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

Date of decision: 10th September, 2018

+ **O.M.P. (COMM) 250/2016**

**DELHI STATE INDUSTRIAL & INFRASTRUCTURE
DEVELOPMENT CORPORATION LTD. Petitioner**

Through: Ms. Anusuya Salwan, Mr. Nikita
Salwan, Ms. Kanika Bansal and Ms.
Shreya Sharma, Advocates.
(M:9811225368)

versus

RAMA CONSTRUCTION CO Respondent

Through: Mr. Avinash Trivedi and Mr. Umesh
Kashyap, Advocates.
(M:9871441764)

**CORAM:
JUSTICE PRATHIBA M. SINGH**

Prathiba M. Singh, J. (Oral)

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 has been preferred by the DSIIDC challenging the award dated 6th June, 2013. The brief background is that the DSIIDC had invited tenders for “*construction of pakka school building for Government school at Gazipur*”. The tender was awarded on 10th January, 2005. Agreement dated 24th March, 2005 was executed between the parties. The time stipulated for completion of the work was 22 months. The actual date of completion was 5th March, 2007.
2. The contractor/Respondent vide its letter dated 12th September, 2008, invoked the arbitration clause in respect of various outstanding claims and

vide letter dated 20th July, 2010, the Chief Engineer (Works)-I, DSIIDC appointed a Sole Arbitrator to adjudicate the disputes between the parties. A total of 21 claims were raised by the Respondent. The summary of the claims awarded are at internal page 28 of the award. The principal sum awarded by the Arbitrator is to the tune of Rs.58,00,237/-. Interest of Rs.26,10,107/- and costs of Rs.82,500/- have also been awarded. Thus, a total sum of Rs.84,92,844/- was awarded to the contractor.

3. The challenge to the award is in respect of claim numbers 8 to 11, 17, 18, 19, 20.3 and 20.4. Claim Nos.8, 9, 10 and 11 relate to various extra works which were awarded to the contractor. Claim No. 17 is in respect of escalation claimed by the contractor under Clause 10CC. Claim No. 18 is in respect of 5% incentive claimed by the contractor. Claim No. 19 is in respect of extra expenditure for watch and ward service. Claim Nos. 20.3 and 20.4 relate to interest for delay in payment of escalation.

4. Before going into the claims, in order to determine the claims, the first and foremost issue to be decided, is in respect of the stipulated date of start and date of completion. On this, the Learned Arbitrator has held that though the date of award of the contract was 10th January, 2005 and the stipulated period for completion was 22 months, the site itself was handed over to the Respondent on 23rd March, 2005. Therefore, the stipulated date of commencement should be considered as 23rd March, 2005 and the date of completion would be 22nd January, 2007.

5. On this issue, there cannot be too much dispute inasmuch as Clause 5 of the Agreement clearly stipulates as under:

“The execution of work shall commence from 15th day or such time period as mentioned letter of Award after

*the date on which the Engineer-in-Charge issues written orders to commence the work or from the date of handing over of the site **whichever is later.***

As per the above clause, the commencement date would be the later of the two dates i.e. the date of issue of written orders and that of handing over of the site. Since admittedly, the site was handed over only on 23rd March, 2005, the date of letter of award of the work cannot be considered as the date of commencement. The Arbitrator has rightly held that the date of commencement is 23rd March, 2005 and hence the date of completion was after 22 months i.e., 22nd January, 2007.

CLAIM No.17

6. This claim is based on Clause 10CC of the Agreement, which reads as under:

“CLAUSE 10CC

If the prices of materials (not being materials or services tendered at fixed prices by the Department in accordance with Clauses 10 & 34 thereof) and /or wages of labour required for execution of the work increase, the Contractor shall be compensated for such increase as per provisions detailed below and the amount of the contract shall accordingly be varied, subject to the condition that such compensation for escalation in prices shall be available only for the work done during the stipulated period of the contract. No escalation shall be paid for the work executed in extended contract period even if extension of time is granted without any action under Clause 2 and also no such compensation shall be payable for a work for which the stipulated period of completion is 18 months or less. Such compensation for escalation in the prices of materials and labour, when due, shall be worked out based on the following provisions.”

The Arbitrator has awarded a sum of Rs.19,52,087/- under this claim. The findings of the Arbitrator are that the delay in the work was due to hindrances attributable to the department, and hence the Respondent is entitled to escalation for the entire period of the execution of the work, though, Clause 10CC stipulated that no escalation would be acceptable beyond the stipulated period. The Arbitrator has further held that the Base Price Index of August, 2004 would be considered and not the Index of September, 2004. The further finding of the Arbitrator is that as per the final Bill – RD-3, the Respondent is entitled to escalation.

