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

Date of Decision: 5th July, 2019

\+ **CS (OS) 854/2011**

M/S LUNAR ELECTRICALS ..... Plaintiff

Through: Mr. Rakesh Kumar Singh, Advocate with Mr. S. K. Chugh, partner in person. (M:9810183600)

versus

NATIONAL BUILDINGS CONSTRUCTION CORPORATION LTD & ORS. ..... Defendants

Through: Mr. Manoj Kumar Das, Ms. Geeta Das and Mr. Deepak Kumar, Advocates. (M:8527038398)

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The present suit has been filed by M/s. Lunar Electricals (*hereinafter referred to as 'Contractor'*) seeking to take on record the award by the Ld. Sole Arbitrator dated 19th January, 2011. M/s. National Buildings Construction Corporation Ltd. (*'NBCC'*) has filed objections to the award under Sections 30 & 33 of the Arbitration Act, 1940.

2. Briefly stated, the background of the case is that the NBCC had called for tenders in respect of "*Internal Electrification works in HUDCO Vishala Project, New Delhi*" being Work Order (W.O.) No.22368 dated 27th August, 1991. The Contractor was awarded the works by letter of award dated 22nd March, 1991. The total value of the contract was Rs.39.42 lakhs. The work order dated 27th August, 1991 was issued after five months of issue of the letter of award. The date of start of work was 23rd March, 1991 and the date

of completion was 21st November, 1992. The payments to the Contractor were to be made in stages as follows:

> "*I. 30% on conduiting*
> *II. 40% on wiring*
> *III. 25% on completion of switch/plates*
> *IV. 5% on testing and commissioning*"

3. The work was not completed and for various reasons, disputes arose between the parties. The Contractor left the site as of April, 1994. Admittedly, the balance contract value, which was not executed, was to the tune of approximately Rs.21 lakhs. Thus, the Contractor had executed only approx. 50% of the work allotted. The case of the Contractor was that the site was made available belatedly and thus, the contract could not be executed within time. The 9th RA bill had been finalised by the time arbitration was invoked. Various Sole Arbitrators were appointed from time to time vide letters dated 26th October 1994, 19th July 1996, 9th October 2000 and 13th April, 2005. The last appointed Arbitrator - Shri M. K. Verma finally gave the award on 19th January, 2011.

4. The Contractor, apart from alleging that there was a delay in making the site available also alleged that the BOQ and specifications etc. were being revised from time to time, as a result of which the original BOQ was rendered redundant. The Contractor raised various claims including claims for loss of profit, overheads, etc.

5. On the other hand, NBCC, after arbitration was invoked, called the Contractor for joint measurement for finalization of the 10th RA bill/final bill. The joint measurements were conducted but the Contractor refused to accept the 10th RA bill. The Contractor sought to justify the non-acceptance

of 10th RA bill by giving reasons.

6. NBCC filed its counter claim on the basis of the 10th RA bill as it was NBCC's case that the advance amounts paid to the Contractor were in excess, and it was entitled to recover a sum of Rs.2,91,018/-. NBCC also raised various other counter claims in relation to supervision, watch and ward, work executed at risk and cost, short procurement of material etc.

7. The ld. Arbitrator came to the following conclusion on the issue of delay of contract and breach of contract.

> *"4.1 Respondents made 2nd Revision of BOQ / tender Specifications /approved brands just two months prior to expiry of completion period besides site was also not available due to non-completion of civil work till expiry of contract period.*
>
> *4.2 It is amply clear from above facts that both parties have defaulted and committed breach in performing their obligations as per contract which lead to slow progress, stoppage, abandonment of work and ultimately risk &cost execution of work."*

Thus, the Arbitrator concluded that both the parties have defaulted in performing their obligations, which led to the slow progress of work.

8. After arriving at the above conclusions, the ld. Arbitrator awarded a sum of Rs.2,36,301/- under Claim 1 and also directed refund of the retention money of Rs.1,09,095/-. All the remaining claims of the Contractor have been rejected and the counter claims of NBCC were also rejected. The amounts were awarded in the following manner:-

> "*Claim 1: Amount of Work done and material at site Rs. 10,19,862.13*
> *1. 10th RA bill was prepared by the respondents after issue of risk and cost execution letter to claimants. This*

incorporated penal recoveries, some recoveries towards risk and cost execution besides certain recoveries not tenable as per contractual provisions.

This 10th R/A bill was disputed and not accepted by claimants. The risk &cost / Penal recoveries / amounts kept in deposit / amounts withheld deducted in 10th RA bill can't be allowed since breach of contract has also been committed by respondents as per para 4.0 above. Thus, it will not be reasonable to consider 10th RA bill prepared after issue of risk &cost notice.

