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

Date of decision: 23rd August, 2018

+ **O.M.P. (COMM) 152/2017**

DELHI JAL BOARD

..... Petitioner

Through: Mr. Naresh Sharma, Advocate.
(M:9811087091)

versus

M/S SATISH BUILDERS

..... Respondent

Through: Mr. Sunil K. Mittal, Mr. Anshul Mittal and Mr. Harshit Vashisht, Advocates. (M:9811040423)

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The present petition has been filed by the Delhi Jal Board challenging the award dated 9th September, 2011 passed by the learned sole Arbitrator.
2. The brief facts are that the Respondent contractor was awarded the work for construction of additional staff quarters at Varun Niketan by the Delhi Jal Board. The award to the Respondent was an award at risk and costs of M/s Wee Aar Constructive Builders. The tender was awarded on 5th April, 2000 and the date of completion was 14th February, 2002. Finally, the work was completed on 31st March, 2003. The payment for the work was released to the Respondent; however, thereafter claims were raised by the Respondent on 27th March, 2007. A total of 35 claims were raised on various counts by the Respondent. Upon not receiving a response from the Petitioner, the Respondent invoked the arbitration clause.

3. On 21st January, 2008, this Court had appointed Hon'ble Ms. Justice Usha Mehra (Retd.) as the sole arbitrator to adjudicate upon the disputes between the parties. Pleadings were completed and evidence was adduced before the learned sole Arbitrator. Learned Arbitrator has, vide a detailed award, considered each of the claims and on the basis of pleadings and evidence on record, allowed some of the claims of the Respondent.

4. The present objection petition has been filed raising objections against the award. The objections pressed before the Court are the following: -

- (i) Objection in respect of rebate of 4.25%;
- (ii) Objections in respect of electricity bills for the period after the handing over the premises by the Respondent;
- (iii) Objection relating to penal rate charged for non-return of the excess steel quantity supplied by the Petitioner to the Respondent;
- (iv) Objection in terms of the Counter Claim filed by the Delhi Jal Board, relating to late handing over of 50% of the quarters, and non curing of various defects therein;
- (v) Objection relating to 10% profit asked for by the Respondent for procuring cement and steel, which stipulation was alien to the contract.

A. Objection No.1 falling from Claim Nos.2, 3 & 23

5. In respect of the first objection, the case of the Petitioner is that under clause 8 of the agreement, the Respondent was to give a rebate of 4.25% on all its bills. This was agreed to as per letter dated 15.10.1999, after the contract was executed. The relevant portion of the letter reads as under:

“With reference to your tender dated 15.10.99 for the

above said work, it is to inform you that Competent Authority has approved the award of work in your favour at the rate of 128.76% above the estimated cost of Rs.1,10,69,013/- and at a total cost of Rs.2,48,51,041.08 including rebate of 4.25% for regular monthly payment”

6. According to the Petitioner, the rebate of 4.25% was not given by the Respondent and hence the same is recoverable from the Respondent. Learned counsel for the Petitioner submits that the clause clearly stipulates that the rebate would be given by the Respondent and the Delhi Jal Board was always willing to make the monthly payments, provided the bills were raised by the Respondent. On the other hand, learned counsel for the Respondent submits that the Ld. Arbitrator has considered the matter in detail and the reasoning given by the Ld. Arbitrator ought not to be interfered with inasmuch as the Ld. Arbitrator has considered that the monthly payments having not been made, rebate was not liable to be granted. Further it is submitted by the learned counsel that the bills were in fact being prepared by the Executive Engineer and there was no question of contractor submitting the bills.

