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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 16.10.2018

+ OMP (COMM.) 545/2016

NORTH DELHI MUNICIPAL CORPORATION..... Petitioner

Through Ms.Renu Gupta, Standing
counsel.

versus

M/S RAVI BUILDERS

..... Respondent

Through Mr.Moni Cinmoy, Mr.Arvind
Kr. Pandey, Mr.Avinash
Mishra and Mr.Ajay Tiwary,
Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Arbitral Award dated 16.03.2015 passed by the Sole Arbitrator adjudicating the disputes that have arisen between the parties in relation to the Work Order dated 22.12.2006 read with Agreement dated 15.01.2007 by which the petitioner had awarded the work of construction of Multi storeyed School Building, Turkman Gate (Balance Work), S.P. Zone, Delhi to the respondent. The summary of the Award is reproduced

hereinbelow:

<i>Claim of Respondent</i>	<i>Award.</i>
<i>Claim No.1</i>	<i>Rs.14,70,514.00p</i>
<i>Claim No.2</i>	<i>NIL</i>
<i>Claim No.3</i>	<i>NIL</i>
<i>Claim No.4</i>	<i>13,32,028.00p</i>
<i>Claim No.5</i>	<i>6,42,487.00p</i>
<i>Total of Claim No.1,4,5</i>	<i>Rs.34,45,029.00p</i>
<i>Claim No.6</i>	<i>Interest on Rs.34,45,029.00p @ 10% per annum for the period from 01.04.2010 till the date of filing of the claim, i.e. 04.05.2013 (37 months) Rs.10,33,509.00p</i>
<i>Claim No.7</i>	<i>Pendente lite and future interest on Rs.44,78,538.00p @ 10% till the date of actual payment (23 months between filing of claim and date of award) Rs.8,58,386.00p</i>
<i>Claim No.8</i>	<i>Rs.2,00,000.00p</i>
<i>TOTAL</i>	<i>Rs.55,36,924.00p</i>

2. Counsel for the petitioner submits that the Award is liable to be set aside as there is no Arbitration Agreement between the parties. She submits that by a Circular dated 11.12.2006 the Arbitration Agreement had been deleted and therefore, the arbitration proceedings were not maintainable.

3. I am unable to agree with the said submission of the learned counsel for the petitioner. In the present case, the Notice Inviting Tender was issued by the petitioner on 05.06.2006, that is, much prior to the Circular dated 11.12.2006. The Circular admittedly does not have a retrospective effect. Even though the Work Order was issued on 22.12.2006 and formal Agreement was executed on 15.01.2007, it would have no effect on the existence of the Arbitration Agreement as the tender had been accepted prior to the issuance of the Circular dated 11.12.2006.

4. Counsel for the petitioner has further challenged the award of refund of Security Deposit in claim no.5. She submits that the amount of Security Deposit was to be refunded only upon the respondent producing Clearance Certificate from the Labour Office. The same having not been produced by the respondent, the respondent was not entitled to this claim.

5. I do not find any merit in the said submission. Even as per the petitioner, the respondent had left the site of work on 30.09.2009. Though, we are in the year 2018, it is not the case of the petitioner that any demand or complaint has been received by it from the Labour Department. In that view merely, because the respondent did not produce a formal Clearance Certificate, it cannot be denied such

claim.

6. Counsel for the petitioner further challenged the Award of Rs.14,70,514/- in favour of the respondent under Claim No.1, which was towards the Final Bill. She submits that the respondent had abandoned the work on 30.09.2009 and for all the work that had been done by the respondent, payment has been made by the petitioner in form of the 5 R.A. Bills.

7. I am unable to agree with the said submission of the learned counsel for the petitioner. The Arbitrator has considered the evidence led by the parties before him and has concluded that the extract of the Measurement Books that were produced by the petitioner before the Arbitrator could not be proved and relied upon. Apart from this the Arbitrator found that there were certain interpolations in the measurement books and also inconsistency in the statement of witnesses produced by the petitioner. As far as the work done by the respondent and the ultimate Award is concerned, the relevant extract from the finding of the Arbitrator are reproduced hereinbelow:

