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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: 15th November, 2018

+ **CS (OS) 1593/2011**

M/S S.A BUILDERS LTD. Plaintiff

Through: Mr. Tarun Gupta and Ms. Madhumita
Bose, Advocates. (M:9958062677)

versus

M.C.D (NOW REPRESENTED DELHI JAL
BOARD)

..... Defendant

Through: Ms. Kanika Agnihotri, Standing
Counsel, DJB with Mr. Bhriku Dhami
and Mr. Preet Singh Oberoi,
Advocates.

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. Present petition under Section 34 of the Arbitration and Conciliation Act, 1996 challenges the award dated 5th May, 2011 passed by the learned Sole Arbitrator.
2. Petitioner - M/s S. A. Builders Ltd. (*hereinafter 'Contractor'*) was awarded a contract for the construction of the 3rd Gravity Duct from RD 3010 to 5140 meters (Part B) at Okhla New Delhi.
3. The contractual amount was Rs.1,79,99,995/-. The date of commencement of work was 12th January, 1984 and the work was to be completed, within 18 months i.e. by 11th July, 1985. The actual date of completion, however, was 31st January, 1989.
4. Disputes were referred to arbitration by a learned Sole Arbitrator. The first and foremost issue decided by the Ld. Arbitrator was the question as to who was responsible for the delay in the execution of the contract.

Both parties blamed each other. Learned Arbitrator, after referring to the various correspondence exchanged between the parties, came to the conclusion that the delay was due to Respondent- Municipal Corporation of Delhi (*hereinafter* 'MCD'). The findings of the learned Arbitrator in the impugned award, are as under:

“The respondents have generally denied all the allegations and have put the blame on the claimant contractor. In this connection two things are note worthy. Firstly, extensions were granted to the contractor time and again. Secondly, no penal action as envisaged in clause 2 was taken by the Respondents. Their general allegation that the delay was due to the Claimant contractor has therefore no legal legs to stand. On the contrary the claimants have submitted evidence (Annexure 3) which shows that the facts of delay were brought to the notice of the Respondents from time to time. They also stated that they would seek compensation for the delay. From the facts and evidence placed before me, I am constrained to conclude that the respondents were in the breach and are responsible for the delays and consequently have to suitably compensate the claimants as per law.”

5. This part of the award is not challenged. The Contractor filed the present suit praying that the award may be made Rule of Court. Objections were, however, filed by the MCD raising various grounds of challenge. The objections qua each of the claims are decided herein below. All the objections raised during the oral arguments have been considered and adjudicated upon.

Claim No.1: This claim was raised by the Contractor on the ground that the lump sum value of the contract was Rs.1,79,99,995/- but the payment made was only Rs.1,66,73,245/- despite the fact that the entire contract was

executed. The Arbitrator proceeded on the basis that the contractor had executed the complete project i.e. “*construction of third gravity duct from chainage 3010 to chainage 5140 mtrs*”. It is also not in dispute that the start and end points were connected through this duct. Accordingly, Arbitrator awarded Rs.13,26,750/- which was the short payment. Further in this claim, the Arbitrator also awarded a sum of Rs.5,21,791/- in respect of the extra items which were executed by the contractor. The total claim qua the extra items was Rs.7,84,030/- out of which Rs.2,62,239/- was already paid. The Arbitrator awarded the difference.

6. Ms. Agnihotri submits that though she does not dispute that the complete ducting was done from chainage 3010 to chainage 5140 meters. As against the total length contemplated of 2130 meters, the actual length turned out to be only 2023 meters. According to her, under the contract, if the length executed by the contractor is lesser than what is prescribed in the contract, the payable amount would be pro rata reduced.