7. The first submission of Ms. Salwan, Ld. Counsel for the Petitioner, is that the Respondent and the learned Arbitrator have failed to consider the proceeding sheets as per the record, wherein on 3rd November, 2012, calculations were submitted in respect of escalation payable and even as per the Respondent itself, the amount due was to the tune of Rs.7,65,301/-. She submits that as against this amount, it was the contention of the Petitioner that only Rs.2,08,551/- was due. In any event, Ms. Salwan submits that the amount awarded could not have been higher than Rs.7,65,530/-, inasmuch as the said calculation was based on the second escalation bill, which was taken into consideration by the learned Arbitrator. Thus, she submits that the awarded amount in Claim No.17, which does not consider these proceeding sheets and the calculation discussed therein, is severely inflated.

8. On the other hand, the Ld. Counsel for the Respondent submits that the Learned Arbitrator, having rightly come to the conclusion that the delay was attributable to the Petitioner, had rightly granted escalation under Clause 10CC. According to Ld. Counsel, the calculations, as discussed in

the proceeding sheet dated 3rd November, 2012 were no longer applicable, as the claims were amended and the revised bill was submitted on 1st October, 2012. Thereafter, pursuant to order dated 3rd June, 2013, a further revised bill was submitted. Thus, the calculations as recorded on 3rd November, 2012, were no longer applicable. He submitted that the Base Price Index of August, 2004 was rightly taken, as Clause 10CC provides that the Wholesale Price Index for construction material that would be applicable would be the one on the last stipulated date of receipt of tender. Since the last date for the receipt of tender was 9th August, 2004, the 2004 Base Price Index would be applicable. Since at the time of making of the claim statement, the August, 2004 Index was not available, the Claimant had used the Base Price Index of September, 2004. Subsequently, however, the August, 2004 Price Index having become available, vide order dated 16th February, 2013, the amended claims were taken on record. This amendment having not been challenged, the same cannot be raised at this stage.

9. A perusal of Clause 10CC makes it clear that the All India Wholesale Price Index as on the date of tender is the applicable index. It is a fact that the initial claim was filed on the basis of the September, 2004 index. This is clear from a reading of the proceeding sheet dated 3rd June, 2013. The initial Claim No.-17 was to the tune of Rs.11,05,080/-, which was revised by filing a subsequent amendment due to which the claim was increased to Rs.22,98,591/-, in the rejoinder submissions. The specific averment by the Respondent in para 17.9 of the rejoinder submission is as under:

“17.9 The claimant submits herewith a statement with detailed calculations of escalation under clause 10CC showing net payable amount of Rs.22,98,591/- to the claimant. In this respect it is submitted as follows:

(i) The claimant submitted tender for this work on 16.08.2004. The index for civil components of construction materials during August 2004 was applicable as initial index. Initial index for August 2004 was not available when payment of escalation bill under clause 10CC was pending for payment. In these circumstances, the claimant had requested vide C-23 dated 11.12.2006 (page 42) to pay the escalation bill by adopting the index for September 2004 on provisional basis and the bill will be revised when the index for August 2004 would be available. The index for escalation under clause 10CC adopted as initial cost index for August 2004 (203.94) is submitted herewith.”

This amendment was allowed on 16th February, 2013 in terms of Section 23 (3) of the Arbitration Act. The use of the All India Wholesale Price Index for construction material was substituted as per the Correction Slip for General Conditions of Contract for CPWD Works 2003 (*hereinafter ‘Correction Slip’*), which incorporated corrections up to 4th April 2003. Thus, no fault can be found with the fact that the Index for August, 2004 was considered by the Arbitrator. The objection, however, raised by Mrs. Salwan is in respect of the fact that the proceeding sheet dated 3rd November, 2012, specifically recorded that the balance amount as per the claim i.e. Claim No.-17 would only be Rs.7,65,301/- based on RD-2 i.e. final bill no.-2. The relevant portion of the said order reads as under:

“3. Claim No.17: (10CC)

(i). Rt submitted a statement, which was submitted earlier by the Ct under his letter Dt16.7.07 to the Rt, Pg.10/RD-9, after checking its calculations, and the same was marked as RD-10. The amount claimed by the Ct in his SOC was Rs.11,05,080/-

However, due to calculation mistakes, the same works out to Rs.7,65,301/- as detailed below and this change is agreed to by both Parties. Pg.10/RD-9 refers.