2. R/A bills prepared by respondent were reconciled and it is observed that undermentioned amounts were withheld/kept in deposit/not paid to respondents without any valid reason :

i)	*9th RA bill for Rs. 1,04,457.00 was passed by respondents but not paid to claimants.*	*Rs.1,04,457.00*
ii)	*An amount of Rs.17,238.00 was withheld towards damages of cable. While receiving the materials from the claimants, no comments regarding damaged cable were recorded by the respondents. Rather, the handing /taking over note signed by respondents mentions that materials have been received in good*	*Rs. 17,238.00*

	condition (Ref C:12). Test certificates showing cables in good conditions were also provided to the respondents.	
iii)	*An amount of Rs.6000/-was withheld kept in deposit without any valid reason.*	*Rs. 6,000.00*
iv)	*An amount of Rs.1680/- was withheld from 3rd RA bill without any valid reason*	*Rs.1,680.00*
v)	*An amount of Rs.62,668.00 was withheld on account of EPF/labour license etc.* *As per contract, the claimant is directly required to pay dues, if any, to the concerned authority. Further, respondents have not been able to produce any record of having paid this amount actually to the concerned authorities after almost 15 years of execution of this work.*	*Rs.62,668.00*
vi)	*An amount of Rs.61,50.00 was also*	*Rs. 6,150.00*

	withheld without any valid reason from 8th R/A bill.	
vii)	*An amount of Rs.18,471.64 has not been paid against "material received by NBCC but not paid (Ref. Statement "A" below)*	*Rs.16,686.00*
viii)	*Higher amount have been withheld Against BOQ items towards part Rates instead of 85% rate (Ref. Statement-B below)*	*Rs.21,422.00*
	Total	*Rs.2,36,301.00*

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5.3 Claim 3: Refund of retention money
Rs.1,44,007.00

It has been concluded in para-4.0 above that NBCC has also defaulted and committed breach in performing obligations as per contract.

A Retention money i.e. Security Deposit @ 5% amounting to Rs.1,09,095.00 was deducted from Running accounts bills of claimants by the respondents. Since the breach of contract was also committed by the respondents, the claimants are entitled for refund of retention money. Thus an amount of Rs.1,09,095.00 is awarded against this claim.

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The arbitrator awarded interest in the following manner:

7.0 MISCELLANEOUS:

a. A simple interest @10% per annum is awarded in *favour of claimants on awarded amounts against claim No.1 & claim No.3 from 26.10.1994 i.e. date of appointment of 1st Sole Arbitrator Sh. J.N. Mehra. The interest is payable till date of payment by the Respondent."*

9. The objections of NBCC have been perused. Mr. Manoj Kumar Das, ld. counsel appearing for NBCC contends that the ld. Arbitrator is guilty of misconduct, inasmuch as there are no reasons given for the award of the amounts. The 10th RA bill has been completely ignored, and the ld. Arbitrator has also ignored the affidavits of two engineers, namely Mr. Dilip Bhaskar and Mr. S. S. Gaur, AE both of whom supported the 10th RA bill. They had, in fact, conducted the joint measurements and had prepared the 10th RA bill, according to which a sum of Rs.2,25,791/- was payable by the Contractor to NBCC. The fact, that the affidavit of Mr. Dilip Bhaskar was filed, is mentioned in award at paragraph 3.8. The preparation of the 10th RA bill is also mentioned at paragraph 2.13. However, despite mentioning of these facts, the ld. Arbitrator failed to give any reasons for ignoring the 10th RA bill. He relies upon the following judgments in support of his submission that if the relevant documents and evidence are not considered by the ld. Arbitrator, the award is liable to be set aside.

- ***K.P. Poulouse v State of Kerala & Anr. AIR 1975 SC 1259***
- ***Indu Engineering and Textiles v Delhi Development Authority Civil Appeal 2881/1996 (Decided on 11th July, 2001)***

10. He further submits that the award of 10% interest from the date of appointment of first Arbitrator i.e. on 26th October, 1994 is also unreasonable as NBCC cannot be blamed for delay of the arbitral proceedings. Even the rate of interest awarded is on the higher side.

11. On the other hand, Mr. Rakesh Kumar Singh, ld. counsel appearing on behalf of the Contractor submits that the award is fairly reasoned. The ld. Arbitrator has considered all the relevant facts. He has even observed in paragraph 4.1 that the site was itself not available for execution of works and thus, the ld. Arbitrator has awarded those amounts that were genuinely payable to the Contractor. Moreover, since the ld. Arbitrator has not accepted the stand of NBCC, the Contractor was liable to be paid for the amount of work executed, as also refund of the retention money.

