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

Date of Decision : 28th November, 2018

+ **O.M.P. (COMM) 122/2017**

**SIVALAYA CONSTRUCTION COMPANY PVT
LTD**

..... Petitioner

Through: Mr. Abhijeet Sinha, Mr. Bipin
Prabhat and Mr. Siddhartha Naidu,
Advocates. (M:9911371736)

versus

**DELHI STATE INDUSTRIAL AND INFRASTRUCTURE
DEVELOPMENT CORPORATION LTD**

..... Respondent

Through: Mr. Moni Cinmoy and Mr. Arvind
Kr. Pandey, Advocates.
(M:9868088168)

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The short question that arises in this case is as to whether the Petitioner-Claimant had given up its claims against the Respondent. The brief background is that the Petitioner was awarded a contract by the Delhi State Industrial and Infrastructure Development Corporation Ltd. (*hereinafter 'DSI IDC'*) for "Construction of IT-cum-Flatted Factory Complex at Okhla Phase-I, New Delhi." Disputes arose between the parties. The Sole Arbitrator entered reference on 28th August, 2013 and rendered a nil award, by which the claims of the Petitioner were rejected.

2. Tenders were invited by the DSI IDC and the Petitioner-contractor had bid for the same. Being the lowest tenderer, the letter of acceptance was issued to the Petitioner on 29th February, 2012. The time for executing the

works, as per the letter of acceptance, was 24 months. Pursuant to the award of tender, the Petitioner had submitted a performance bank guarantee for a sum of Rs.1,88,72,000/-. Security deposit, as per the tender, had also been made to the extent of 5%.

3. Immediately after the award of tender, various letters were exchanged between the parties including letters dated 2nd August, 2012 and 30th October, 2012 written by the Petitioner-Claimant. In the letter dated 30th October, 2012, the Claimant stated that there were several delays in handing over of the site by the DSIIDC and in view of these delays, the contractor wanted to suspend the work, without prejudice to its rights. The Relevant excerpts from the said letter is set out below: -

“.....In view of the situation explained above we hereby request the employer DSIIDC to treat closure of the contract from our side. This will serve better interest of the DSIIDC for minimizing the losses and the DSIIDC to continue their work as and when it is able to proceed with unhindered working site. This is without prejudice to our rights contractual and also the law of the land.”

4. On 9th November, 2012, the contractor had a meeting with DSIIDC and pursuant to the said meeting, addressed a letter to the DSIIDC dated 15th November, 2012 to the following effect: -

“Subject:- Work “Construction of IT Cum Flatted Factory Complex at Okhla, Phase-I, New Delhi.”

Respected Sir,

With reference to our letter dated 30/10/2012 addressed to CMD, Chief Engineer & CPM (RGP-II), DSIIDC Ltd. A meeting was held in chamber of Project Director (K.B. (I & H)) on dated 09/11/2012 at 2.00

P.M. After a lot of discussion & to maintain business relation with DSIIDC Ltd., we agreed to foreclose the contract for the work cited in subject as per clause 3(A) of contract agreement and to facilitate the corporation for early payment of our deposits. So your goodself is requested to release our Earnest Money deposit & Performance Guarantee at the earliest and we are not going to claim any thing further from the corporation.”

5. Curiously, on the same date, the contractor sought to resile from the above letter and claims to have issued another letter dated 15th November, 2012 which reads as under: -

“Subject:- Work “Construction of IT Cum Flatted Factory Complex at Okhla, Phase-I, New Delhi.

Respected Sir,

*With reference to our earlier letter sent by us today addressed to **Project Director (K.B. (I&h)) & CPM (RGP-II), DSIIDC Ltd.**, it is submitted that the department created such a coercive/undue influence situation that we were having no other alternative but to agree for closure of the contract under clause 3(A). It is also submitted that we agreed to foreclose that contract without prejudice to our right. Further to above, in our today’s letter, clause 3 has inadvertently been written as clause 3(A). It is submitted that Clause 3(A) be read as Clause 3 of the agreement.”*

6. Both the first and the second letter dated 15th November, 2012 were initially denied by the DSIIDC. However, the DSIIDC annexed the first letter dated 15th November, 2012 as Exhibit-R-5 and relied upon it to submit that the contractor, having invoked clause 3(A) and the Performance Bank Guarantee and the security deposit having been released to the contractor, no

damages or compensation can be claimed by the contractor.

7. The learned Arbitrator after perusing the documents and the evidence on record, held as under: -

“To sum up, it is held that Ex. C-06 cannot be treated as a genuine document and that it has no evidentiary value. The claimant is not entitled to take any advantage on the basis of this document.”

