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

Date of Decision: 22nd January, 2019

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O.M.P. 265/2011

DELHI DEVELOPMENT AUTHORITY

..... Petitioner

Through: Mr. Dhanesh Relan, Mr. Rishi Vohra
and Ms. Kanika Singh, Advocates.
(M:9999498955)

versus

M/S K.R BUILDERS (P) LTD.

..... Respondent

Through: Mr. Raman Kapur, Senior Advocate
with Mr. Aviral Tiwari and Mr. R. P.
Singh, Advocate. (M:9810359150)

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. Present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (*'the Act'*) challenges the award dated 29th November, 2010 passed by the Ld. Sole Arbitrator, Justice Usha Mehra (Retd).
2. The Petitioner – DDA (*hereinafter, 'DDA'*) invited tenders for “Construction of 630 SFS houses at Vasant Kunj, Sector- 'E' Pkt. 5 & 6 falling in category II & III in Vasant Kunj and 60 SFS houses (36 Cat. III, 24 Cat. II) and 36 s/Garages at Vasant Kunj, Gr. XI.” (*'Works'*). The parties entered into contract dated 10th March, 1989. The total cost of the tender was Rs.91.08 lakhs. The Respondent – M/s. K. R. Builders Pvt. Ltd. (*hereinafter 'the Contractor'*) was to complete the work within 18 months i.e. on or before 22nd August, 1990. Extension was granted by the DDA without levy of liquidated damages until 30th June, 1991. Finally, the work

was completed on 5th August, 1993. Date of completion was recorded as 5th August, 1993. However, final bill was paid only on 19th October, 2005. The payment of the final bill was not to the satisfaction of the Contractor and claims were raised. A total of 26 claims were raised by the Contractor.

3. Ld. Arbitrator, after considering all the claims, allowed some of the claims and awarded in favour of the Contractor. Operative portion of the award is set out herein below:

“Claim No.26

Presuit, Pendentelite and future interest @18% per annum.

92. I have award a total sum of Rs.9,32,113.85P plus the amount of escalation amounting to Rs.72,832/-, in favour of the claimant and against the respondent. On the awarded amounts, claimant will be entitled to interest pendente lite and future till realization @ 9% per annum.”

4. Mr. Dhanesh Relan, learned counsel appearing for DDA submits that the DDA has challenged the award in respect of some of the claims. Objections have been argued in respect of claim nos.1, 2, 4, 14, 15, 19 & partly 23.

A. Claim No.1- Claim of Rs.56,635.28 on account of amount unlawfully recovered by the department from final bill towards rebate for monthly payments, release of security, payment of final bill and sanction of EIS without fulfilling the contractual obligations

5. A perusal of claim no.1 shows that the DDA had, according to the Contractor, unlawfully deducted a sum of Rs.56,635/- towards rebate for monthly payments, release of security, payment of final bill and sanction of EIS. The case of the DDA is that the Contractor was obliged to raise the bills on a monthly basis and upon DDA making the monthly payments, it

was entitled to rebate on the estimated cost @ 0.25%. It was also claimed by the DDA that on extra/substituted items, the DDA was entitled to 0.1% of the gross amount, if the same was sanctioned within three months from the date of occurrence. DDA further argued that the final bill if paid within 6 months and if release of security deposit happens within one month from the expiry of maintenance period, it is entitled to a further rebate of 0.25%. Submission is that under clause 8, the Contractor was obliged to raise the bill on a monthly basis, which was then to be paid by the DDA on a monthly basis. In the present case, admittedly, the Contractor did not submit the bills in time and the Engineer-in-Charge himself prepared the bill. In view of this, the DDA claims that rebate ought to be given and deductions were rightly made by the DDA. Mr. Relan also relies upon the letter dated 14th February, 1989 which contained the said details of the rebate which can be deducted and was duly accepted by the Contractor.