7. A perusal of paragraph 16 of the award clearly shows that the Ld. Arbitrator has considered all the letters written by the Respondent which were filed on record and has come to the conclusion that the deduction of 4.25% unilaterally, was incorrect and not justified. An amount of Rs.5,90,677/- was deducted from the running bills, as also the final bills. The reasoning of the Ld. Arbitrator contained in paragraph 17 is quite cogent inasmuch as if regular monthly payments were not made the rebate was not liable to be granted as per the clause extracted above. Moreover,

clause 8 clearly provides for the contingency if the contractor does not raise the bills, the Engineer in charge can go ahead and do the measurements and prepare the bill. The relevant portion of clause 8 reads as under: -

“A bill shall be submitted by the contractor each month on or before the date fixed by the Engineer in charge for all work executed in the previous month and the Engineer in charge shall take or cause to be, the requisite measurements for the purpose having the same verified, and the claim, as far as admissible, adjusted, if possible, before the expiry of ten days from the presentation of bills. If the contractor does not submit the bill within the time fixed as aforesaid the Engineer in-charge may depute a subordinate to measure up the said work in the presence of the contractor, whose counter signature to the measurement list will be sufficient warrant and the Engineer in charge may prepare a bill from such list which shall be binding on the contractor in all respects.”

Thus, the non submission of the bill by the Contractor cannot be a reason for not making monthly payments. Considering the detailed discussion in the award on this issue along with the correspondence which has been referred to therein, the objection is not tenable.

B. Objection No.2 falling from Claim No.9

8. Insofar as the objection in respect of the electricity bills are concerned, point (ii) above, as contained in objection I of the petition, learned counsel for the Petitioner points out that a temporary electricity connection was installed on the site in order to enable the contractor to carry out the civil work. The said connection was obtained by the Respondent and he was obligated to get the same disconnected before leaving the premises. The claim of the Respondent is, therefore, not tenable as the Respondent

having not got the temporary connection disconnected, all the electricity bills have to be paid by the Respondent.

9. On the other hand, learned counsel for the Respondent submits that the temporary connection was obtained in the name of the Executive Engineer. The Department was deducting the electricity bill amount from the payments made to the Respondent. The payment to the electricity department was made by Delhi Jal Board and not by the Respondent. Hence there was no obligation on the Respondent to get the temporary connection disconnected as the same could have caused disruption to the work at the site.

10. Admittedly, the premises was handed over to the Petitioner on 31st March, 2003, therefore, for the period subsequent to 31st March, 2003, the electricity bills are not the responsibility of the Respondent.

11. A perusal of the discussion in the award shows that the learned Arbitrator has affixed the responsibility of the electricity bills till 3rd July, 2003 i.e. till completion of defect liability period upon the Respondent. Against a total claim of Rs.4,25,496/- the learned Arbitrator has held that the Petitioner can deduct the sum of Rs.1,91,452/- which is the amount till the defect liability period comes to an end. The reasoning of the Arbitrator is valid inasmuch as after the contractor had exited the premises, the liability to pay the electricity dues cannot be saddled on the contractor. There is justification for the Respondent to say that disconnection could have caused disruption. Further the Petitioner could have easily issued a letter for disconnection of the meter. Having used the meter and consumed electricity, the responsibility for payment of the bill cannot be fixed on the contractor. No interference is warranted on this count.

C. Objection No.3 falling from Claim No.10

12. Insofar as objection no (iii), above is concerned, the quantities of steel supplied by the Petitioner to the Respondent are not in question. As against the total quantity of 255425 kgs of steel supplied by the Petitioner, the Respondent has consumed only 219990 kgs. According to the learned counsel for the Petitioner, only 6450 kgs were returned and the steel quantity of the excess 28,985 kgs which remained with the Respondent. The excess quantity of steel was removed from the site by the contractor which could not have been done, and for the said quantity, the contractor ought to be made to pay the penal rate.

13. A perusal of the award, insofar as this objection is concerned, clearly shows that the learned sole Arbitrator has accepted the case of the Petitioner insofar as the quantity of steel was concerned, however, the rates which have been awarded in favour of the Petitioner are the actual rates of steel and not the penal rate. According to the learned Arbitrator, as per the judgment in *Kalyan Chand Goyal vs. DDA, 1999 (3) Arb.LR 79 (Delhi)* penalty can be levied only if it can be proved that actual loss was suffered by the Department. Since no loss was suffered by the Department, nor any evidence was led to the said effect by the Petitioner, the actual amount of Rs.4,01,731/- instead of Rs.8,03,463/- could have been deducted in a justified manner by the Delhi Jal Board. Thus, the reasoning given by the Ld. Arbitrator is as per law, inasmuch as amounts in the nature of penalty can be levied only if there is proof adduced that there has been either direct or indirect actual loss or damage suffered, as per Sections 73 and 74 of the Indian contract Act. The objection is not sustainable.

