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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on : 11th October, 2018

Date of decision : 2nd November, 2018

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O.M.P. 372/2008

GOVT. OF NCT OF DELHI

..... Petitioner

Through: Mr. Sanjay Dewan & Ms. Nishima
Arora, Advocates (M-9953221778).

versus

M/S GUPTA CONSTRUCTION CO. & ANR. Respondents

Through: Mr. Raman Kapur, Senior Advocate
with Mr. Dhiraj Sachdeva, Advocate.

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. The Government of NCT of Delhi i.e. the Petitioner (*hereinafter*, 'Petitioner') challenges the award dated 14th April, 2008 passed by the Learned Sole Arbitrator. The award arises out of a contract for widening of existing road on Left Forward Bund from arterial highway to Delhi-UP border (RD 0 m to RD 5750 m) including widening of bund. The contract was awarded to the Respondent/contractor vide letter dated 14th January, 1998. The contract was to be completed by 20th January, 1999, but was extended up to 5th August, 2000. In August, 2000, the work was foreclosed. The contractor invoked the arbitration clause in 2006 and raised various claims. The Arbitrator's award in respect of the various claims is as under:

A. CLAIM NO.1

2. Claim on account of double handling in view of peculiar site position – Nil award.

B. CLAIM NO.2

3. Contractor claimed sum of Rs.52,414/- on account of restoration of damaged water bound macadam which had been caused due to digging of lying cables – **Rs.26,207/- awarded in favour of the contractor.**

C. CLAIM NO.3

4. Claim of Rs.3,03,942/- on account of double handling of stone for pitching and stone masonry – **Nil award.**

D. CLAIM NO.4

5. Damages claimed in view of the period of the work having been extended till 5th August, 2000 for no fault of the contractor – **Rs.7,28,900/- awarded.**

E. CLAIM NO.5

6. Rs.18 lakhs as loss of profits in view of the delay in completion of the work – **Rs.7,20,413/- awarded.**

F. CLAIM NO.6

7. Claim for withheld amounts with the running bills – **Rs.30,000/- awarded.**

G. CLAIM NO.7

8. Claim of Rs.3 lakhs on account of VAT payments on the basis of assessment order. The claim was restricted to **Rs.2,36,234/-** and the same was awarded.

H. CLAIM NO.8

9. This claim is regarding interest. There were three elements of interest:
- a) Interest on delayed payment of escalation and delayed payment of final bill;
 - b) *Pendente lite* interest;
 - c) Future interest.

10. On (a) a sum of **Rs.8,62,511/-** was awarded. The interest was to run from 13th November, 2006 till date of making final payment. Award against claim no.9 was not to carry interest.

11. On (b) above, *pendente lite* interest @8% simple interest p.a. was granted from date of making reference to arbitration i.e., 15th September, 2006 till date of payment of award or decree.

12. On (c), simple interest @ 8% p.a. on the awarded amount was granted if payment is made period of three months. If not, simple interest @ 10% p.a. was awarded.

I. CLAIM NO.9

13. Sum of **Rs.75,000/-** awarded as cost.

J. COUNTER CLAIM NO.1

14. Nil award.

15. Thus, the total awarded sum by the Arbitrator is as under:

“In a nutshell, the net amount of the award as on 14th April, 2008 works out as follows:-

<i>Claim no.</i>	<i>Amount (in Rs.)</i>
1.	<i>Nil</i>
2.	<i>26,207/-</i>
3.	<i>Nil</i>
4.	<i>7,28,900/-</i>
5.	<i>7,20,413/-</i>
6.	<i>30,000/-</i>
7.	<i>2,36,234/-</i>
8.	<i>8,62,511/-</i>
9.	<i>75,000/-</i>
<i>Total</i>	<i>26,79,265/-</i>

Amount for the purpose of interest = Rs.(26,79,265 – 862511-7500)

Or Rs.1741,754/-

“A”

Interest on “A” @ 8% per annum for 19

*months=Rs.2,20,622/-
Deduct interest @ 10% on Rs.3000/- for 2 months and
28 days = Rs.457/-
Interest on claim no.8(a)-Rs.98,135/-
Net amount of award as on 14 April
2008=Rs.29,97,565/-
(Rs. Twenty nine lakhs ninety-seven thousand five
hundred and sixty-five only)”*

16. The objections to the aforesaid award are three fold:

- i) First that the claims are barred by the limitation;
- ii) The contractor is not entitled for any damages on account of delay in work;
- iii) That the contractor is also not entitled to loss of profits.