“38. The work awarded to the claimant was the left over work of construction of the school building at Turkman Gate, New Delhi. The work to the Claimant was awarded vide work order dated 21/12/2006. The contractual Cost of the work was Rs. 93, 90, 396/-. The claimant was made payment by the respondent against five R A bills and the detail of such payments is at page 000447 in part IV, Volume 2 (Ex. RW-1/3 colly). The payment against RA Bills is not disputed by the claimant. The case of the claimant is that he had completed the entire work awarded to him to the

satisfaction of the respondent and had left the site after completing the work finally on 30/09/2009. Although the claimant has made reference in his statement of claim to some work executed by him at the camp office of the M.C.D Commissioner on the instructions of the respondent but the pleadings in regard to the additional work of camp office allegedly executed by the claimant has nothing to do with the Settlement of his final bill relating to the work in question awarded to him vide work Order dated 21/12/2006. The claimant would be entitled to get at least the contractual amount in case the entire awarded work was executed by him. The respondent in its statement of defence has taken a stand of complete denial. It has denied the receipt of final bill dated 03/12/2009 and has also denied that the Claimant had completed the work in question. According to the respondent the claimant had abandoned the work midway and was liable for action under clauses 2 & 3 of the contract. The respondent could not stand the test of cross examination of its witnesses on this crucial aspect. RW-2 Mr. Atkan had supervised the work on behalf of the respondent right from the beginning of the work till end and he has stated in his cross examination that on 30/09/2009 when the claimant had finally left the site 98-99% of the awarded work was complete and for the remaining finishing work of painting and touching etc. he had left his 2-3 labour people there at the site. It shall be significant to mention that the respondent in its counter claim has claimed salary allegedly paid by it to a chowkidar during the period between 30/09/2009 and 12/04/2013 for watch & ward of the building allegedly left incomplete. The possession of the building in question was handed over by the respondent to the school authorities on 12/04/2013. Both the witnesses of the respondent examined before this tribunal have stated in their respective cross examination that the building was handed over by them

to the school authorities on 12/04/2013 in the same Condition it was left by the clamant on 30/09/2009 without any addition or alterations and without getting the alleged left over work completed from some other work agency. Although the witnesses of the respondent have said in their cross that they had made the list of left over work at the time of handing over of the school building to the school authorities but no such list has either been pleaded, produced or proved on record of this tribunal. On an analysis, evaluation and assessment of the oral and documentary evidence produced by the parties the only inescapable conclusion that can be drawn is that the work awarded to the claimant as per work order dated 21/12/2006 was fully completed by him and that the claimant is entitled to the balance payment as per contractual cost of the work mentioned in the contract after adjusting the payment already made to him against R A Bills. A perusal of the summary of payment of R A Bills provided by the respondent at page 000478 would show that the claimant was made a gross payment of 85, 62, 369/-. Out of the said gross payment deductions on account of security deposit/adjustment of EDM and the statutory deductions on account of income tax, vat, labour cess etc. have been made from the R A Bills. An amount of Rs. 6, 42, 487/- is deducted from the R A Bills on account of security deposit/adjustment of EDM and rest of the deductions are statutory deductions. The claim of the claimant for refund of security deposit/EDM shall be considered separately herein after. After subtracting the amount of security deposit/EDM of Rs. 6, 42, 487/- from the gross amount of Rs. 85, 62, 369/- shown paid against five R A Bills, the net payment stood already paid to the claimant comes to Rs. 79, 19, 882/-. The contractual cost of the work as per the contract was Rs. 93,90,396/- out of which Rs. 79,19,882/- as stated above stood already paid to him leaving a balance of Rs. 14,70,514/- that

remains to be paid by the respondent to the Claimant for the work in question done by him. The Ld Counsel appearing of the respondent on being specifically asked during the hearing could not give plausible reason why balance payment for the work done by the claimant be not awarded to him. This arbitral tribunal is of the considered view that the contractor is entitled to get at least the contractual price agreed by the parties at the time of contract on completion of work. Since the claimant is otherwise found entitled to balance payment for the work done by him, this arbitral tribunal does not consider it necessary to go into the nitty-gritty of the disputed contention raised relating, to receipt of non-receipt of final-bill (Ex.CW-1/11 colly) alleged to had been sent by the claimant on 03/12/2009 within three months of the completion of the work. It is amply proved that the claimant had not left the work incomplete. The work at site was completed on 30/09/2009. The question of abandoning the site after receiving the payment against 5th RA Bill could not arise as the payment of the said R A Bill was made on 27/09/2011 whereas the work was completed two years prior to that i.e. on 30/09/2009. The claimant is held entitled to an amount of Rs. 14, 70, 514/- as against Rs.14,73,950/- claimed by him against claim No.1. Both these issues are decided accordingly in favour of the claimant and against the respondent.”

