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

*Reserved on : 11<sup>th</sup> September, 2018*

*Date of decision : 18<sup>th</sup> December, 2018*

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**O.M.P. 577/2008**

DELHI DEVELOPMENT AUTHORITY

..... Petitioner

Through: Ms. Suneha Jain, Advocate.  
(M:9818900024)

versus

M/S SUKUMAR CHAND JAIN

..... Respondent

Through: Mr. Sandeep Sharma, Mr. Bhrighu  
Dhami and Mr. Nilesh Deep,  
Advocates. (M:9811636700)

**CORAM:**

**JUSTICE PRATHIBA M. SINGH**

**JUDGMENT**

**Prathiba M. Singh, J.**

1. The present petition under Section 34 has been preferred challenging the award of the Ld. Sole Arbitrator dated 11<sup>th</sup> June, 2008. The Delhi Development Authority (*hereinafter*, 'DDA') had awarded a contract for construction of 93 MIG houses in Pocket 11-B, Sector 23, Rohini to the contractor M/s Sukumar Chand Jain (*hereinafter* 'contractor'). The date of agreement was 9<sup>th</sup> May, 2001. Construction commenced on 14<sup>th</sup> May, 2001 and was to be completed within 18 months i.e. on or before 13<sup>th</sup> November, 2002. The actual date of completion was 11<sup>th</sup> March, 2004 with defects. According to the DDA, the defects were never rectified.

2. Disputes arose between the parties and the matter was referred to arbitration. The following claims were raised by the contractor on the

ground that there were several hindrances and delays caused by the DDA:

*“i) Payment of deviation. The department had ordered to carry out work of superstructure beyond the deviation limit of tender i.e. maximum of 20% on individual items as referred in tender documents and therefore, the department is liable to pay for such deviation calculating the item rate at the market rate as per clause 12-A of the tender form.*

*Rs.6,29,001.67*

*ii) Escalation of prices of material and labour under clause 10-CC.*

*Rs.2,88,462.04*

*iii) Reduction item statement. The department had never informed the alleged defects with in maintenance period and therefore, such reduction item statement approved by SE is totally uncalled for and cannot be now reduced.*

*Rs.25,064.00*

*iv) Amount withheld of quality control.*

*Rs.60,000.00*

*v) Amount withheld of ALR.*

*Rs.25,000.00*

*vi) Amount withheld of door fitting*

*Rs.50,000.00*

*vii) Amount withheld of over tank*

*Rs.12,000.00*

*viii) Payment of extra items*

*a) 18mm plaster in 2 coats*

*Rs.24,950.00*

*b) E.I.S. extra for plaster on walls*

*Rs.17,822.00*

*c) Hole cutting for spout*

*Rs.14,493.00*

*ix) Payment of watch and ward*

*x) Part rate statement*

*Rs.5,82,801.86*

*xi) Refund of payment towards W.C.T. The tender quoted only 2% W.C.T. to be paid by the contractor balance to be paid by department. However, after negotiation, my clients had agreed to pay 4% W.C.T., excluding stipulated items. Since my clients had paid W.C.T. @ 4% on stipulated items also and therefore,*

*the department is liable to reimburse the excess tax paid by my clients on stipulated material.*

*Rs.3,33,470.00*

*xii) Loss of Cartage of material Rs.36,059.00*

*xiii) Loss of profit for non construction of 14 remaining M.I.G. houses. Rs.4,33,416.01*

*xiv) Refund of test lab charges Rs.87,373.00*

*xv) Earnest money and security deposit deducted from the current bills. Rs.8,61,777.00”*

3. In order to decide the various claims, the Ld. Arbitrator split up the issues and gave the following findings.

**A. ISSUE No.1 – Whether the plaintiff is entitled for an amount of Rs.42,61,516/- as claimed by it in the plaint? O.P.P.**

4. The bill of the contractor was not finalized till the conclusion of the arbitral proceedings and the security deposit was not refunded. Thus, the undertakings given by the Claimant on 24<sup>th</sup> February, 2005 that he shall not ask for refund of security deposit, if the bill is approved, does not come in the way of the contractor.