Total gross amount of Ct's 2nd Escalation Bill inclusive of 1st Escalation Bill =Rs.26,56,674/-

Less already paid (i)against 1st Bill Rs.13,94,312/-(Net was Rs.13,21,194/-)-

(ii)against 2nd Bill Rs. 4,97,061/-

Total Rs.18,91,373/- (-) Rs.18,91,373/-

Hence, balance amount as per Claim = Rs.7,65,301/-"

The Learned Arbitrator has, while dealing with Claim No.-17 clearly held that though by the time the final award was passed, the third bill i.e. final bill no.-3 was submitted, the difference between the final bill no.-2 and final bill no.-3 was not much. The Arbitrator observed as under:

“(a). Two escalation bills No.1, Dt. 17.7.2006 and No.2, Dt. 16.7.2007 submitted by the Claimant were paid by the Respondent after some adjustments in the amounts. As per Claimant the Escalation Bill No.2 was for the whole work as the work was completed by Jan.'2007, though the Respondent had recorded the date of completion as 5.3.2007. In support of the same Claimant relied upon the final bill as submitted by them on 28.5.2007 as per which value of work done, for agreement items only on which 10CC is payable, is Rs.5,28,74,627/- and the Escalation bill No.2 is also for almost the same value of the work done of Rs. 5,28,51,262/-. The difference is negligible and is inconsequential. The 3rd bill had to be submitted by the Claimant as 2nd bill was not paid in full. But for the claim under consideration I do not intend to look into this Bill No.3 as the same is of no relevance. Based on the above facts I, however, hold that the escalation bill No.2 was for the whole work which as per the

Claimant was completed by January, 2007 and accordingly the escalation bill No.2 also showed the last quarter for which 10CC was claimed as Nov. & Dec.2006 and Jan 2007 i.e 8th Qr. In the amended claim also the Claimant has claimed for the whole work only.”

The Arbitrator hence considered final bill no.-2 in order to award Claim No.-17. The claimed amount under Claim No.-17 was only Rs.22,98,591/-. This is also as per the rejoinder submissions, CD-17. Since, the amount claimed is only Rs.22,98,591/- and the amount already paid was Rs.18,91,373/-, the balance amount would have only been Rs. 4,07,218. The Arbitrator, therefore, erred in taking the claimed amount as per CD-24 without considering the documentation and the proceeding sheet of 3rd November, 2012. CD-24 was admittedly submitted pursuant to order dated 3rd June, 2013 which was just before the passing of the award. The objection raised by the Respondent in respect of the final bill having been considered by the Arbitrator, CD-24 could not have been taken into consideration. Thus, Claim No.-17 is restricted to Rs. 4,07,218/-. The absence of any documentation in the impugned award as to the calculations recorded on 3rd November, 2012 and sudden increase in Claim no.-17 just before passing of the award lends credence to the case of the Petitioner that an inflated calculation has been wrongly considered by the Arbitrator.

CLAIM NO.18

10. This claim is in respect of the award of incentive for early completion of work. The Arbitrator has awarded the incentive of 5% on the basis that considering the value of the work done on the basis of the stipulated date of completion which was extended by 226 days. Since, bonus of 1% per month

is to be given as incentive for value of the work done subject to maximum of 5%, the same works out to Rs.24,69,245/-.

11. The submission of Ms. Salwan is that the arbitrator has wrongly held that additional work was awarded to the Respondent, when in fact the value of the work had changed only because of change in the price of materials, and the quantum of work had not increased. Thus according to her, the deed of extension of the contract was baseless.

12. On the other hand, learned counsel for the Respondent submits that such a calculation by an arbitral tribunal is completely valid inasmuch as the Petitioner itself had considered that 15% additional extra work had been awarded to the Respondent. The arbitrator has changed 15% to 25%, going by the nature of the contract. Learned Counsel relies upon a judgment of the Division Bench of this Court in ***Union of India vs. N.N. Buildcon Pvt. Ltd*** ***FAO(OS) 438/2015(Decided on 1st September, 2015)*** to argue that whenever there is additional work, which is allotted, the date of completion automatically changes and on that basis, the incentive has to be awarded. Ms. Salwan submits that the arbitrator has not dealt with the specific plea that the change was only in cost of materials used and not in the quantum of work.

13. On this aspect, there is no doubt that if additional work has been awarded, the date of completion would have to be extended proportionately. The claim of the Respondent is that the additional work was allotted as the originally tendered work was of Rs.4,93,84,901/- and since the delay was attributable to the DSIIDC, and additional work was awarded, the contract ought to be extended by 226 days. Clause 2(A) as inserted by the Correction Slip reads as under:

“2A. In case, the contractor completes the work ahead of scheduled completion time, a bonus @ 1 % (one percent) of the tendered value per month computed on per day basis, shall be payable to the contractor, subject to a maximum limit of 5% (five percent) of the tendered value. The amount of bonus, if payable shall be paid along with final bill after completion of work.”