8. Exhibit C-06 was the second letter dated 15th November 2012. The learned Arbitrator arrived at this finding by reading both the letters and also by interpreting clauses 3 and 3(A). The reasoning given by the Arbitrator to support this finding is as under: -

“..... I am not impressed by the argument of the claimant as the following facts effectively settle the issue against the claimant.

(i) It is of note that neither the first letter dated 15.11.2012 of the claimant (Ex. R-5) nor its disputed second letter dated 15.11.2012 (Ex. C-06) carry any dispatch no. so as to discern one from the other. This appears to have been done deliberately by the claimant to create scope for confusion and to take advantage of the same by claiming that wherever letter dated 15.11.2012 is mentioned in future correspondences by the parties, the same should be taken as Ex. C-06 whereas the respondent could by no means imagine if the letter dated 15.11.2012 referred to in future correspondence by the claimant could be other than Ex. R-5, particularly as it has denied to have received Ex. C-06 and the claimant has not proved its delivery to the respondent.

(ii) The claimant, vide its letter dated 30.10.2012 (Ex. C-04) wrote to the respondent that given the state of affairs in regard to the availability of site and

drawings they were of the view (ref. para 3) that the employer had failed in his all obligation and therefore why the contract should not be closed due to reasons not attributed to them on the similar reciprocal condition of contract Clause-3 and 16 of the contract since the validity of Clause-3A is no more valid nor applicable. The claimant accordingly requested the respondent to close the contract from their side but added that this was without prejudice to their rights contractual and also law of the land. With reference to the said letter of the claimant, a meeting was admittedly held in the chamber of respondent Project Director on 09.11.2012. The claimant had thus good nine days after his letter dated 30.10.2012 to weigh its options and make up its mind. And if it agreed for closure of the contract under Clause 3A (which, according to me too, is the only relevant Clause for closure of the contract) with an undertaking for no further claim except release of Earnest Money Deposit and Performance Guarantee, it cannot be said to have been done under the coercion or undue influence as alleged in the so called disputed letter dated 15.11.2012 (Ex. C-06).

- (iii) *The claimant's letter dated 22.12.2013 (Ex. R-7) which is an admitted document and the very first letter written by the claimant after closure of the contract refers to only respondent's letter dated 21.12.2012 (Ex.R-6) relating to closure of the contract and release of Earnest Money Deposit and Performance Guarantee. The text of the same is reproduced below :*

With due regards, it is submitted that the work cited in the subject has been closed vide your office letter no. DSIIDC/CPM (CD-RPG-II)/341/2012-13/488 dated 21.12.2012.

So your good self is requested to release our Earnest Money Deposit (END) and Performance Bank Guarantee (PG) as early as possible.

- (iv) If at all, the claimant had written the disputed letter dated 15.11.2006 (Ex. C-06), as it has asserted, there was no reason why it should not have made reference to this letter in its letter dated 22.12.2012 (Ex. R-7). But it preferred not to do so and it was not without reason. As also so contended by the respondent, the claimant, for obvious reasons, preferred to keep quiet in regard to Ex.C-06 till it received Earnest Money Deposit (EMD) and Performance Guarantee (PG). The claimant accordingly raised the issues as mentioned in its so called letter dated 15.11.2012 (Ex.C-06) only vide letter dated 31.01.2013 (Ex.C-07), after the EMD and PG were released by the respondent vide letter dated 24.12.2012 (R-8 Colly).*
- (v) The claimant has heavily relied on Ex.C-06 to prove that it had agreed to closure of the contract under Clause 3A due to coercive / undue influence situation and that it agreed to closure of the contract without prejudice to its right and also that Clause 3A written in their letter (Ex.R-5) inadvertently should be read as Clause 3.*
- (vi) Ex.C-06 is fountain head of the claims raised by the claimant. It would therefore not appeal to any one that the claimant should have chosen to deliver such an important letter (from its own point of view) by hand and without taking acknowledgment from the respondent's office."*

9. Learned counsel for the Petitioner-Claimant has two main submissions challenging the above award which are as under:

- (i) That both letters dated 15th November, 2012 were genuine and the fact that DSIIDC denied both letters initially and thereafter admitted the first letter itself shows that its conduct was not bonafide. It is further submitted that the said two letters have to be read together with the chain of correspondence, and not in an isolated manner.
- (ii) The second submission is that the Petitioner-Claimant had led evidence that the first letter was written under coercion and the negation of this plea is not valid in law.

