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

Date of Decision: 11.12.2018

\+ **O.M.P. (COMM) 498/2018**

THE DEPUTY SECRETARY (HOSPITALS) ..... Petitioner

Through Mr. Saurabh Mishra, Mr. Abhishek Singh and Mr. Vivek Tyagi, Advs.

versus

BHAYANA BUILDERS PVT LIMITED ..... Respondent

Through Mr. Gaurav Mitra, Ms. Manmeet Kaur and Mr. Yashvardhan Bandi, Advs.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J. (ORAL)

CAV 1153/2018

1. Since the respondent has entered appearance caveat stands discharged.

I.A. 16920/2018

2. Allowed, subject to just exceptions.

O.M.P. (COMM) 498/2018 & I.A. 16919/2018 & I.A. 16921-22/2018

3. Issue notice. Mr. Mitra accepts notice on behalf of the respondent.

3.1 Learned counsel says that he does not wish to file a reply and that he will argue the matter based on the record.

4. Via this petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (for short '1996 Act') challenge is laid to the interim award dated 26.5.2018.

4.1 The interim award is confined to claim no.3 lodged by the respondent.

5. To be noted, before the Arbitral Tribunal, the respondent was the claimant.

6. Briefly, in respect of claim No.3, the respondent took the following stand.

6.1 The respondent averred that it had raised fifteen (15) running account bills during the construction and submitted a final bill on conclusion of the subject work.

6.2 It was the respondent's stand that upon scrutiny of the final bill the petitioner had made illegal deductions.

6.3 Accordingly, according to the respondent, the amount that was admitted by the petitioner was only for a sum of Rs.1,57,54,177.61.

6.4 The respondent further averred that out of the admitted amount, a sum of Rs.1,20,00,000/- was paid and the balance sum, i.e. Rs.37,54,177.61 was withheld.

7. The record discloses that an agreement was arrived at between the parties on 2.9.2015, whereby, following was agreed *vis-a-vis* the claim in issue i.e. claim no.3.

> *"Claim No. 3-. <u>This Claim is for Rs. 37,54,178/- with interest. The Respondent is willing to make the payment of this amount subject to a discharge certificate under clause 60.11-60.13 of the General Conditions of Contract (GCC). Since the dispute is pending before the Arbitrator on various issues a discharge certificate will not be proper to be given at this stage. The Respondent can make the payment leaving it to the adjudication by the Arbitrator as to whether the Respondent has any interest liability on this score. The Arbitrator will also give an appropriate direction regarding the discharge certificate when the</u>*

stage comes."

(emphasis is mine)

Arguments therefore were heard on the question as to whether claimant is entitled to interest on a sum of Rs.37,54,177.61 and the period for which such interest can be granted. The Respondent relies on the rules called General Conditions of Contract or GCC which formed part of the contract between the parties. The time for payment is provided in Section 60.8 of the GCC which is as under:

> *"60.8 Time of Payment*
> *The amount due to the Contractor under any Interim Payment Certificate certified by the Engineer pursuant to this Clause, or to any other term of the Contract, shall, subject to Clause 4 7.1 to 4 7.2, be paid by the Employer to the Contractor within 30 days after the Contractor's monthly statement has been submitted to the Engineer for certification or, in the case of the Final Certificate pursuant to Sub-Clause 60.13, within 120 days after the agreed Final Statement and written discharge have been submitted to the Engineer for certification."*

8. Concededly, pursuant to agreement dated 2.9.2015, a sum of Rs.37,54,177.61 has been paid by the petitioner to the respondent. The payment was made on 20.10.2015.

9. Therefore, the only aspect with which the Arbitral Tribunal was concerned with and that which was agitated before me by the parties was whether or not the interest was payable to the respondent.

10. The respondent had claimed interest at the rate of 18 per cent per annum.

10.1 The petitioner resisted the claim for interest on the ground that a discharge certificate had not been submitted by the respondent.

11. The learned Arbitral Tribunal has discussed in detail as to why a discharge certificate for triggering the payment of interest would be an unsustainable proposition in context of clauses incorporated in the GCC in that behalf.

11.1 The core reasoning of the Arbitral Tribunal is contained in paragraphs 9 and 11. For the sake of convenience, the same are extracted hereafter.

> *"9. The argument of the learned counsel of Respondent cannot be accepted as it leads to absurdity. If the argument is accepted the day when the agreed Final Statement can be prepared, becomes absolutely uncertain. Although the construction took place in 2010, the parties are still litigating before the Arbitrator. The Arbitrator's award is subject to scrutiny under Section-34 of the Arbitration and Conciliation Act. Therefore it can be said that till the objection under Section 34 gets decided the dispute remains pending since the Final Statement can be prepared only on disposal of the Arbitration case and till then the liability to pay does not arise. This certainly cannot be the intention of the rules.*
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> *11. The Respondent has already paid Rs.1,20,00,000/- out of the amount agreed to by the engineer. The Respondent agreed to pay this amount without the discharge certificate. It is not explained how, if the rule regarding the discharge certificate is so sacrosanct how Rs. 1,20,00,000/- was paid without the discharge certificate. The Respondent itself waived the rule regarding discharge certificate. If payment of Rs.1,20,00,000/lacs could be made to without complying with the provisions of discharge certificate, the Respondent could as well pay the entire amount withholding only Rs.1. This certainly is not the position taken by the Respondent. We do not find any merit in the Respondent's contention that the Respondent did not become liable to payment as the discharge certificate was not regarding the final bill has not been settled."*
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> *(emphasis is mine)*

11.2 Having regard to the reasoning articulated in the impugned award, I find that there is no error in the conclusion reached by the Arbitral Tribunal that the interest was wrongly awarded.

11.3 Furthermore, the interest, as noted in the impugned interim award has been granted not at 18 per cent but at 12 per cent per annum for the period commencing from 1.10.2012 and ending on 20.10.2015. The interest has been quantified as Rs.13,59,012/-. In addition thereto, Arbitral Tribunal has also indicated that if the interest is not paid within the two months it will carry future interest at the rate of 12 per cent per annum till the date of actual payment.

11.4 As alluded to above, I find nothing wrong in the conclusion reached by the Arbitral Tribunal.

12. Accordingly, the petition preferred under Section 34 of the 1996 Act is dismissed.

13. Consequently, all pending applications shall stand closed.

RAJIV SHAKDHER, J

DECEMBER 11, 2018
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