6. Mr. Raman Kapur, learned Senior Advocate appearing for the Contractor, submits that as a matter of practice, the Contractors never submit the bill and the measurements are done by the Engineer-in-Charge. Thus, the Engineer-in-Charge himself prepares the bill. Since the payment was not made on a month to month basis, the DDA is not entitled to rebate. Mr. Kapur relies upon the judgment in ***Saraswati Construction Co. vs. DDA in IA No. 970/94 in Suit No.2472/93*** decided on 19th December, 2002 as is relied upon by the Ld. Arbitrator.

7. The clause in the contract is clear and categorical that the Contractor has to submit the monthly bill. It is possible that there can be joint measurement, which can be conducted but the obligation for submission of the bill cannot be shifted on the Engineer-in-Charge. If the Contractor did

not submit the bill in time, the Engineer-in-Charge himself took upon the onus of preparing bills, thus, it cannot be said that the DDA is not entitled to rebate. Similar is the position in respect of the final bill, as also release of security and sanction of EIS. Thus, on this count, the Ld. Arbitrator having clearly noticed that the Engineer-in-Charge prepared the bills, has erred in not upholding the stand of the DDA. It is, accordingly, held that the deduction by the DDA to the tune of Rs.56,635.28 is justified. The award on this claim is set aside.

B. Claim No.2 – Rs.66,753.48P on account of unlawfully recovery by the department from the final bill towards penal/double rate recovery against steel, G.I. pipe-15mm dia, glazed tiles, C.I.Pipes (Class I.A.) 100mm dia, Bitumen and flush & Panel door shutters etc.

8. Insofar as claim no.2 is concerned, the DDA claims that cement, steel and other material, which were supplied to the Contractor and were not used, were not returned back to the DDA. Ld. Arbitrator has undertaken a detailed analysis of the correspondence and documents on record and has awarded a sum of Rs.8,400/- in favour of the DDA. The Ld. Arbitrator has taken the price of cement and steel as per BOQ items. Double rate recovery is clearly not permissible as per the settled law. Accordingly, no fault can be found in the award of the Arbitrator on this count.

C. Claim No.4 – Rs.72,427/- on account of amount unlawfully recovered by the deptt. In the final bill towards alleged risk and cost.

9. The case of the DDA is that pending works in respect of two flats i.e. Flat Nos.4587 & 4597 had to be got done by a third party. Ld. Arbitrator has, after perusing the exhibits on record and letters exchanged between the parties, arrived at a conclusion that the Contractor, in fact, completed the

work in respect of all the flats and there was no reason as to why these flats would have been left out by the Contractor. The mere fact that the flat numbers were missing in the letters, does not show that the Contractor had not completed the work. Thus, the Ld. Arbitrator rejected the claim of the DDA. The claim is factual in nature and objections in respect thereof are not maintainable under Section 34. The said award does not warrant any interference.

D. Claim No.14 – Rs. 35,055.22 on account of balance payment for the work of providing ornamental grills but arbitrarily paid by the deptt. As per agreement item for plain grills.

10. The Contractor has been awarded a sum of Rs.35,055/- in respect of installing ornamented grills. Case of the Contractor is that ornamental grills were not part of the original tendered items and there is no dispute that the Contractor actually executed the work of erecting ornamental grills. As per the contract, only plain grills were to be erected. Since the Contractor has executed the work and has, in fact, erected the ornamental grills, no fault can be found in the award of the amounts in favour of the Contractor for erection of ornamental grills.

E. Claim No.15 – Rs.15,960.92 on account of amounts unlawfully and uncontractually recovered by the deptt. In respect of alleged RIS/DIS from final bill.

11. Stand of the DDA in respect of this claim was that the same constitutes 'excepted matter'. The DDA was, however, unable to produce any decision of the superintendent engineer in respect of this issue which holding it to be "excepted matter". DDA also did not issue any notice under clause 14 during the currency of the contract and has thus made recovery in

the running bills without any justification. Ld. Arbitrator, thus, held that the reduction was not justified. Ld. Arbitrator observed that since the completion was recorded as 30th April, 1997 and reduction was sanctioned 8 years later i.e. 12th August, 2005 after the entire work was executed, same is not justified. This reasoning by the Ld. Arbitrator is justified and is not liable to be interfered with.