**B. ISSUE No.2 –Whether the plaintiff is entitled for interest? If so at what rate and for which period? O.P.P.**

5. The Arbitral Tribunal holds that the contractor would be entitled to interest.

**C. ISSUES No.3 – Whether in view of undertaking of 24.02.2005 given by the plaintiff, they are estopped from claiming any amount? O.P.D. and ISSUE No. 4 – Whether the undertaking by the plaintiff was given under duress and coercion? O.P.P. -**

6. Since the undertaking dated 24<sup>th</sup> February, 2005 was revoked on 4<sup>th</sup>

March, 2005, the same is not binding.

**D. ISSUE No.5 - Relief**- Nil award.

7. Thereafter, the Ld. Arbitrator decided the claims as under:

**A. CLAIM No.1** – Nil award;

**B. CLAIM No.2** :- Award of Rs.2,88,462/- under Clause 10-CC.

**C. CLAIM No.3** :- Nil award.

**D. CLAIM No.4** :- Rs.1,35,000/- awarded in respect of with-held amounts.

**E. CLAIM No.5** :- Nil award for extra items.

**F. CLAIM No.6** :- Rs.1,34,800/- awarded for watch and ward of flats.

**G. CLAIM No.7** :- Part rates withheld in the last paid bill, Rs.5,62,562/- awarded.

**H. CLAIM No.8** :- Nil award for loss of profits.

**I. CLAIM No.9** :- Security deposit in the form of bank guarantee directed to be released. In addition, Rs.61,777/- as part of the security deposit also released.

**J. CLAIM No.10** :- Simple interest @ 10% on awarded amounts w.e.f. 11<sup>th</sup> September, 2004 till date of award.

**K. CLAIM No.11** :- Rs.50,000/- awarded as costs of proceedings.

8. The challenge in the present petition is towards the award of Claim Nos.2, 4, 6, 7, 10 and 11.

**A. Claim no.2: For Rs.2,88,462.04/- being escalation under Clause 10CC of the agreement**

9. Insofar as Claim No.2 is concerned, the objection raised by the DDA

is that the Ld. Arbitrator has wrongly awarded escalation under Clause 10-CC of the contract by applying Rs.93/- as the labour rate instead of Rs.97.05/-. The submission of DDA is that though the contract was executed on 9<sup>th</sup> May, 2001, on 28<sup>th</sup> September, 2001, with retrospective effect from 1<sup>st</sup> August, 2000, the labour rates were increased to Rs.97.05/- and hence for the purpose of calculation of escalation under Clause 10-CC, the higher figure had to be considered. This submission of DDA has been rejected by the Ld. Arbitrator since the circular was issued post the date of the tender i.e. 22<sup>nd</sup> January, 2001 and hence the circular is not applicable.

10. A perusal of sub-Clause 7(a) of clause 10-CC shows that there is no doubt that the higher figure would be applicable in calculating the escalation under Clause 10-CC under Clause 7(a) which reads as under:

*“The minimum wage of an unskilled male mazdoor mentioned in sub para 6 above shall be the higher of the following two figures; namely those notified by the government of India, Ministry of labour and those notified by the local administration both relevant to the place of work and the period of reckoning.”*

11. The issue has been complicated in view of the circular which was issued later i.e. in September, 2001 with retrospective effect from August, 2000. At the time, when the tender was floated, the applicable labour rates were Rs.93/- and not Rs.97/-. Unless and until it can be shown by the DDA, the contractor had taken the higher amount of Rs.97/- into consideration while submitting his bid, it cannot be argued that the higher amount has to be considered. The contractor's bid was submitted on the basis of the circular applicable and in operation on the date when the bid was submitted and not on the basis of a circular which came out in the future. Calculation

of labour rates has to be, therefore, on the basis of the bid amount and not on a subsequent circular which has retrospective effect.

12. The contractor is entitled to the full amount of escalation based on the rates that were contained in his bid. Though, Clause 7(a) mentions the circular applicable is the circular relevant to “*the period of reckoning*”, the said period of reckoning has to be the actual period of reckoning and not the circular applicable which came in the future, but with retrospective effect. If such an interpretation is accepted, a contractor who has paid labour rates @ Rs.93/- would be deprived of escalation on the fictional basis that he has actually paid Rs.97/-. There is no evidence on record to show that this period could have been broken in any manner i.e. pre September, 2001, and post September, 2001. In the absence of any evidence that the circular is applicable to the present contract, the higher amount of Rs.97.05/- cannot be considered qua Claim No.2.