7. Clause 32 which deals with proportionate reduction is set out below:

*“32. It there is any variation in length of the duct as specified in NIT either the recovery will be made or payment will be made as the case may be on the prorate basis (ie. @ rate which is equal to)
L.S. PRICE QUOTED FOR CONST. OF DUCT (ie. ITEM NO.1 OF PRICE SCHEDULE)
Length specified in NIT ie (5140-3010) meter = 2130”*

8. The reply of the MCD in respect of Claim no.1 reads as under: -

“The claimant is not entitled to receive a sum of Rs.18,48,541/- as claimed by him. He has not given the details of the payments not made to him. Whatever has been stated in Annexure -5 under the heading extra items, the payments for (1) to (25) have already been

made as per the entries made in the measurement books. The payment for no.26 i.e. for 2 number of interconnections inside the duct no.1 has already been paid to him and nothing is due on this account. The payments for the work done as per agreed terms and conditions of the agreement, have already been made except the final bill amounting to Rs.30,000/- and the same is ready for release provided the claimant accept the same.”

9. The stand of the MCD has been considered by the Ld. Arbitrator in the following manner in the impugned award: -

“On perusal of the records and arguments of both the parties, It Is seen that the aforesaid work was for the construction of 3rd gravity duct from chainage 3010 to chainage 5140 mtrs. The claimant had stated that the aforesaid work have been completed by them from the start point i.e. chainage 3010 to the end point I.e. chainage 5140 mtrs. The respondent have not denied or objected to the construction of 3rd gravity duct from chainage 3010 to chainage 5140 mtrs and that the start and end points have been connected through this duct.

Further, I had observed that the respondent, on the contrary, in reply to claim no. 10 & 11 have argued that the duct was not measured. Under Claims 10 and 11, the claimant had asked payment due to extra length of the duct. I, therefore, find-no basis in the argument of the respondent with regard to the length of the duct.”

10. There is no dispute insofar as the proposition that there would be a pro rata reduction. However, the MCD had a duty to point out to the Arbitrator that the actual length which was executed was 2023 meters and not 2130 meters. In response to claim no.1, the MCD did not point out that

the actual length executed was lesser. In the absence of the same, it cannot be argued now that the Arbitrator ought to have made a pro rata reduction. The Arbitrator may not have been apprised of the fact that length executed was lesser. Since the same is a new submission being made in the present petition, it is not liable to be entertained. It is further submitted by Ms. Agnihotri that even though the MCD did not point out the actual length having been executed was lesser by the contractor, the Arbitrator had a duty to look at the chart being Annexure-20 which gave the length which was executed and thereafter calculate the same.

11. The clear stand of the MCD before the Arbitrator was that the duct was not measured. Thus, the Arbitrator could not have surmised that the actual duct which was executed by the contractor was lesser than the actual length which was awarded. It was the duty of the MCD to point out that the length actually executed was lesser, if it was so. The Arbitrator in fact was dealing with the contractor's contention that extra length had been executed. At no point in time, was it pointed out to the Arbitrator that there was a deficiency in the length of ducting which was executed. Under such circumstances, the Arbitrator could not have, despite being conscious of the contractual clause, presumed that the length was deficient and reduced the payments to the contractor. The Arbitrator proceeded on the presumption that the construction of the third gravity duct from chainage 3010 to chainage 5140 was fully completed.

12. Ms. Agnihotri submits that as per *Food Corporation of India v. Chandu Construction and Anr. (2007) 4 SCC 697* if the Arbitrator went beyond the terms of the contract, he would have mis-conducted himself. A perusal of the reply to the claim petition shows that the MCD neither

pleaded that the executed work was short of the length which was to be executed nor was any term of the contract pointed out to the Arbitrator. There is no doubt that the Arbitrator has to proceed as per the terms of the contract. However, in the absence of even a pleading or any evidence led before the Arbitrator that the actual length of duct which was executed was lesser than the awarded contract, it cannot be expected that the Arbitrator himself would imagine such a situation to exist and then try to apply the terms of the contract.

13. In the background of the reply to this claim, the Arbitrator has clearly not mis-conducted himself and does not warrant any interference.

