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

+ **FAO(OS) (COMM) 138/2018**

Date of decision: 10th July, 2018.

K R ANAND

..... Appellant

Through Mr. Harish Malhotra, Sr. Advocate with
Mr. Rajender Agarwal and Mr. R.K. Modi,
Advocates.

versus

DELHI DEVELOPMENT AUTHORITY & ANR. Respondents

Through Mr. Pawan Mathur, Standing Counsel for
DDA with Mr. P.K. Ex engineer DDA.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA J. (ORAL)

C.M. No.26673/2018

There is delay of 5 days in filing of the appeal.

Counsel for the respondents does not oppose the application.

Delay is condoned.

FAO(OS) (COMM) 138/2018

This intra-Court appeal under Section 13 of the Commercial Court, Commercial Division and Commercial Appellate Division of the High Courts Act, 2015 read with Section 37 of the Arbitration and Conciliation Act, 1996 (A and C Act, for short) impugns order dated 10th April, 2018, passed by the single Judge partly accepting objections raised by the Delhi

Development Authority (respondent before us) in their application/petition under Section 34 of the A and C Act.

2. The issue and dispute raised in the present appeal relates to claim Nos. 7 and 8 for compensation on account of under utilization of infrastructure, staff establishment, overheads, labour, workers, T and P machineries etc. during the contract period and during the extended period due to prolongation of contract period by the respondent. Claims were predicated on breach of contract by the respondent.

3. Reasoning given by the learned Arbitrator for awarding an amount of Rs.33,98,270/- against claim Nos.7 and 8 made by the appellant reads as under:-

“28.3.1 The Claimants' certificate for not claiming damages for the delay on the proforma for extension of time and later withdrawal, of the same Is considered as his own prerogative as the contract do not bind him in this matter. The circumstances in which the certificate was given being not known, it is considered that the Claimants claim for the additional cost for on overheads cannot be denied on this score alone. I have no reason to disagree with the submissions made by the Claimants on this issue. It is quite common that officers of the government organization throw hints for levy of compensation for delay in completion and ask for such, certificate. Such certificate for not claiming damages is neither a requirement as per the proforma prescribed for application for extension of time to be submitted by the contractor nor a requirement under any provisions of the contract. In my opinion, even a contractor of average prudence will not give such blanket certificate voluntarily. In view of the above, and also In view of the fact that the Claimants have withdraw the undertaking

subsequently, I hold that this cannot be a deterrent in considering this claim of the Claimants.

28.3.2 As regards, cost of overheads on account of delay due to execution of the additional work, the overheads include the cost of additional work paid to the Claimants as extra item. The provision exists in the contract for deriving such time for additional work, and the same has also been allowed while granting extension of time. Therefore, nothing is payable to the Claimants for period of delay on account of the additional work carried out.

28.3.3 As seen in the Extension of Time (EOT) application and its approval attached with the final bill, apart from the delay due to additional work, there are three main reasons for delay cited therein. They are:

(a) Rains, 99 days

Delay in the mix design, 87 days (all, of which are concurrent to the period of delay due to rains)

(c) Delay due to extreme weather, 45 days.

All these hindrances have been found valid by the Respondents and extension of time granted without levy of any compensation' as seen in the attachment to the final bill submitted by the Respondents. A period of 55 days have also been allowed as delay due to additional work.

In the EOT papers, while deriving period for additional work the amount of actual work done is taken as Rs.35,78,60,106. however, as per the final bill submitted by the

Respondents, the gross amount of work done is Rs, 37,26,23,089. Thus, the justified period of delay on account of the additional work done as per provisions of the contract works out as under:

No of days allowed for the additional work =
 $1.25 \times (\text{Actual amount of work done} - \text{Amount as per contract}) \times \text{Stipulated time as per contract (in days)} / \text{Amount as per contract}.$

$1.25 \times (372623089 - 287424811) \times 184 / 287424811$
= 68 days. (A)

