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

+ **Date of Decision: 15.05.2019**

FAO(OS) 102/2019
DELHI AGRICULTURAL MARKETING BOARD

..... Appellant

Through: Mrs. Avnish Ahlawat, St. Counsel, GNCTD (Services) with Mr. N.K. Singh, Advs.

versus

M/S H R BUILDERS

..... Respondent

Through: Ms. Anusuya Salwan with Ms. Renuka Arora, Ms. Nikita Salwan and Mr. Ayush Srivastava, Advs.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MS. JUSTICE REKHA PALLI

VIPIN SANGHI, J. (ORAL)

CAV No. 530/2019

Learned counsel for the caveator has appeared. The caveat stands discharged accordingly.

C.M. No. 23383/2019

Exemption allowed, subject to all just exceptions. The application stands disposed of.

FAO(OS) 102/2019 & C.M. No. 23382/2019

1. The appellant Delhi Agricultural Marketing Board assails the decision of the learned Single Judge dated 25.03.2019 rendered in O.M.P. 307/2015, whereby the learned Single Judge has dismissed the appellant's objections under Section 34 of the Arbitration and Conciliation Act in respect of the arbitral award dated 15.02.2015 passed by the Sole Arbitrator.

2. The learned Arbitrator adjudicated upon the claims and counter claims of the respondent and the appellant respectively in relation to the contract entered into between them for construction of 4 Nos. Building Blocks (5-8) for Commission Agent Shops, Wholeseller Shops, including internal electrification and road work at fruit, vegetable and food grain market at IFC, Ghazipur (PH-II) awarded by the appellant to the respondent under agreement dated 06.02.2008.

3. The scheduled date of start of work was 28.02.2008 and the scheduled date of completion was 27.11.2009. The period of completion was 21 months. The actual date of completion, however, was 13.04.2011 and there was a delay of 502 days in completion of the work. The respondent contractor raised his claims for enhanced rates during the said extended period of 502 days. The primary dispute that arose between the parties was whether the said delay of 502 days was justified, as claimed by the respondent contractor, or unjustified, as claimed by the appellant.

4. The learned arbitrator rendered an exhaustive award after dealing with the submissions and counter submissions of the parties, inter alia, on the said issue. These findings are recorded in para 13.6 of the impugned award. The learned arbitrator has concluded after an exhaustive discussion of the

relevant contract clauses, and after taking into account materials such as the Hindrance Register, that the work was delayed primarily due to the delays/ defaults/ lapses on the part of the appellant herein, and not due to the reasons attributable to the respondent contractor. Hence no liability whatsoever could be fixed on the claimant for delay in completion of the work. Consequently, the claimants claim for enhanced rates during the extended period of contract has been awarded.

5. The learned Arbitrator has held that for all intents and purposes, the extension of time upto the actual time of completion i.e. 13.04.2011 is deemed to have been granted under provisions of Clause 5 of the agreement without any action under Clause 2 – which permits the appellant/ employer to levy liquidated damages on account of delay in execution of the work.

6. The appellant, while raising objections under Section 34 of the Arbitration and Conciliation Act, sought to heavily place reliance on the obligations case upon the contractor under Clause 5 of the Contract. The said clause has been extracted in the impugned order passed by the learned Single Judge. The said clause reads as follows:

> *"Clause-5*
>
> *The time allowed for execution of the Works as specified in the Schedule 'F' or the extended time in accordance with these conditions shall be the essence of the Contract. The execution of the works shall commence from such time period as mentioned in letter of acceptance or from the date of handing over of the site whichever is later. If the Contractor commits default in commencing the execution of the work as aforesaid, Government shall without prejudice to any other right or*

remedy available in law, be at liberty to forfeit the earnest money & performance guarantee absolutely.

5.1 As soon as possible after the Contract is concluded the Contractor shall submit a Time and Progress Chart for each mile stone and get it approved by the Department. The Chart shall be prepared in direct relation to the time stated in the Contract documents for completion of items of the works. It shall indicate the forecast of the dates of commencement and completion of various trades of sections of the work and may be amended as necessary by agreement between the Engineer-in-Charge and the Contractor within the limitations of time imposed in the Contract documents, and further to ensure good progress during the execution of the work, the contractor shall in all cases in which the time allowed for any work, exceeds one month (save for special jobs for which a separate programme has been agreed upon) complete the work as per mile stones given in Schedule 'F':

5.2 If the work(s) be delayed by:

i) force majeure, or

ii) abnormally bad weather, or

iii) serious loss or damage by fire, or

iv) civil commotion, local commotion of workmen, strike or lockout, affecting any of the trades employed on the work, or ;

v) delay on the part of other contractors or tradesmen engaged by Engineer-in-Charge in executing work not forming part of the Contract, or;

vi) non-availability of stores, which are the responsibility of Government to supply, or

vii) non-availability or breakdown of tools and plant to be supplied or supplied by Government, or

viii) any other cause which, in the absolute discretion of the authority mentioned in Schedule 'F' is beyond the Contractor's control.

then upon the happening of any such event causing delay, the Contractor shall immediately give notice thereof in writing to the Engineer-in-Charge but shall nevertheless use constantly his best endeavors to prevent or make good the delay and shall do all that may be reasonably required to the satisfaction of the Engineer-in-Charge to proceed with the works.

5.3 Request for rescheduling of Mile stones and extension of time, to be eligible for consideration, shall be made by the Contractor in writing within fourteen days of the happening of the event causing delay on the prescribed form. The Contractor may also, if practicable, indicate in such a request the period for which extension is desired.