D. Objection No.4 - Counter Claim No.1

14. Insofar as objection 'O' is concerned, the same relates to the counter claim filed by the Delhi Jal Board, in view of late handing over of 50% of the quarters, and all the defects not being cured within time. A perusal of the award of the Ld. Arbitrator clearly points out that the Engineer gave the certificate of completion on 29th March, 2003, and there was no notice issued pointing out any defects in the quarters. Further 50% of the flats were allotted and the Engineer, who appeared as a witness, could not mention the date when the allotment was made. If the date of allotment was not brought in evidence, this claim can hardly be entertained, inasmuch as it is upon the late allotment that the whole claim is based upon. The Delhi Jal Board has not been able to establish that allotments were given late. Moreover, the Ld. Arbitrator has also considered that in fact the allotment was completed before the expiry of the defect liability period. If allotment of quarters was completed before the said period, the contractor's responsibility obviously is done away with as per Special Condition No.11. Even this objection is not tenable.

E. Objection No.5 falling from Claim No.19 and 20

15. The next objection by the Petitioner is in respect of award of 10% mark up as profit in respect of cement and steel which were procured by the contractor from the open market, as the Petitioner could not provide the same. Under the contract, the Petitioner was to supply the cement and steel for carrying out of the works. However, since the Petitioner could not supply the same, the Respondent procured cement and steel from the market and raised an invoice on the Petitioner by marking up the invoice with 10% profit.

16. The learned Arbitrator in paragraph 51 has awarded a sum of Rs.4,57,886/- towards these claims (claim nos.19 & 20) on the ground that since the Petitioner was responsible to provide the cement and steel and had failed to do so, the Respondent having invested its own money for procuring the same, 10% profit can be marked up over and above the actual cost of the cement and steel.

17. Learned counsel for the Petitioner submits that it was on mutual agreement that the Respondent agreed to obtain the quantity of cement and steel on its own and this is clear from page 218 of the documents file. On the other hand, Mr. Mittal, learned counsel for the Respondent, submits that the scope of interference by the Court under Section 34 of the Arbitration and Conciliation Act, 1996, being limited, the 10% profit which is awarded is quite reasonable and should not be interfered with.

18. It is clear that the 10% profit which has been awarded by the Ld. Arbitrator is not contained in the contract. As per the contract, the Petitioner was to supply the same to the Respondent. However, during the course of the work, there appears to have been an agreement between the parties because of which the Respondent procured the cement and steel from the market. In the absence of a contractual provision or other agreement, permitting the addition of 10% over and above the actual cost of the cement and steel, the Respondent could have only been awarded the amount spent by it for procurement of the cement and steel and the Ld. Arbitrator could not have awarded 10% mark up over and above the cost of cement and steel.

19. A perusal of page 218 clearly shows that the stand of Delhi Jal Board was that the Respondent agreed to supply the same without any conditions or objections. This is unrebutted and since there are no conditions and

objections which have been shown to make such procurement, any award contrary to terms of the contract and in the absence of an agreement, cannot be sustained. The 10% mark up is alien to the contract and since there is no agreement, the award of 10% which is a whimsical percentage, lacking basis, cannot be sustained. Accordingly, the objection raised by the Petitioner in respect of this claim is allowed and the reimbursement to the Respondent is restricted to the actual cost of cement and steel procured by the Respondent.

20. The Arbitrator has awarded interest @9% per annum from the due date till date of realization. The awarded amount as modified above in respect of claims 19 and 20, be paid within eight weeks. In case of failure to make payment, Delhi Jal Board would be liable to pay future interest of 9% per annum on the awarded amount till the date of payment.

21. The OMP is disposed of with the above observations. *Dasti.*

AUGUST 23, 2018

Rekha

**PRATHIBA M. SINGH
JUDGE**