10. On the other hand, learned counsel appearing for the DSIIDC submits that a perusal of clauses 3 and 3(A) clearly shows that it was only clause 3(A) that could have been invoked by the Petitioner, and not clause 3. The second letter of 15th November, 2012 is not genuine and was never delivered to the DSIIDC and, therefore, cannot be considered in these proceedings. He further submits that a perusal of clause 3 shows that the said clause vests powers, which are purely the prerogative of the Engineer-in-charge, and not the contractor. He further submits that the Claimant having obtained the benefit of refund of PBG and the security deposit, is now trying to resile from the first letter and ought not to be permitted to do so.

11. This Court has heard the learned counsels for the parties. Before going into the letters and their interpretation, it is important to set out the two clauses i.e. clause 3 and 3(A). The same are set out herein below: -

“CLAUSE 3

Subject to other provisions contained in this clause, the Engineer-in-Charge may, without prejudice to his any other rights or remedy against the contractor in respect of any delay, inferior workmanship, any claims

for damages and/or any other provisions of this contract or otherwise, and whether the date of completion has or has not elapsed, by notice in writing absolutely determine the contract in any of the following cases:

- (i) If the contractor having been given by the Engineer-in-Charge a notice in writing to rectify, reconstruct or replace any defective work or that the work is being performed in an inefficient or otherwise improper or unworkmanlike manner shall omit to comply with the requirement of such notice for a period of seven days thereafter.*
- (ii) If the contractor has, without reasonable cause, suspended the progress of the work or has failed to proceed with the work with due diligence so that in the opinion of the Engineer-in-Charge (which shall be final and binding) he will be unable to secure completion of the work by the date for completion and continues to do so after a notice in writing of seven days from the Engineer-in-Charge.*
- (iii) If the contractor fails to complete the work within the stipulated date or items of work with individual date of completion, if any stipulated, on or before such date(s) of completion and does not complete them within the period specified in a notice given in writing in that behalf by the Engineer-in-Charge.*
- (iv) If the contractor persistently neglects to carry out his obligations under the contract and/or commits default in complying with any of the terms and conditions of the contract and does not remedy it or take effective steps to remedy it within 7 days after a notice in writing is given to him in that behalf by the Engineer-in-*

Charge.

- (v) *If the contractor shall offer or give or agree to give to any person in Government service or to any other person on his behalf any gift or consideration of any kind as an inducement or reward for doing or forbearing to do or for having done or forborne to do any act in relation to the obtaining or execution of this or any other contract for Government.*
- (vi) *If the contractor shall enter into a contract with Government in connection with which commission has been paid or agreed to be paid by him or to his knowledge, unless the particulars of any such commission and the terms of payment thereof have been previously disclosed in writing to the Engineer-in-Charge.*
- (vii) *If the contractor shall obtain a contract with Government as a result of wrong tendering or other non-bonafide methods of competitive tendering.*
- (viii) *If the contractor being an individual, or if a firm, any partner thereof shall at anytime be adjudged insolvent or have a receiving order or order for administration of his estate made against him or shall take any proceedings for liquidation or composition (other than a voluntary liquidation for the purpose of amalgamation or reconstruction) under any Insolvency Act for the time being in force or make any conveyance or assignment of his effects or composition or arrangement for the benefit of his creditors or purport so to do, or if any application be made under any Insolvency Act for the time being in force for the sequestration of his estate or if a trust deed be executed by him for benefit of his creditors.*

- (ix) *If the contractor being a company shall pass a resolution or the court shall make an order that the company shall be wound up or if a receiver or a manager on behalf of a creditor shall be appointed or if circumstances shall arise which entitle the court or the creditor to appoint a receiver or a manager or which entitle the court to make a winding up order.*
- (x) *If the contractor shall suffer an execution being levied on his goods and allow it to be continued for a period of 21 days.*
- (xi) *If the contractor assigns, transfers, sublets (engagement of labour on a piece-work basis or of labour with materials not to be incorporated in the work, shall not be deemed to be subletting) or otherwise parts with or attempts to assign, transfer, sublet or otherwise parts with the entire works or any portion thereof without the prior written approval of the Engineer-in-Charge.*

When the contractor has made himself liable for action under any of the cases aforesaid, the Engineer-in-Charge on behalf of the President of India shall have powers;

- (a) *To determine the contract as aforesaid (of which termination notice in writing to the contractor under the hand of the Engineer-in-Charge shall be conclusive evidence). Upon such determination, the Earnest Money Deposit, Security Deposit already recovered and Performance Guarantee under the contract shall be liable to be forfeited and shall be absolutely at the disposal of the Government.*
- (b) *After giving notice to the contractor to measure up the work of the contractor and to take such whole, or the balance or part thereof, as shall be un-executed out of his hands and to give it to*

another contractor to complete the work. The contractor, whose contract is determined as above, shall not be allowed to participate in the tendering process for the balance work.

