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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: 14th August, 2018
+ **O.M.P. (COMM) 166/2016**

EXECUTIVE ENGINEER CD-II Petitioner

Through: Mr. Kushagra Pandey, Advocate
(Mob. No. 9999266111)

versus

M/S J.K. ENGINEERS Respondent

Through: Mr. Sandeep Sharma with
Mr. Sarthak, Advocates (Mob. No. 9654023616)

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This is a petition challenging Award dated 24th June, 2014 passed by the learned Arbitrator.
2. The tender for the work 'Widening of Bridge on Najafgarh Drain at RD 53716m (Rajpura Road Bridge) at Vijay Nagar near Christian Colony, Delhi University, North Campus, Part-I (Substructure) Deposit Work' was awarded by the Petitioner to the Respondent as per letter dated 31st March, 2010.
3. A formal agreement was entered into between the parties, being agreement No.EE-CD-II/AC/ACMT.No.2/2010-11. Various disputes had arisen between the parties in respect of the claims made by the contractor.
4. A sole Arbitrator, Sh. S. R. Pandey was appointed vide letter dated 29th November, 2012. Vide Award dated 24th June, 2014, the disputes were decided. The present objection petition was filed challenging the award of the some of the claims in favour of the Respondent.

5. On 22nd December, 2014, by a detailed order, the scope of the present petition was restricted to Claim No.1.04. The issue in this item/claim was whether the rate to be paid to the Respondent was Rs.8524.28/- per meter or Rs.10,770.44/- per meter. Ld. Arbitrator applied the higher amount, as claimed by the Respondent, and awarded a sum of Rs.9,88,486/-. The relevant portion of order dated 22nd December, 2014 is as set out herein.

“2. The challenge in the petition is made with regard to the three claims. The first claim is, in fact, a sub-claim, which bears the description: No. 1.04. The other claim, which is challenged, is claim No.3, and the last claim, which is under challenge, is claim No.6.

3. Insofar as sub-claim No.1.04 is concerned, it pertains to the rate to be awarded to the respondent herein, with respect to a substituted item.

3.1. As per the petitioner, payments in respect of the substituted item, i.e. item No.1, were made at the rate of Rs.8524.18 per metre. According to the petitioner, the respondent accepted 90% of the payment at that rate and, raised an objection qua the rate, only on, 18.8.2010.

3.2 It is, however, not disputed by Mr. Madan, who appears for the petitioner, that no rebuttal was issued by the petitioner with regard to the letter dated 18.8.2010.

3.3 As is evident upon a perusal of the record, the learned Arbitrator, has accepted the rate of the respondent qua the substituted item, (which is pegged at 10770.44 per metre), and accordingly, awarded a sum of Rs.9,88,486/-.

3.4 To be noted, the said amount has been arrived at by noting the difference between the rates offered by the petitioner and the one which was claimed by the respondent herein.

3.5 It is Mr. Madan's contention that the Arbitrator has committed an error, as he has not disclosed, as to why

the rate of Rs.8524.28 per metre, was not acceptable vis-a-vis the substituted item. He says that, a rate analysis, in respect of how, the petitioner had arrived at the rate of Rs.8524.28 per metre, was filed with the learned Arbitrator.

3.6 This aspect, however, does not come through upon reading of the award. Mr. Madan says that he will produce the relevant document, which was placed before the learned Arbitrator in this behalf.

4. Insofar as claim No.3 is concerned, the learned Arbitrator has awarded a sum of Rs.11,60,600 against a claim of Rs.16 lakhs. This claim pertains to compensation on account of staff, establishment, overhead and machinery, T&P etc.

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4.7. Therefore, I am of the opinion that the conclusion drawn by the learned Arbitrator's based on appreciation of the material placed before him cannot be overturned, merely, because one may have different view of the matter. This is specially so, as the learned Arbitrator, has returned a finding that the respondent had committed no breach, and that, the delay, if any, was on account of impediments, which the petitioner could not get removed.

4.8. I may also take note of the fact that the learned Arbitrator has, in fact, docked, nearly, 50% of the claim by holding that the respondent was required to mitigate its losses.

5. In these circumstances, I am of the view that the challenge to the said claim cannot be sustained.

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6. This brings me to the last aspect of the matter, which is the challenge to claim No,6.

6.1 The learned Arbitrator has awarded pendete lite interest at the rate of 9% per annum and future interest at the rate of 12% per annum.

6.2. The period for which interest has been awarded is not in issue before me. Therefore, the challenge to the

said claim is also rejected as the rate according to me is reasonable given the facts and circumstances of the case.

7. Insofar as sub-claim No. 1.04 is concerned, the Registry will requisition the arbitral record.

8. Mr. Madan, will be at liberty to make efforts on his own and file relevant documents.”

6. Learned counsel for the Petitioner submits that as per the agreement between the parties and the additional terms & conditions which have been signed by the Respondent, the rates to be applied were the CPWD rates and as per the said rates, for the description of work which was carried out by the respondent, the rate liable to be applied was Rs.8524.18/- He has handed across a document, which was filed as Ex. R-2 in the arbitral proceedings, which shows that rate is Rs.8,524.18/-.