17. Learned counsel for the Petitioner submits that the Arbitrator has failed to take into consideration letters dated 13th June, 2005 and 4th July, 2005 given by the contractor to the following effect:

Letter dated 13th June, 2005

“To DATED 13/06/05
The Superintending Engineer
Flood Central No.-I
Shastri Nagar- Delhi

*Sub:- Widening of existing road from L.F. Bund to
Arterial High way to Delhi, U.P. Border (RD 0 M TO
5704 M) including widening of the Bund.*

Sir,

*In continuation my letter dated 16/3/05 on the noted
subject. I do hereby under take that:-*

*1. That I will not claim any interest etc on account of
delay in my payment due to non receipt of fund from
UPSIDC. I understand my payment will be made after
the receipt of fund from UPSIDC.*

2. I will not go to arbitration in this case.

Thanking your
Yours faithfully
M/s Gupta Const. Co.”

Letter dated 4th July, 2005

“To, DATED 4.7.2005
The Superintendent Engineer (FC-I)
Shastri Nagar, Shahadra, Delhi.

Sub: Widening of existing road from L.F. Bund to Arterial High way to Delhi, U.P. Border (RD 0 M TO 5704 M) including widening of the Bund.

Ref: YourNo.Div-IV/W-742/Part IV/SW/SEF/1033 dt. 14.6.05 addressed to Executive Engineer Civil Div-IV Delhi

Sir,

We convey our thanks for grant of time extension upto the date of actual completion (upto 5/8/2000) without levy of compensation which was pending since long.

We also intimate and clarify that the undertaking given by us on the bottom of Extension Proforma and mentioned in our letter dated 13.6.2005 are withdrawn as these were given by us under duress and undue pressure.

We farther clarify that our huge payment was due and pending since long on account of Security Deposit and final bill. There was on other alternative except to given the said undertaking and hence withdraw.

Please note that we reserve our right to prefer our bonafide claims on account of prolongation of contract and hold up of our huge amount and escalation etc.

We reiterate that we will prefer our all claims through Arbitration or any other appropriate FORUM

Thanking you and assuring our best cooperation at all times.

Yours faithfully
(Partner)
Gupta Const. Co.”

18. The Petitioner submits that it was this due to this undertaking given by the contractor that though the delay was on account of the contractor, the Government did not raise any claim of liquidated damages or impose any liquidated damages. The Ld. Counsel for the Petitioner relies upon the application for extension of time. It is submitted that the entire extension was given on the basis that the contractor would not raise any claims of damages or interest or seek any arbitration. Ld. Counsel relies upon the noting of the Sub-Divisional Officer which reads as under:

“The work was awarded to M/s Gupta Co. with stipulated date of start comp as 21/1/98 and 20/1/99 respectively. But the work was foreclosed to 5/8/2000 with a total delay of 562 days where as delay of 487 day was justified as per Hindrance register. Since the department has not suffered any damage due to this delay as such it is recommended that extention of granted upto 5/8/2000 without levy of compensation.”

19. On the basis of the above application for extension of time, the Executive Engineer passed the following order on 13th June, 2005:

“Considering the of the file, replies of the contractor & the recommendations of EE CD-IV vide his letter No.EE CD-IV/Acs/8(1)/97-98/77 dt. 28.5.05 clarifying the facts & recommending that EOT be granted without levy of compensation, I hereby grant EOT upto 5.8.2000 without levy of compensation on proposed above.”

20. The contractor having taken advantage of the extension which was granted to it without levy of any compensation/damages, took a U-turn after the extension of time was granted and withdrew the letter dated 13th June, 2005 on 4th July, 2005. Ld. Counsel further submitted that the two claims which were awarded i.e., Claim no.4 and Claim no.5 are over-lapping in

nature.

21. On the other hand, Learned Senior Counsel for the Respondent submits that the undertaking which was given dated 13th June, 2005, was under coercion and duress and cannot be relied upon. Further, the final bill was paid only in 2006. Hence, the claims are not barred by limitation. The delay of 18 months being for reasons not attributable to the contractor, damages and loss of profits are liable to be awarded.

22. The Court has considered the rival submissions of the parties. The only two claims that are under challenge are in respect of claim no.4 and claim no.5. Before going into the claims, the aspect of limitation needs to be considered. On the aspect of limitation, there is a fundamental issue as to whether the Engineer-in-Charge was to prepare the Bill or the contractor had to submit the bill. This is because under clause 25 of the contract, any claims had to be raised within 120 days of receiving the intimation from the Engineer-in-Charge that the final bill is ready for payment.