In the event of above courses being adopted by the Engineer-in-Charge, the contractor shall have no claim to compensation for any loss sustained by him by reasons of his having purchased or procured any materials or entered into any engagements or made any advances on account or with a view to the execution of the work or the performance of the contract. And in case action is taken under any of the provision aforesaid, the contractor shall not be entitled to recover or be paid any sum for any work thereof or actually performed under this contract unless and until the Engineer-in-Charge has certified in writing the performance of such work and the value payable in respect thereof and he shall only be entitled to be paid the value-so certified.

CLAUSE 3A

In case, the work cannot be started due to reasons not within the control of the contractor within 1/8th of the stipulated time for completion of work, either party may close the contract. In such eventuality, the Earnest Money Deposit and the Performance Guarantee of the contractor shall be refunded, but no payment on account of interest, loss of profit or damages etc. shall be payable at all.”

12. A perusal of clause 3 shows that the Engineer-in-charge can issue notice to the contractor for various purposes without prejudice to the right to claim compensation including;

- (a) For rectifying, reconstructing or replacing any defective work;
- (b) If the contractor suspends the work or fails to proceed with the

work with due diligence;

- (c) If there is a persistent neglect by the contractor;
- (d) If any misconduct is found to have been committed by the contractor;
- (e) If the contractor is into liquidation or winding up;
- (f) If the contractor assigns or sublets any portion of the work without prior written approval.

13. In all these situations, the Engineer-in-charge can terminate the contract and hand over the balance part of the work, if any, to another contractor for completion. If this clause is invoked by the Engineer-in-charge then the Earnest Money Deposit ('EMD'), security deposit and the Performance Bank Guarantee ('PBG') are liable to be forfeited and the contractor cannot claim any compensation.

14. On the other hand, in clause 3(A), if the work has not started for any reason, either party may close the contract and in such an eventuality, the EMD, PBG would be refunded without any interest, loss of profits or damages.

15. In the present case, it is not disputed that upon receipt of the first letter dated 15th November, 2012, the EMD, PBG and other deposits were released to the contractor. If the second letter was delivered to the DSIIDC and clause 3(A) is replaced with clause 3 as claimed in the second letter of 15th November, 2012, there would have been no occasion to refund the EMD, PBG and other deposits. Clause 3, which is the clause mentioned in the second letter of 15th November, 2012, cannot be invoked by the contractor. Thus, the claim of the contractor that clause 3 should be read in the first letter instead of clause 3(A) is bereft of merit.

16. The contractor has clearly attempted to obtain a refund of all the amounts, which was itself substantial in nature and has thereafter filed a claim petition claiming loss of profits and damages. The contractor does not dispute the writing of first letter dated 15th November, 2012. The said letter is a deliberate, conscious act on behalf of the contractor which has been further reconfirmed and reiterated by the contractor, who obtained refund of the PBG and the EMD. Another fact which confirms this position is that the contractor waited until the amounts as per the PBG and EMD were received and only thereafter invoked arbitration to claim compensation/damages. The award of the learned Arbitrator that the second 15th November, 2012 letter is suspect is, therefore, tenable and plausible. It does not warrant any interference.

17. There is no doubt to the proposition of law canvassed by the contractor-Petitioner that a contractor cannot be said to have waived its right if a letter has been issued under coercion. In the present case, the first letter is clearly not issued under coercion, inasmuch as the contractor cannot choose to partially agree to the said letter and partially disagree. Since the contractor obtained the benefit of the first letter dated 15th November, 2012, the plea of coercion is a clear afterthought and is not maintainable. The Arbitrator has rightly rejected the plea that the first letter was issued under coercion.

18. Learned counsel for the contractor submits that the affidavit of Mr. Aggarwal was not considered by the learned Arbitrator. This Court has perused the affidavit of Mr. Aggarwal, who has primarily proved the documents and the correspondence. Even if the second letter of 15th November, 2012 is taken to be a genuine letter, the conduct of the parties i.e.

that the contractor sought refund under clause 3 (A) and DSIIDC gave refund under clause 3(A) is something which completely belies the second letter dated 15th November, 2012. Moreover, in the affidavit of Mr. Aggarwal, there are no facts mentioned which even remotely suggest coercion in any manner by the DSIIDC.

19. Considering the scope of interference under Section 34 as laid down in judgment of *Associate Builders v Delhi Development Authority (2015) 3 SCC 49*, this Court does not deem this as a fit case which is liable to be entertained under Section 34

“.....Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts.....”

20. The impugned award is thus upheld and the petition stands dismissed.

**PRATHIBA M. SINGH
JUDGE**

NOVEMBER 28, 2018

Rekha