The Learned Arbitrator has considered in detail - the manner in which the delay occurred, as also the additional work which was awarded to the Respondent. The incentive has been awarded on the basis of the tendered value. Going by the judgement of the Division Bench of this Court in ***Union of India vs. N.N. Buildcon Pvt. Ltd.***, such an incentive is payable in all contracts where Clause 2(A) is applicable. The finding of the Arbitrator is set out herein below:

“(iv). I have carefully examined and analyzed the submissions made by both the Parties. It is an undisputed fact that incentive (bonus) Clause 2A on Pg. 222 of the Agmt, is part and parcel of the Agmt entered into between the Parties. This Clause 2A is at para 10 of the 'Corrections Slip for General Conditions Of Contract for CPWD Works 2003 starting from Pg. 219 of the Agmt. Paras 27 to 29 of these corrections, deal with modifications in Escalation Clause 10CC of the Agmt which has been followed by both the Parties and Contractor's Claim No. 17 for balance escalation is also based on these modifications in Clause 10CC only. Applicability of these corrections under that Claim has never been objected to or disputed by the Respondent. Inconsistent approach of the Respondent in respect of these two Clauses by arguing that Clause 2A is not applicable whereas Clause 10CC which has already been implemented based on which payment

also made, and both of which are forming part of the same Document of the Agmt, cannot be appreciated. Therefore the Respondent's stand that Clause 2A is not applicable in the instant case is totally devoid of any merit. Entry at Sl No. 4 in EOT Proforma Pt II, Pg 132/CD-2, filled by the Respondent themselves, reveals that a percentage of 80% has been considered for that hindrance and not 100% to work out the period of extension, and as such it is wrong on the part of the Respondent to say now that the hindrances were not calculated by them on a proportionate basis. The stipulated date of completion as already decided earlier, is 22.1.2007 and not 30.11.2006 as stated by Respondent EE. Clause 12.1.1 of the Agmt provides that time for completion in the event of deviations resulting in additional cost, be extended in the proportion which the additional cost bears to the original tendered value plus 25% of the time so calculated or such further additional time as may be reasonable. Hence minimum 25% extra has to be considered and not 15% as considered by the Respondent. The scheduled completion time as per the contract was 22 months. On account of hindrances which are attributable to Respondent such as delay in issue of revised drawing for FF slab, delay in providing of electrical conduits, stoppage of work of 3rd and 4th floors by DD and extra time required on account of additional work, the scheduled completion time gets contractually extended by 226 days. Against this the additional time taken by the Claimant Contractor was only (5.3.2007-22.1.2007)=42 days. Thus the work was completed (226-42)=184 days before the deemed extended scheduled completion time.”

These findings being on a complete appreciation of facts, the only submission of Mrs. Salwan is that the Arbitrator did not consider that the

quantum of work was not increased, but the value of the work was increased due to higher cost of the material used. This fact ought to be established by independent evidence. The DSIIDC had pleaded as under:

“That it is humbly submitted that the contents of Claim No.18 being false and misleading are denied as untenable. That it is humbly submitted that the actual date of completion is beyond the stipulated date of completion. Hence, incentive is not admissible.”

14. Further, no details whatsoever were given to substantiate the argument that the increase in the value of the work was not because of increase in quantum of work but on account of increase in cost of materials. In the absence of the same, the challenge to this is untenable.

CLAIM NOs.8, 9, 10 and 11

15. Insofar as Claim Nos.8, 9, 10 and 11 are concerned, all of these are for extra work which has been executed by the contractor. The rates which have been applied by the Arbitrator are the rates which were suggested by the Respondent itself. Thus, no interference is called for in the same.

CLAIM NO.19

16. Insofar as Claim No.19 is concerned, the claim was for a sum of Rs.48,600/-. Since after the completion, the Petitioner, as also the Respondent had also engaged workers for rectification of defects, the same has been divided into 50% each. This is a reasonable and plausible view.

CLAIM NOs.20.3 and 4

17. Insofar as interest is concerned, the Arbitrator has awarded interest @ 10% simple interest per annum, which is quite reasonable. Interest has also been allowed only on the first and second bills. The third bill has not been considered. Thus, no interference is called for.

CLAIM NO.20.4

18. Insofar as Claim No.20.4 is concerned, on the awarded sum, the Arbitrator allowed 10% simple interest per annum. A perusal of the order sheet of the Arbitration shows that though the award of the contract was in 2005 and the date of completion was 2007, the matter remained pending in arbitration and no major delay has been caused by the Respondent. The Respondent was duly represented in the arbitration proceedings, and in fact a substantial part of the bills were paid by the Respondent. Accordingly, insofar as escalation is concerned, the same has been restricted by the present order and no interest would be payable. However, insofar as the remaining claims are concerned, interest @ 8% per annum would be payable.

19. With these observations, the O.M.P. is disposed of.

SEPTEMBER 10, 2018

Rahul

**PRATHIBA M. SINGH
JUDGE**