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

Date of decision: 27th November, 2018

+ **O.M.P. 1567/2014**

DELHI STATE INDUSTRIAL & INFRASTRUCTURE
DEVELOPMENT CORPORATION LTD

..... Petitioner

Through: Mr. Moni Cinmoy, Mr. Arvind
Kumar Pandey, Mr. Ajay Tiwari,
Advocates (M-986088168) with Mr.
Jatinder Kr. Sharma, E.E

versus

M/S THE KRISHNA CONSTRUCTION COMPANY..... Respondent

Through: Mr. Raman Kapur, Senior Advocate
with Mr. Varun Kapur, Advocates
(M-9910032035).

AND

+ **O.M.P. 56/2015**

M/S KRISHNA CONSTRUCTION CO

..... Petitioner

Through: Mr. Raman Kapur, Senior Advocate
with Mr. Varun Kapur, Advocates
(M-9910032035).

versus

DELHI STATE INDUSTRIAL AND INFRASTRUCTURE
DEVELOPMENT CORPORATION

..... Respondent

Through: Mr. Moni Cinmoy, Mr. Arvind
Kumar Pandey, Mr. Ajay Tiwari,
Advocates (M-986088168) with Mr.
Jatinder Kr. Sharma, E.E.

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. M/s The Krishna Construction Company was awarded a contract for “Construction of Boundary Wall and Preparation of WBM surface at DTC Bus Depot, Kair (Najafgarh), Delhi”. The estimated cost of the project was Rs.3,83,70,882/-. However, the contractor had tendered for a sum of

Rs.2,81,39,269/- which was awarded. The date of commencement of the work, as per the agreement, was 28th October, 2009 and the work was to be completed within six months i.e. by 27th April, 2010. The actual date of completion, however, was 10th October, 2011. It is not in dispute that extension of time was granted without levy of any compensation or liquidated damages. Disputes arose between the parties which was referred to arbitration.

2. The Ld. Sole Arbitrator passed the award dated 12th September, 2014 which is under challenge. Both the parties have raised a challenge in respect of the payment directed by the Ld. Arbitrator under para 1.5(iii) in respect of items of GSB. The argument of Mr. Raman Kapoor, Ld. Senior Counsel is that the Ld. Arbitrator has failed to apply clause 12.2(a)/(b) as would have been applicable. The amounts have not been worked out by properly comparing the difference between the agreement rate of the substituted item and the market rate of the item so substituted.

3. Insofar as substituted items are concerned, there are two issues. One, the pricing/rate of the substituted item and two, the extent to which the amount is to be awarded and whether there is any deviation. These two issues are independent of each other. Clause 12.2, as a whole, determines the manner in which the price for the substituted item is to be determined. The question as to whether there is any deviation, and to what extent the deviation has to be considered, is distinct and separate. A perusal of the award shows that the manner in which clause 12.2 has to be applied has been misconstrued by the Ld. Arbitrator. Clause 12.2 (a) and (b) of the present agreement are reproduced herein below:

“(a) If the market rate for the substituted item so

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

4. A perusal of this clause shows that the Learned Arbitrator has to consider the rate of the agreement item, the market rate of the agreement item and the market rate of the substituted item. The increase/decrease which the contractor is entitled to is only to the extent of the difference between the market rate of the substituted item duly increased/decreased to the market rate of the agreement item. The rates payable to the contractor in case of substituted items are therefore to be calculated as under:

(i) If the market rate of the substituted item so determined is more than the market rate of the agreement item (to be substituted) the rate payable to the contractor would be the rate of agreement item plus the difference between the market rate of the two items. Therefore, the market rates of the agreement item and substituted item are taken and the difference between the two is to be added to the agreement rate to determine the rate payable to the contractor.

(ii) In case the market rate of the substituted item is less than the market rate of the agreement item, the rate is accordingly decreased.

This clause has been misconstrued by the Learned Arbitrator as the Arbitrator has not considered the respective market rates and worked out the difference. Both parties are aggrieved and due to the incorrect application of clause 12.2, the award in respect of this claim is not sustainable. The same is accordingly set aside.

5. Insofar as the Deduction and Reduction items are concerned, counsel for DSIIDC submits that the analysis of rates submitted by the DSIIDC has been re-worked by the Ld. Arbitrator. The Ld. Arbitrator has used the rates specified in the agreement in order to compute the deductions to be made i.e. by applying DSR-2007. The contention of Ld.counsel for the DSIIDC is that the rate that should have been considered for the purpose of deduction should also include the rate plus escalation. This does not stand to logic. The deduction is on account of work which is not executed. If a work has not been executed, the deduction permissible would only be as per the rates specified in the contract and not by applying escalation. Thus, the objection in respect of Deduction and Reduction items is not sustainable.

6. Insofar as claim no.2 is concerned i.e. escalation claimed under Clause 10C, the Ld. Arbitrator has held that since there were no supporting documents given by the contractor to show actual expenses incurred on this account, only 50% was awarded. While the contractor challenges non-award of 50%, the DSIIDC challenges the award of 50% escalation.

7. There is no doubt that under Clause 10C, if there is an increase in labour wages, escalation is permissible. However, the escalation can be granted only strictly as per the terms of the contract and upon sufficient documents and evidence having been placed on record by the contractor in terms of the contractual stipulations. DSIIDC, on the other hand, submits

that Clause 10C is not even applicable in view of schedule F. The counsel for the contractor relies upon *V.K. Madan v. Delhi Development Authority CS (OS) No. 97A/2000 (Decided on 17th November, 2009)* to argue that contractor should have kept his books of accounts ready for inspection in order to claim escalation under Clause 10C. The rival contentions have been noticed by this Court only in order to capture the challenge before this Court. Both counsels are in agreement that insofar as this claim is concerned, the matter can be remanded back for being decided afresh.

8. DSIIDC further raises objections under claims 3 and 4, where compensation has been awarded on the score of idling of staff and idling of tools. A perusal of the discussion of the Ld. Arbitrator shows that the Ld. Arbitrator has come to the conclusion that a sum of Rs.2,57,813/- and Rs.2,70,417/- is liable to be paid to the contractor in view of the scope of work itself having been increased and the delay having not been attributable to the contractor. No interference is called for in respect of these two claims.

9. Thus, with the consent of the parties, the matter is remanded for consideration afresh on the basis of existing records, pleadings evidence and documents only for decision in respect of para 1.5(iii) and claim no.2. Mr. A.P.S. Ahluwalia, Senior Advocate (M:- 9810294209) is appointed as the Sole Arbitrator to decide the above claims afresh on the basis of the existing record. The arbitral proceedings shall be concluded within a period of six months. The fee of the Arbitrator is fixed at Rs.2 lakhs in the form of a lumpsum to be shared by both the parties. Record be sent to the Ld. Arbitrator. Both OMPs are disposed of.

PRATHIBA M. SINGH
JUDGE

NOVEMBER 27, 2018

Rahul