8. I again do not find any fault with the finding of the Arbitrator. The Arbitrator has given reasons for the Award in favour of the respondent, based on the appreciation of the evidence led before him. The same cannot be said to be perverse or unreasonable.

9. In **Associate Builders v. DDA** (2015) 3 SCC 49, the Supreme Court, after analyzing the provisions of Section 34 of the Act, has held as under:-

“33. It must clearly be understood that when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score [Very often an arbitrator is a lay person not necessarily trained in law. Lord Mansfield, a famous English Judge, once advised a high military officer in Jamaica who needed to act as a Judge as follows:

“General, you have a sound head, and a good heart; take courage and you will do very well, in your occupation, in a court of equity. My advice is, to make your decrees as your head and your heart dictate, to hear both sides patiently, to decide with firmness in the best manner you can; but be careful not to assign your reasons, since your determination may be substantially right, although your reasons may be very bad, or essentially wrong”.

It is very important to bear this in mind when awards of lay arbitrators are challenged.] . Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd. [(2012) 1 SCC 594 : (2012) 1 SCC (Civ) 342] , this Court held: (SCC pp. 601-02, para 21)

“21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that

the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at.”

10. The next challenge of the petitioner is to the grant of escalation under Clause 10CC of the Contract in favour of the respondent under Claim No.4. Counsel for the petitioner submits that Clause 10CC was not applicable to the Contract in question as the period of work was only 15 months, that is, below the prescribed period of 18 months. She submits that in spite of the said Clause being not applicable to the Contract in question and in spite of the finding of the Arbitrator that the respondent has failed to produce any evidence in support of this claim, the Arbitrator has not only applied the said Clause, but has awarded the amount in favour of the respondent without any proof in support thereof.

11. This Court in ***North Delhi Municipal Corporation v. Ravi Builders***, 2018 SCC OnLine Del 10126, has considered this issue at length and has held that the respondent would not be entitled to the said claim as Clause 10CC was not applicable to the Contract in question and the respondent had failed to lead any evidence in support of this claim of escalation. The same reasoning is fully applicable to the facts of the present case. Therefore, the Award in

so far as it relates to claim no.4 cannot be sustained and is set aside.

12. Counsel for the petitioner has further challenged the Award of interest under Claim no.6 on the ground that there is no Clause in the Contract entitling the respondent to the claim of interest on any delayed payment.

13. I do not find any merit in the said contention of the learned counsel for the petitioner. Admittedly, there is no Clause in the Contract which prohibits grant of such interest. Section 31(7)(a) of the Act empowers the Arbitrator to award interest from the date of accrual of the cause of action till the date of the passing of the Award at such rate as he may deem reasonable. The Arbitrator having exercised this jurisdiction and the rate of interest that has been awarded by the Arbitrator in favour of the respondent not been found unreasonable, the award of interest cannot be interfered with.

14. Counsel for the petitioner has lastly challenged the Award of interest under Claim No.7 for the *pendent lite* period. She submits that while awarding this interest, the Arbitrator has awarded interest on Claim No.6 as well. Therefore, this is a case of awarding interest on interest. This Court has considered this issue in ***North Delhi Municipal Corporation*** (Supra) and had set aside similar Award of interest by the Arbitrator.

15. In view of the above, this petition is partially allowed. The Award in so far as it relates to Claim no. 1 and Claim no. 5 is upheld. The Award with respect to Claim No.4 is set aside and consequently, Award with respect to Claim No.6 shall stand modified as the respondent would not be entitled to any interest on amount that had

been awarded under Claim No.4. The Award under Claim No.7 shall also stand modified and the respondent shall not be entitled to *pendente lite* interest on amount awarded under Claim Nos.4 and 6.

16. There shall be no order as to costs.

NAVIN CHAWLA, J

OCTOBER 16, 2018/Arya