23. The Petitioner argues that the contractor had to submit the final bill. The contractor argues that the Engineer was to himself prepare the bill. This aspect can be put to rest by reference to the rejoinder filed by the Claimant before the Arbitrator. In para VIII of the reply on merits, the contractor states as under:

*“VIII. The work was completed on 5.8.2000. Completion certificate was recorded. **The final bill was also submitted to the respondent.** In this connection letter dt. 28.6.2002 Para 4 (C-28) and letter dated 20.8.2004 Para 4 (C-29) are self explanatory. The claimant claimed only those items which were not paid in the final bill and the claimant accepted the bill under protest and claimed the items not included in the final bill in the Arbitration.”*

24. A perusal of the above paragraph clearly reveals that after the completion on 5th August, 2000, the contractor submitted the bill to the Government on 28th June, 2002. Thus, from the date of completion, the contractor itself had delayed the submission of the final bill. This plea also shows that it was the obligation of the contractor to submit the final bill. However, after submission, it is not disputed that the bill was prepared by Engineer on 25th July, 2003 and was approved by Engineer-in-Charge on 13th June, 2005. Part payment of the bill was also released on 12th December, 2006. The clause is clear to the effect that claims have to be made within 120 days after the Engineer-in-Charge intimates that the final bill is ready for payment. Though, the work was completed on 5th August, 2000, the bill was submitted only in 2002. The parties have not shown any clause of the contract which stipulates as to within how much time the final bill is to be submitted from the date of completion. The contractor in the present case has been raising claims since 1999 as is evident from EX.C-18 dated 6th February, 1999 and EX.C-19 dated 26th March, 1999. Thus, even before the completion of the work, the contractor has been raising claims relating to compensation and damages. This, it is difficult to hold that the claims are barred by limitation. By a strict reading of clause 25, the Arbitration has been invoked within the limitation period.

Claim No.4: Rs.16,01,250 - Claimants claim on account of Loss suffered on account of actual expenditure incurred for prolongation of contract on account of staff employed for unproductive work idling of T&P & expenditure incurred on liasoning

25. Coming to claim no.4, this claim of the contractor is for compensation/damages and a prayer for additional rates. The contractor had sought extension of time. This claim is on account of loss suffered towards actual expenditure incurred for prolongation of the contract. The contractor claimed that it was due to the lapse on the part of the Respondent and delay in decisions connected with the work that the completion of the work got delayed as per the document handed over by the counsel for the Petitioner. The total delay was to the tune of 562 days and the Government has taken a view that the delay of 487 days was justified as per the hindrance register. Thus, no compensation or damages was levied on the contractor.

26. Apart from this, after accepting the undertaking of the contractor, the entire payment of the final bill was released. The contractor has accepted that 75 days' delay was unjustified by accepting payment of the final bill. On the basis of the reasoning given by the Divisional Engineer and thereafter approved by the Executive Engineer, extension of time was also granted without levy of compensation up to 5th August, 2000. The contractor having accepted this, cannot thereafter be permitted to make claims in respect of additional 18 months unless and until the actual expense is proved on record. The various over heads under which the claims have been made are in respect of salaries paid to various personnel @ Rs.99,800/- per month for 18.5 months, head office overheads and profits to the tune of Rs.16,01,250/-. In reply to this claim, the Government argued that for this period escalation under clause 10C has already been granted to the tune of Rs.24,35,378/- and Rs.17,43,205/-. Moreover, the Government also argued that there was no labour lying idle at the site of work and for this very period, escalation have already been granted. This is a case of clear

duplication.

27. In rejoinder, the contractor admits that escalation was given not as per clause 10C but as per clause 10CC. Due to prolongation of contract, the contractor claimed that he had only claimed actual expenditure incurred by him. The Arbitrator simply awards a sum of Rs.39,400/- per month as against Rs.99,800/- claimed by the contractor. The Arbitrator himself comes to the conclusion that the delay was wholly due to the Petitioner as is clear from the fact that 487 days was held to be justified even as per the hindrance register. Clause 10CC only relates to increase in price of material or wages of labour and not in respect of expenses incurred on labour, etc. for the additional. The Arbitrator has scaled down the expenses accordingly and the amount of Rs.39,400/- per month awarded does not warrant any interference.

Claim No.5: Rs.18,00,000 – Loss of Profit suffered due to prolongation of contract.