5.4 In any such case the authority mentioned in Schedule 'F' may give a fair and reasonable extension of time and reschedule the mile stones for completion of work. Such extension shall be communicated to the Contractor by the Engineer-in-Charge in writing, within 3 months of the date of receipt of such request. ***Non application by the contractor for extension of time shall not be a bar for giving a fair and reasonable extension by the Engineer-in-Charge and this shall be binding on the contractor****. (Emphasis, supplied)"*

7. The submission of Mrs. Ahlawat is that a perusal of the said clause would show that it was the obligation of the contractor to notify the reasons for delay upon happening of the events which may lead to delay. He was obliged to seek re-scheduling of milestones and extension of time within 14 days of the happening of the event causing delay, on the prescribed form. The authority mentioned in Schedule (F) of the contract had the discretion to

give a fair and reasonable extension of time and re-scheduling the milestone for completion of work. Such extension had to be communicated by the Engineer-in-Charge to the contractor in written within three months of the receipt of such request.

8. Mrs. Ahlawat submits that the respondent contractor did not seek extension of time by pointing out any cause for delay during the currency of the contract. The respondent contractor applied for extension of time only on 06.03.2010, which was well after the schedule date of completion of the work.

9. Mrs. Ahlawat submits that the reason for delay claimed by the respondent contractor was, firstly, that the Ready Mix Concrete was not available from one of the approved sources. However, the contractor never sought the permission of the appellant to source the Ready Mix Concrete from other suppliers. So far as the delay in payment of the running bills is concerned – as recorded in the Hindrance Register, Mrs. Ahlawat submits that the contractor was not submitting the bills himself and, thus, there was no question of delay in payment thereof. It was the appellant which, on its own, was forced to prepare the running bills and to make the payment. Thus, it could not be said that the delay was on the part of the appellant in the matter of payment of running bills, justifying the extension of time for completion of work.

10. Mrs. Ahlawat further submits that the respondent did not submit evidence justifying the claim under Clause 10C and 10CC for the extended period of 502 days.

11. We have heard learned counsel for the appellant, perused the record and considered her submissions. The learned Single Judge has considered the aforesaid submissions of the appellant while dealing with its objections.

12. Clause 5 of the contract, as extracted hereinabove, shows that the contractor is not obliged to necessarily make an application for extension of time. This is clear from the highlighted portion of Clause 5.4, which states that non application by the contractor for extension of time shall not be a bar for giving a fair and reasonable extension by the Engineer-in-Charge and this shall be binding on the contractor.

13. Thus, even if the contractor did not submit the application to seek extension of time in terms of clause 5.1, 5.2 and 5.3, during the stipulated period of completion, if there was justification for grant of such extension, the same could be considered and granted by the Engineer-in-Charge. In the facts of the present case, the respondent contractor, admittedly, had made the application to seek extension of time though not contemporaneously i.e. before the scheduled date of completion. The said application was made after the scheduled date of completion but before the actual date of completion i.e. on 06.03.2010. The actual date of completion of work, as noticed above, was 13.04.2011. The Engineer-in-Charge, however, did not convey his decision on the said application made by the respondent contractor. Pertinently, though a show cause notice was issued to the respondent contractor under Clause 2 to levy liquidated damages on account of delayed completion of work, after receiving the reply of the respondent contractor, that notice was dropped. Thus, the appellant was evidently

satisfied that the delay in the completion of the work was not attributable to the respondent contractor.

14. The learned Arbitrator has relied upon the Hindrance Register maintained at the site, which shows that there were Hindrances for as many as 563 days, whereas the extension of time requested in the present case was only 502 days.

15. The Hindrance Register is a document which is maintained at the work site and is signed by the officers of the employer and the contractor. It records the events which occur contemporaneously in relation to the hindrances that may be faced by the contractor from time to time in the execution of the work. It is a document which is a log of the communications which take place between the employer and the contractor in relation to the events leading to hindrance in the execution of the work.

16. The extension of time that may be considered by the Engineer-in-Charge necessarily would have to rely upon records, such as the hindrance register. In the present case, the Arbitrator has found that the Hindrance Register recorded hindrances for as many as 563 days, whereas the actual delay in completion of the work was only 502 days. That being the position, the finding returned by the learned Arbitrator fixing the responsibility for delay in completion of work, in our view, is completely justified.

17. We find that the learned Single Judge has considered the aforesaid submissions of the appellant exhaustively, and it cannot be said that the view taken by the learned Single Judge or the Ld. Arbitrator is contrary to the

contractual terms. The view taken by the Arbitrator is a plausible view on the interpretation of the contractual terms, which the Arbitrator was entitled to take.

18. So far as the submission with regard to procurement of RMC from other sources is concerned, the same are factual aspects which, in any event, cannot be gone into by the Court while dealing with objections to the Arbitral Award. The Arbitrator is the final judge of facts. For the same reason, the submission that the running bills were not submitted by the respondent contractor, and that the same were prepared by the appellant employer on its own and there was no delay in payment thereafter, is an aspect which cannot be gone into under Section 34 and under Section 37 of the Arbitration and Conciliation Act. Same holds good for the rates awarded under Clause 10 C and 10 CC.

19. Thus, we find absolutely no merit in this appeal.

20. Dismissed.

VIPIN SANGHI, J.

REKHA PALLI, J.

MAY 15, 2019
N.Khanna