14. Accordingly, the award of Rs.13,26,750/- does not deserve to be interfered with.

15. Insofar as the award towards extra work is concerned, learned counsel for the Contractor submits that the claim of Rs. 7,84,030/- was based on calculations which are placed as Annexure-P-3. According to him, the rate applied are on the basis of CPWD rates.

16. The contractor does not dispute that insofar as extra work is concerned, the following clause is applicable

“16. Since the contract is a lump sum contract, the tenderer shall include all items of work, to make the job, complete. In case any extra work is required to be executed by the engineer-incharge beyond the scope of contract, the same shall be paid on the basis of CPWD Schedule of rate 1977 (for) Delhi) + 100% contractors premium. For purpose of evaluation of tender total estimated cost of such extra items based on schedule shall be taken as 5% of the contract value.”

17. A perusal of Annexure-P-5 shows that the same is claimed to be based

on prices published by Bureau of Economics and Statistics, Delhi Administration.

18. There is no doubt that as per the clause, the CPWD 1977 Rates for Delhi plus 100% contractor's premium had to be applied. The full and final bill which has been placed on record consists of certain rates. However, learned counsel for the Contractor is unable to show to the Court that these are based on 1977 CPWD Rates. Further, the stand of the MCD is that the payments for items Nos.1 to 25 have already been made as per the entries made in the measurement books.

19. Considering this stand of the MCD, the Arbitrator records

“Second part of this claim was for the payment of extra work done by the claimant under clause no. 16 of the agreement. The respondent have not denied the work done by the claimant. The claimant had claimed an amount of Rs. 7,84,030/- against this extra work which was paid to an extent of Rs. 2,62,239/- by the respondent. The claimant has shown in their final bill that the extra items as shown under serial no. 1 to 26, (details entered in the MB) and the total of the aforesaid items comes to Rs. 3,92,015.50. Adding 100% premium on these items as per clause 16 of the contract agreement the premium amount comes to Rs.3,92,015.50. Therefore, the total claim amount becomes (392015.50 +392015.50) Rs. 7,84,030.00 The respondent had stated that the payment for item 1 to 26 of Annexure -V has already been made to an extent of Rs.262239/- to the claimant and there is nothing due on this account.

There is a clear provision for the payment of extra work under clause no. 16 of the agreement and although the respondent has confirmed with regard to execution and payment of extra items but could not prove anything on the contrary to the amount claimed

by the claimant on this account. No other point was argued. I, therefore, find that the balance amount of Rs. 5,21,791/- (Rs.7,84,030.00 - 2,62,239.00) toward balance payment of extra work is payable to the claimant. I have therefore awarded Rs. 18,48,541/- (Rs.5,21,791.00 + Rs.13,26,750.00) under this claim”

20. Since there is no denial in respect of the work done by the Claimant, the Arbitrator awarded the amounts as per the calculations filed by the contractor. It is made clear that the amounts towards this claim would be payable only in terms of the CPWD 1977 Rates for Delhi plus 100% contractor's premium as per clause 16. The award in respect of extra work, is modified accordingly.

Claim No.2:

21. In respect of Claim No.2, it is the admitted position between the parties that escalation can be awarded under clause 10C. The Arbitrator had applied clause 10C. As against a claim of Rs.53,19,223/- a sum of Rs.12,00,000/- has been awarded by the Arbitrator. The same does not warrant any interference, as the fact that delays occurred due to the MCD is not disputed.

Claim No.3:

22. Insofar as the material escalation is concerned, the Arbitrator has again applied 10C and has granted the same in terms of the formula. Claim has also been awarded by the Arbitrator on the ground that the delay was caused due to the MCD, which is not disputed.

Claim No.4:

23. The present claim had been withdrawn by the contractor vide letter dated 6th August, 1990. When this plea was taken in the reply by the MCD,

in the written arguments filed by the contractor at page 97, the contractor takes a completely false stand that the copy of the letter has not been placed on record. The contractor ought to have been candid and admitted the letter dated 6th August, 1990 rather than challenging the same. Under these circumstances, the said claim is not sustainable and is liable to be set aside.