**B. Claim no.4: For withheld amount of Rs.1,47,000/- from the bills of the Contractor**

13. In respect of Claim No.4, an amount of Rs.1,35,000/- has been awarded after deducting Rs.12,000/- from the claimed amount of Rs.1,47,000/-. The sum of Rs.12,000/- was deducted due to non-submission of test reports. The Ld. Arbitrator found that no notice was issued after the actual completion of work on 11<sup>th</sup> March, 2004 and hence the amounts were wrongly withheld. The contractor having completed the work, the withheld amounts have been rightly directed to be refunded.

**C. Claim no.6: Watch and ward charges of Rs.2,03,200/- till April, 2007**

14. In respect of Claim No.6 i.e., the Watch and Ward charges, the Ld. Arbitrator has awarded a sum of Rs.1,34,800/-. DDA's submission is that in letter dated 24<sup>th</sup> February, 2005, the contractor admitted that he would complete the left out work. Thus, since the work itself was not completed, no watch and ward charges is awardable. The letter dated 24<sup>th</sup> February, 2005 reads as under:

*"M/s SUKUMAR CHAND JAIN  
ENGINEERS AND CONTRACTORS*

*Dated: 24/2/05*

*Executive Engineer,  
RDP-6, DDA,  
Rohini Complex, (Rohini Zone)  
Delhi*

*Sub: C/o 93 M.I.G. houses i/c scooter garage, internal development, water supply, sewerage and S.W. drain and ..... , etc.*

*Sir,*

*In continuation of my letter dated 29.12.04 regarding finalisation of bill for above said work, we hereby undertake that we shall not ask for refund of security deposit lying in the shape of Bank Guarantee, till the completion of the left out work and also till the approval of statements required for the finalisation of Bill is finalised. If any financial implication is involved in such statement to be approved by the competent authority, the same may be recovered from our security deposit after encashment of our B.G. which is in lieu of security deposit.*

*Yours faithfully  
Sd/-  
(S.C.Jain)"*

15. Even as on 15<sup>th</sup> February, 2005, the contractor wrote to the DDA saying that several defects have been removed. Though, the actual completion was on 11<sup>th</sup> March, 2004, there were defects which were subsequently rectified by the contractor. On this issue, the Ld. Arbitrator has awarded the said amount without considering the letters on record. Since, the letter dated 24<sup>th</sup> February, 2005, does admit that some work is still left out, the award of amounts under Claim No.6 is not sustainable. The award of this claim is liable to be set aside. Order accordingly.

**D. Claim no.7: For payment of Rs.6,40,138/- on account of part rates**

16. Regarding Claim No.7, the total amount awarded is Rs.5,62,562/-. However, Rs.1 lakh is stated by the DDA to have been paid already to the Contractor. This is pleaded by DDA in the Section 34 petition as under:

*“15. That in respect to claim no.7 the amount awarded is liable to be set aside as the amount payable as per the final Bill accepted by the respondent is Rs.4,60,327/- and the same was prepared during the currency of the arbitration proceedings as the work was rectified till 2-1-2008 and the claimant was called for the acceptance of the bill and which was accepted by the claimant.”*

The DDA admits that the amount payable is Rs.4,60,327/-. Thus, this claim is restricted to Rs.4,60,327/-.

**E. Claim no.10: For Interest @15% P.A. on the aforesaid amounts from 1,12,2003 till date of payment**

17. All the defects in the work were rectified way back in 2008. Even during the currency of the arbitral proceedings, the final bill was not cleared.

Thus, the awarded rate of interest @10% is not unreasonable and is liable to be upheld. However, the period is modified as the completion certificate was issued subject to clearance of defects. The final rectification of defects as per the DDA took place in 2008. The Engineer-in-Charge recorded that the final defects were removed in 10 MIG houses only as on 2<sup>nd</sup> January, 2008. This is clear from a reading of pages 98 and 101 of the petition. Thus, interest @10% would be payable from 9<sup>th</sup> January, 2008 and not 11<sup>th</sup> September, 2004 as awarded by the Ld. Arbitrator.

18. The award of costs qua Claim No.11 do not call for interference.

19. OMP is disposed of, in the above terms.

**PRATHIBA M. SINGH**

**JUDGE**

**DECEMBER 18, 2018**

*Rahul*