7. On the other hand, Mr. Sandeep Sharma, learned counsel for the Respondent submits that this item was a substituted item and is governed by the Clause 12.2 of the contract. He submits that while all the awarded items were to be dealt with as per the CPWD rates, insofar as deviation and extra items were concerned, market rates were payable. Accordingly, the claim of the respondent made vide letter dated 18th August, 2010 was fully justified.

8. The quantity of the work executed is not in dispute It is also not disputed as to what the CPWD rates are. Learned counsel for the Petitioner also does not dispute that these are substituted items. What is however, in dispute is whether the contract envisages payment at CPWD rates in respect of the substituted items.

9. Clause 12.2 relied upon by the respondent reads as under:-

“In the case of extra item (s), the contractor may within fifteen days of receipt of order or occurrence of

the item(s) claim rates, supported by proper analysis, for the work and the engineer-in-charge shall within one month of the receipt of the claims supported by analysis, after giving consideration to the analysis of the rates submitted by the contractor, determine the rates on the basis of the market rates and the contractor shall be paid in accordance with the rates so determined.

In the case of substituted items, the rate for the agreement item (to be substituted) and substituted item shall also be determined in the manner as mentioned in the aforesaid para.

(a) If the market rate for the substituted item so determined is more than the market rate of the agreement item (to be substituted), the rate payable to the contractor for the substituted item shall be the rate for the agreement item (to be substituted) so increased to the extent of the difference between the market rates of substituted item and the agreement item (to be substituted).

(b) If the market rate for the substituted item so determined is less than the market rate of the agreement item (to be substituted), the rate payable to the contractor for the substituted item shall be the rate for the agreement item (to be substituted) so decreased to the extent of the difference between the market rates of substituted item and the agreement item (to be substituted).

In the case of contract items, substituted items, contract cum substituted items, which exceed the limits laid down in schedule F, the contractor may within fifteen days of receipt of order or occurrence of the excess, claim revision of the rates, supported by proper analysis for the work in excess of the above mentioned limits, provided that if the rates so claimed are in excess of the rates specified in the schedule of quantities, the Engineer-in-Charge shall within one month of receipt of the claims supported by analysis,

after giving consideration to the analysis of the rates submitted by the contractor, determine the rates on the basis of the market rates and the contractor shall be paid in accordance with the rates so determined”.

10. A reading of the above clause clearly shows that in respect of any deviation, substituted or extra item, the rate would be determined on the basis of the market rates and the contractor would be paid in accordance with the rate so determined.

11. There is no dispute that the CPWD rate is Rs.8524.18/- per meter and the Petitioner paid the Respondent as per the said rate. Upon receiving 90% of the payment, the Respondent vide letter dated 18th August, 2010 raised a claim to the effect that the CPWD rate was not liable to be applied and the market rate had to be applied. The market rate was calculated, which is at page No.75, along with the letter dated 18th August, 2010. No dispute has been raised in respect of the calculation by the Respondent. The clause is absolutely clear that the market rate would be applicable for any deviations, substitutions and for extra items. The learned Arbitrator has held that the Respondent vide its letter dated 18th August, 2010 had pointed out the analysis of the rate and filed the analysis justifying the application of the rate Rs.10770.44/- per meter. The learned Arbitrator has simply awarded the said amount as there was no rebuttal by the Respondent.

12. The Ld. Arbitrator has not dealt with the issue as to whether the Respondent is liable to be paid as per the CPWD Works Manual or the market rate. In response to Claim 1.04, the Petitioner had stated as below:-

“That Claim No.1.04 is denied. That the same is not payable. The contractor has been paid for substituted item no.1 against item No.7 as per CPWD work Manual and contractor has accepted the same by

utilising this money”.

13. In response to this claim No.1.04, the Respondent merely stated that the disputes were raised as per Clause 25 and also that the CPWD Manual was not a part of the agreement. It is surprising the Respondent did not also point out Clause 12.2 at that stage. Though the reply is not satisfactory, Clause 12.2 is clearly applicable in this case. In so far as the substitutions, deviations and additional items are concerned, the rate that would be applicable is the market rate. The same has to be however claimed by the Contractor, along with a proper analysis – which the Contractor did file in the present case. The claim is contained in letter dated 18th August 2010 and a complete analysis as to how the amount of Rs.10,770.40, is arrived at is also provided. There is no rebuttal as to the actual calculations made by the Respondent. Thus the analysis of the market rate has to be taken, as submitted by the Respondent. The actual market rate of Rs.10770.40 is therefore correctly applied. The award is upheld for the reasons stated hereinabove. No other claims are liable to be adjudicated in view of the earlier order dated 22nd December 2014.

14. The OMP (Comm.) stands disposed of.

**PRATHIBA M. SINGH
JUDGE**

AUGUST 14, 2018
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