Claim No.5:

24. This claim is not under challenge.

Claim No.6:

25. Insofar as Claim No.6 is concerned, the same related to removal of surplus earth. There was a meeting held between the contractor and the MCD on 11th July, 1990. The minutes of the same are reproduced below: -

“Subject: Excess Excavation & removal Of Surplus Earth

The case regarding the 27/c IIIrd G /duct has been discussed with Sh. Dinesh Garg, the representative of the firm on 9th and 11th July 1990. Matter has also been discussed with Sh. P.L.... (not legible) on telephone on 11/7/90. The matter is settled.

DK Garg

11/7/90

(Management Trainee)”

Mr. Akhlaq

11/7/90

JR

26. In the reply to this claim, the MCD took the following stand

“CLAIM NO. 6 FOR A SIJM OF RS. 3,79,440\ -ON ACCOUNT OF REMOVAL OF SURPLUS EARTH

In this regard, it is submitted that a meeting was held on 9th and 11th July 1990 at the site with firm's representative Shri D.K.Garg. As per minutes record, the matter was settled and hence the claimant are now estopped from claiming this amount from the respondent. Nothing is payable on this account and the

claim of the claimant is liable to be rejected.”

27. In the rejoinder, the contractor took a stand that firstly the minutes were not placed on record and secondly it is also contended that the person who met the engineer was only a management trainee. Such a submission cannot be entertained inasmuch as, the recordal in the minutes is categorical and clear that the matters stood settled. Once the representative from the contractor firm had visited the office of the MCD and the matter had been settled, the claim ought not to have been raised. Moreover, to argue that a management trainee could not have settled is completely untenable as Mr. Dinesh Garg had gone as the representative of the firm and the fact that he was the management trainee cannot give any benefit to the contractor. The MCD official as per the minutes also had a telephonic conversation with another official of the contractor before recording that the issue stood settled. Thus, the stand of the contractor is contrary to the record and is misleading. Since the meeting was held with the official of the MCD by an official of the contractor, irrespective of his designation, he is deemed to have been authorised. Accordingly, the award of Rs.3,79,440/- towards Claim No.6 is liable to be set aside.

Claim No.7:

28. This claim has been rejected.

Claim No.8:

29. In respect of Claim No.8, the argument of the MCD is that as per condition 4 of the contract, nothing extra was payable in respect of variation in sub-soil water table. The said condition is reproduced herein below: -

“Directions for design/ execution of work & special

conditions for construction of 3rd Gravity Duct

As observed at site, depth. Of sub-soil water table from ground level at the various chainages are as Annex D. These levels are subject to variations due to seasonal changes. As such during the course of construction if different levels found. Are nothing extra shall be paid nor any deductions made. The tenderer has to make allowances for variation in the sub soil water level on the upper side by 1 m for seasonal variations while designing the structures without any additional claim.”

30. The stand of the MCD is that the variation could not have been more than 1 mtr. He relies upon the latter part of the clause in this respect. He also relies upon Annexure-D which is at page 108 of Volume 3 to argue that at the time when the contract was awarded, the depth of the soil table was only 7.70 mtrs whereas in reality it turned out to be only 4 mtrs. Therefore, the variation was more than 1 mtr and therefore the claim is liable to be awarded.

31. It is the settled position that the Arbitrator has to go by the contractual terms. A perusal of the discussion under Claim No.8 shows that the Arbitrator has failed to consider condition no.4 which is part of the contract. The said condition is clear that nothing extra is payable. In view of this, the award in this respect is not sustainable and the same is set aside.

32. O.M.P. is disposed of with the above modifications.

33. The awarded amount along with interest shall be paid within three months by the MCD.

PRATHIBA M. SINGH
JUDGE

NOVEMBER 15, 2018

Rekha