12. Mr. Singh further submits that the Ld. Arbitrator being a technical Arbitrator, cannot be expected to give detailed reasoning and the reasons, which have been given are sufficient to support the award in favour of the Contractor. He further submits that the awarded interest is also completely valid and justifiable in the facts, as the contract itself dates back to 1991 and the matter has reached its conclusion several years later. He relies upon the following judgments.

- ***Indian Oil Corporation Ltd. v. Indian Carbon Ltd., AIR 1988 SC 1340***
- ***U. P. Hotels & Ors. v. U. P. State Electricity Board, (1989) 1SCC 359***
- ***Bhagwati Oxygen Ltd. v. Hindustan Copper Ltd., 2005 IV AD (SC) 554***
- ***Thazhathe Purayil Sarabi & Ors. v. Union of India & Anr., (2009) 7 SCC 372***

13. He further submits that 10th RA bill was rightly rejected by the Ld. Arbitrator, as the same was not prepared in accordance with the contract. Moreover, the evidence of the engineers is not liable to be considered,

inasmuch as these were unilateral affidavits filed by NBCC and they were not directed to be filed by the Ld. Arbitrator. The 10th RA bill was not even signed by the officer concerned.

14. The Court has heard ld. counsels for the parties and has considered their submissions. The Court has also perused the impugned award, the written submissions filed and the case laws cited by ld. counsels for the parties.

15. A perusal of the award shows that the Ld. Arbitrator has referred in detail to the 10th RA bill and has recorded the submissions of the Contractor in respect of the 10th RA bill as under:

> "*2.13 After issue of Risk and cost letter, the respondents prepared 10th R/A Final bill which was denied & not accepted by the claimants. Claimants disputed the measurements recorded in this bill inter-alia stating that bill has not been prepared on the basis of joint measurements and respondents have made penal/unwarranted recoveries not tenable as per contract.*"

16. Thereafter, the Ld. Arbitrator, after going through submissions and documents has held that the delay had been caused by both the parties leading to slow progress, stoppage, abandonment and ultimately execution of the work at risk and cost. Under these circumstances, the Ld. Arbitrator has rejected almost all the claims of the Contractor but has only awarded to the Contractor the amount payable as per the works executed. The award of the amount under Claim 1 is fairly detailed and is based on the 9th RA bill, which was an admitted document between the parties. The 10th RA bill was clearly denied by the parties and evidence would have been required to be adduced to prove the same. Long protraction of the arbitration proceedings,

and the change of at least three Arbitrators, leading to the 4th Arbitrator having rendered the award, shows that the process of pleadings and exhibition of documents was repeatedly being undertaken before each of the Arbitrators. Mr. Singh has referred to the letter dated 10th October, 1995 written by the earlier Arbitrator Mr. J. N. Mehra, who had directed the parties to reconcile the 10th RA bill, which according to him, had not been done. In view of these circumstances, it is clear that the Ld. Arbitrator has gone by the 9th RA bill, which was last RA bill between the parties. Each of the items of work, which has been executed by the Contractor, has been enumerated by the Ld. Arbitrator and the amount has been awarded on that basis. The award in respect of Claim 1 is, therefore, not to be faulted with in any manner.

17. Insofar the retention amount is concerned, the admitted position is that the Contractor did not execute the full awarded contract for whatsoever reasons. As per the award rendered, clause 4 required the submission of security deposit by the Contractor. The said clause reads as under:

> "*4. 5% of the value. of the work done shall be retained security deposit from the running bills of the contractor/ PRW's. The security deposit as such shall be refunded after satisfactory completion of the work.*"

18. As per the above clause, the security deposit was liable to be refunded only after satisfactory completion of the work. The Ld. Arbitrator has actually arrived at the finding that there was abandonment of the work, for which both the parties are liable. There is also risk and cost execution of the work by NBCC as per the Ld. Arbitrator himself. This finding of the Ld. Arbitrator has not been challenged by the Contractor. Clearly, there was,

therefore, no satisfactory completion of the work as admittedly approximately 50% of the work remained unexecuted by the Contractor. Under these circumstances, this Court is of the opinion that the award of refund of retention amount is not liable to be sustained. Accordingly, the said award under Claim 3 is, accordingly, set aside.

19. Insofar as interest is concerned, all the Arbitrators were appointees of NBCC. The appointing authority was also Chairman/Director of NBCC. Delays by the Arbitrators, who were employees of NBCC, cannot be attributed to the Contractor. Moreover, 10% interest rate, which has been awarded is also not unreasonable considering that the Contractor had to fight long drawn battle with NBCC. Hence, interest as awarded is upheld under Claim 1.

20. OMP is disposed of with the above observations.

PRATHIBA M. SINGH
JUDGE

JULY 05, 2019/*dk/dj*