F. Claim No.19 – Rs.8,00,000/- on account of balance payment under clause 10(cc) of the agreement

12. This claim relates to grant of escalation under Clause 10CC. The Contractor completed the work and completion certificate was given on 30th April, 1997. The DDA, however, in 2004 sought to levy liquidated damages vide order dated 8th June, 2004. Ld. Arbitrator held that levy of liquidated damages in this manner, 8 years after issuance of completion certificate, was wholly unjustified. Ld. Arbitrator records that payment under Section 10CC for escalation was made up to March, 1992 and hence the Contractor is entitled to escalation for a period from March, 1992 to 30th April, 1997. A perusal of the decision by the DDA dated 8th June, 2004 shows that levy of liquidated damages is on the basis that extension was granted up to 31st March, 1992 subject to recovery of liquidated damages. Subsequent to March, 1992, there has been correspondence between the parties, which is referred to by the Ld. Arbitrator. In fact, Ld. Arbitrator records that the hindrance register itself shows that there were various hindrances caused as recorded herein below:

“Clause 2 was partly relied by the respondent and this has resulted in miscarriage of justice. Admittedly after the completion of work in August 1993 and/or 30th

April 1997 and after expiry of Defect Liability Period, contract came to end except the subsisting of arbitration clause. Hence respondent could not have taken any decision of levying of LD on claimant vide order dated 08.06.2004. Even clause 2 of the agreement, to my mind, does not survive after the Defect Liability Period was over. How can the Superintending Engineer levy compensation in April 2004 with retrospective effect from 01.04.1992 to 30.04.1997 when contract was not surviving. Moreover hindrance register copy of which is filed as Annexure R-3 show that the material like SG Pipe of 75mm dia was not made available by DDA till 14.05.1992, similarly glazed tiles were not made available till 11.02.1993, Aldrin was not made available by the respondent till 18.02.1992. That the work was held up for want of issue of 16mm dia steel as the same was not available at the store of DDA. Foundation drawings were not made available, therefore, work could not proceed. Same was the position of layout plan. Service plan of MCD was not made available. From Annexure R-3 it is apparent that delay of completion of work can be attributable to the respondent. Reference can also be made to Exhibit C-25 and C-26 dated 05.05.94 and 01.07.94 respectively which show that claimant had brought to the notice of respondent that flush door shutters were defective and asked those to be replaced in order to avoid loss of time. This was followed by letter Exhibit C-25. Therefore levy of compensation after 8 years is not justified after the agreement came to an end. Contract did not exist except the arbitration clause.”

13. From a perusal of the above findings of the Arbitrator, it is clear that levy of liquidated damages in June, 2004 without taking into consideration the developments post March, 31st March, 1992 is wholly untenable. The Contractor having executed the work is entitled to escalation under Clause

10CC, as has been rightly awarded by the Ld. Arbitrator. Ld. Arbitrator has given taken into account reconciliation between the parties and as against the claim of Rs.8 lakhs awarded Rs.6,16,347/- in accordance with clause 10CC. The same does not warrant any interference by this Court.

G. Claim No.23 – Rs.2,50,000/- on account of balance escalation on the amounts to be awarded against various claims.

14. This is a claim wherein escalation was sought by the Contractor on the amounts payable under earlier claims. On this claim, Ld. Arbitrator has awarded a sum of Rs.72,832/- after considering the amounts awarded in respect of claim nos.1, 2, 6, 7, 14 & 15. By today's order, award of claim no.1 has been set aside. Accordingly, the award under this claim would be restricted to the amounts awarded under claims 2, 6, 7, 14 & 15.

15. The Contractor prayed for interest @ 18% per annum and Ld. Arbitrator has awarded 9% per annum. Considering that there was enormous delay in the bills being raised by the Contractor itself, interest is modified to 6% per annum, *pendente lite* and future interest. The payments be made within three months as per the present order failing which interest @ 8% per annum would be payable.

16. OMP is disposed of in the above terms.

**PRATHIBA M. SINGH
JUDGE**

JANUARY 22, 2019/dk