- on the basis of average rates in July, 1989. Further, Mr. Vivekanand, also points out that as per the minutes of the meeting dated 18th April, 1989, the Defendants agreed to process the claim for escalation. Relevant portion of the said minutes is set out below:

"11. Contractor requested for decision on payment of escalation though it is not provided in the contract as the work has prolonged too long and the labour and materials rates have increased very high. Without prejudice to the contract CCI agreed to process this."

In view of the above facts, granting of claim no.7 by the Ld. Arbitrator does not warrant any interference.

14. **Claim No.6, 8, & 9:** Insofar as the Claim No.6, 8 & 9 are concerned, they relate to insurance premium, salary of permanent staff and establishment cost, which do not warrant any interference, as no serious objections are raised in respect thereof.

15. **Claim No.10:** Insofar as Claim No.10 is concerned, the Ld. Arbitrator has calculated that the remainder amount of work was to the tune of Rs.23,32,286/-. The finding of the Ld. Arbitrator was that the Defendants had delayed in providing the drawings etc., and the termination was also not as per the contract. Thus, the Ld. Arbitrator has awarded a sum of

Rs.2,32,228/- which is 10% of losses and profits on the remainder amount of work, which is as per the settled law. This finding of the Ld. Arbitrator also does not warrant any interference.

16. **Claim No.13:** Insofar as Claim No.13 is concerned, considering that the Defendant Company is in liquidation and has suffered losses, interest rate is modified to 6% per annum. Interest @ 6% per annum shall also be payable from the date of decree till the date of payment.

17. **Claim No.14:** Insofar as Claim No.14 is concerned, the costs are reduced to Rs.1 Lakh.

SUMMARY:

18. The following is the summary of the claims and awarded amounts as directed above:

- a) **Claim No.1: Termination of the contract by the Defendant is unjustified** – This Court has concurred with the findings of the Arbitrator and held that the termination of the contract by the Defendants was unjustified.
- b) **Claim No.2: Rs.7,00,000/- on account of balance amount due towards work executed and security deposit** – This Court has concluded that the findings of the Arbitrator do not warrant interference as the claim was awarded on an appreciation of the facts.
- c) **Claim No.3: Rs.4,71,494.40 on account of balance payment due towards extra items executed** – Ld. Arbitrator, having given a detailed factual analysis, the award qua this claim has been upheld by this Court.
- d) **Claim No.4: Rs.1,73,838.04/- on account of cost of unsecured materials which remained in possession of CCI at site of work**

after termination of the contract – This Court has restricted the claim to Rs.43,866/- which is the amount due that stands admitted by the Defendants.

- e) **Claim No.5: Rs.2,38,430.88 on account of balance payment towards secured materials** – This Court held that there is no error in the award passed as the Arbitrator has merely awarded the remaining 25% of the amount, which was outstanding. 75% of the amounts towards this item already stood paid.
- f) **Claim No.6: Rs.8,000 on account of Insurance premium** – No interference called for in the award of the Ld. Arbitrator.
- g) **Claim No.7: Rs.3,00,000/- on account of payments due under Clause 10-CC** – The findings of the Ld. Arbitrator do not warrant any interference, since the Defendants have agreed to process the claim for escalation.
- h) **Claim No.8: Damages on account of salary of staff** - No interference called for in the award of the Ld. Arbitrator.
- i) **Claim No.9: Rs.1,26,000/- on account of establishment costs from 18.10.1988 to 31.8.1989 @Rs.12,000 p.m.** - No interference called for in the award of the Ld. Arbitrator.
- j) **Claim No.10: Rs.3.75 lakhs on account of loss of profits** – This Court has held that the award has been passed as per the settled position of law and does not call for interference.
- k) **Claim No.11: Rs.9,800/- on account of cost of Air conditioning grills** – Objection not pressed.
- l) **Claim No.12: Refund on account of electricity charges** – Objection not pressed.

m) **Claim No.13: Interest @18% per annum** – This Court has restricted the rate of interest to 6% per annum instead of 18% that was awarded.

n) **Claim No.14: Costs @ Rs.1,50,000/-** - This Court has restricted the costs to Rs.1,50,000/-.

19. The impugned award is modified and made Rule of Court. Decree sheet in terms of the claims awarded above be drawn up. Suit is disposed of. All pending IAs also stand disposed of.

AUGUST 28, 2018
Pallavi

PRATHIBA M. SINGH
JUDGE