28. Insofar as claim no.5 for loss of profits is concerned, the claim of the contractor under this head is set out herein below:

“CLAIM NO.5 : Rs.18,00,000

Loss of Profit suffered due to prolongation of contract

The claimant quoted their rates considering that the entire work will be completed within 12 months. The reasonable profit was included at the rate of 10% of the tendered amount. The tendered amount was Rs.2,96,31,344 and total profit to be earned within 12 months was 29,63,134 i.e. Monthly profit anticipated was Rs.2,46,928 P.M. The execution of work prolonged for a period of more than 31 months against stipulated period of 12 months. The detailed calculation for loss of profit are calculated as per Annexure ‘C-4’ for the

perusal of the Ld. Arbitrator. The loss of profit works out to Rs.1,80,0000 which may awarded in favour of the claimant”

29. The position on loss of profits is settled and has been laid down in ***Ahluwalia Contract (India) Limited v. The Union of India [FAO(OS) (COMM) 143/2017 decision dated 17th October, 2017]***, wherein the Division Bench of this Court has held that if there is no proof of injury, there can be no loss of profits. The findings of the Division Bench are as under:

“10. That in arbitration proceedings, just as in civil cases, an injured party can claim damages, does not necessarily translate into an award for damages towards loss of profits unless some due diligence is exercised by the party (in the present case, Ahluwalia claiming it). In other words, a claim for damages (general or special) in the proceedings, cannot as a matter of course, result in an award, without proof of having suffered injury.....”

30. Further, the Supreme Court in ***M/s Kailashnath Associates v. Delhi Development Authority & Anr. (2015) 4 SCC 136*** held as under:

“43. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:

43.1. Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only

reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation.

43.2. Reasonable compensation will be fixed on well-known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.

43.3. Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the section.

43.4. The section applies whether a person is a plaintiff or a defendant in a suit.

43.5. The sum spoken of may already be paid or be payable in future.

43.6. The expression “whether or not actual damage or loss is proved to have been caused thereby” means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

43.7. Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application.”

31. Recently this Court in ***National Projects Construction Corporation Ltd. v. Ambika Engineers & Consultants [OMP 59/2008 decision dated 18th September, 2018]***, held as under:

“29. Insofar as loss of profits is concerned, the breach having been committed by Ambika itself which, did not execute the work under the garb of non-approval by

MES, and also left the site on 7th July, 2004, no loss of profits is liable to be awarded. The legal position as canvassed from both sides is not required to be gone into the present case inasmuch as, since the facts do not support the finding of breach by NPCC to that extent, the award does not deserve to be upheld. Moreover, it is the settled position that loss of profits cannot be awarded merely upon a surmise or a conjecture. The loss has to be proved. It cannot be mere 'paper profits'. Only once it is established that the loss has been suffered, only then the manner of estimating the same can be gone into by applying any of the recognised methods. Moreover, loss of profits can be awarded only if there is wrongful termination or breach by NPCC. In the present case, owing to the manner in which the works were delayed beyond reasonable periods and despite repeated notices, there was no progress seen, the termination by NPCC is held to be valid. Hence no claim of loss of profits is liable to be awarded. Since the termination is held to be valid, the case laws cited on both sides, need not be considered."

32. The contractor has in effect raised a claim on a monthly basis of loss of profits of the contract which is executed. The contractor has been paid for the works executed. The contractor has been given escalation under Section 10CC and has also been compensated for any expenditure which he had incurred. Profits are always calculated on a particular assignment and not on a monthly basis. Allowing a claim of profits when the contractor has been paid fully for the work executed without levy of the liquidated damages, especially when there was admitted delay, would result in double payment. The tendered amount was Rs.2,96,31,344/- and the final bill paid was Rs.2,96,34,319/-. Thus, on the tendered amount, the entire money has been paid. Thus, the contractor has already earned the profits in respect of this contract.

33. No part of the contract was either foreclosed, cut down or restricted. For the additional period of the contract, the expenses have been reimbursed and escalation has also been given under Section 10CC. The contractor signed an undertaking but withdrew the same. Irrespective, once the contractor has been awarded the full payment for the work done, a loss of profits claim would clearly be over-lapping. The cases where loss of profits have been awarded which are relied upon by the contractor are those in which it was found that the delay was due to the idle tools, plant, machinery, establishment as in *Mittal Estates Pvt. Ltd. v. DDA C.S.(OS) No.44A/1997* or in cases where the Government is in breach and there was a termination or premature foreclosure. No actual loss or injury has been established. In the present case, the Arbitrator has clearly concluded that *“for example, it is hard to believe that any prudent contractor will allow his machines to remain idle. Similarly, he will not allow any mistry to sit idle. The onus of mitigating the loss lies squarely on the claimant.”*

34. In the face of the above conclusion, no loss of profits is awardable. Thus, while the Arbitrator has rightly compensated the contractor for expenses which were incurred by an estimate of expenses incurred for the prolongation of contract, no loss of profits is liable to be awarded as clearly the two heads are over-lapping.

35. For all the above reasons, the award of loss of profit is set aside. The remaining award is not interfered with.

36. OMP is disposed of in the above terms.

**PRATHIBA M. SINGH, J.
JUDGE**

NOVEMBER 02, 2018

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