28.3.4 This is noted that the work was awarded such that, the date of start itself falls at the start of the rainy season, though, the tender for the work was received as early as In; Dec, 2012 with the bids to remain valid for 90 days only. Such long period of delay in awarding the work is abnormal. Therefore, the Respondents cannot absolve themselves of the responsibility of bringing the period of execution of work during rains. Similarly, the contract stipulates, approval of design mix by CRRI or such organization. The Respondents again cannot absolve themselves of the responsibility of delay by CRRI which is a government organization like that of the Respondents and Respondents were in good position to get this expedited. The initial delay in award of work has also resulted into bringing the work running into extreme cold weather of winter season. Since the work is predominantly bituminous work which is not advisable to be executed during extreme cold weather and the period has rightly been allowed by the Respondents as a genuine delay. In view of this, it is considered that the Claimants need to be partly compensated for extra expenditure on overheads for the part of the period other than the period of delay due to extra work.”

(In view of the limited issue, which arises for consideration, we have not quoted the computation made by the Arbitrator).

4. Learned counsel for the appellant submits that the Arbitrator in paragraph 28.3.1 had referred to his experience and rightly opined that it

was common for the officers in government to throw hints for levy of compensation for delay in completion and ask for no objection certificates when the contractors apply for extension of time. Our attention was also drawn to paragraph 28.3.4 to urge that there was delay in approval of 'Design Mix' by CRRI for which the appellant was rightly compensated.

5. Appellant had submitted their bid pursuant to notice inviting tender on 27th December, 2012. Appellant's bid was accepted by the respondent and tender was awarded to them on 29th June, 2013. Appellant did not object or protest against any delay in award of work. They did not withdraw or claim that as the work was awarded in June, 2012, they should be paid an additional amount. Pursuant to the award of work, a written contract binding between the parties was signed. Contract term had clearly stipulated the date of commencement and completion as 9th July, 2013 and 8th January, 2014, respectively. In these circumstances, we cannot accept the reasoning given by the Arbitrator that there being delay in acceptance of the bid made in December, 2012 vide in acceptance on 25th June, 2013, the appellant should be compensated for extension of time post award of work due to rain and bad weather. Post acceptance of the bid, written contract was executed. Claim for compensation for breach would arise if the terms of the written contract were violated. Time or term of completion was six months from date of commencement i.e. 9th July, 2013. This was the agreed and accepted term. Assuming that the tender was accepted in March or April, 2013, the next six months would have included the monsoon period in July and August.

6. On the question of approval of 'Design Mix', the appellant in the application for extension of time had stated that there were rains for 99 days.

Delay in 'Design Mix', it was stated, was for 87 days that were concurrent to the period of delay due to rains. Last reason given by the appellant was 'extreme weather' because of which there was delay of 45 days. Impugned judgment refers to clause 28.5 of the contract, to highlight, the contractor/appellant's obligation under the contract to get the 'Design Mix' approved from CRRI or any other premier government institution. The appellant was well aware that this could take time. It was not the obligation of the respondent to get the 'Design Mix' approved. Thus, there was no question of breach of obligation by the respondent. Even assuming there was some delay attributable to CRRI, the respondent would not be liable to pay damages merely because CRRI was a government organization. Completely ignoring the contractual mandate, the award erroneously holds that the respondent had committed breach of contract and was liable to pay damages.

7. Learned single Judge has also commented and referred to the findings in paragraph 28.3.1., where in the arbitrator had accepted that that the "circumstances in which extension application was made by the appellant were not known".

8. We are in agreement with the single Judge that this was a fit case in which interference was required and necessary in exercise of jurisdiction under Section 34 of the A and C Act. Impugned order refers and quotes from *Associate Builders v. Delhi Development Authority*, (2015) 3 SCC 49, to observe that when the finding is based upon no evidence, or arbitral tribunal takes into account something which is irrelevant for the decision and ignores vital evidence in arriving at its decision, such decision would necessarily be perverse. Third ground of public policy, justifies interference when the

award is against justice or morality. An award is stated to be against justice when it shocks conscience of the Court. The said parameters, when applied to the facts of the present case, would vindicate and affirm impugned judgment.

9. In view of the aforesaid discussion, the appeal is dismissed, with no order as to costs.

SANJIV KHANNA, J.

CHANDER SHEKHAR, J.

JULY 10, 2018
MR/NA

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