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

Date of decision: 8th April, 2019

+ **O.M.P. 516/2013**

K.S NARULA

..... Petitioner

Through: Ms. Renuka Arora, Ms. Nikita Salwan and Ms. Shreya Sharma, Advocates (M: 9958307722).

versus

MCD

..... Respondent

Through: Ms. Eshita Baruah, Advocate for Mr. Gaurang Kanth, Advocate (M: 9999285585).

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The present petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (*hereinafter, 'Act'*) challenging the impugned award dated 30th November, 2012.
2. Vide work order dated 21st December, 2005, M/s Narula Construction Company, which is a sole proprietorship of Mr. K.S. Narula was awarded works for the improvement of Gokulpur Drain. The value of the tender was for a sum of Rs. 1,87,99,995/-. The time given for completion was 12 months. A formal agreement, in terms of the work order was entered into on 11th February, 2006. While the stipulated date for completion of the work was 31st December, 2006, the work was actually completed on 14th November, 2007. The contractor invoked arbitration in respect of several claims. Parallely, the contractor also filed a Civil Suit challenging the penalty imposed by the MCD and in the said suit, the following relief was claimed: -

“(a) pass a decree of declaration declaring that the letter dated 8.2.2008 levying penalty is illegal and arbitrary and liable to be set aside.

(b) Grant a decree of permanent injunction permanently injuncting the defendant, their agents, assignees or representatives in any manner appropriating an amount of Rs.23,12,400/- levied under Clause-2 of the agreement.”

3. Along with suit, an interim application was filed seeking a restraint order against the MCD from appropriating the money which was due to the contractor. In the said application, a Division Bench of this Court vide order dated 12th September, 2008 passed the following order:-

“CM No. 13144/2008

Allowed subject to just exceptions.

FAO (OS) No. 388/2008 and CM No. 13143/2008 (delay)

Learned counsel for the appellant contends that show cause notice dated 13th June, 2007 under clause 2 of the agreement was given by the Executive Engineer whereas the appropriate authority is Superintending Engineer and therefore, the entire action of levying liquidated damages on the basis of said show cause notice is without authority and void.

She further submits that under clause 2, the maximum penalty which could have been imposed for the delays in execution of the work is 10% of the tendered amount. In this case, she points out that the tendered amount was Rs. 1,87,99,995/- and the 10% thereof would be Rs. 18,80,000/- approximately. As against this, the respondents have levied the penalty of Rs. 23,12,400/-. Taking into consideration the contractual cost which is impermissible in view of language of clause 2 of the contract, issue notice to the respondents to show cause as to why delay in filing the appeal be

not condoned as well as the appeal be not admitted, returnable on 21st October, 2008.

In the meantime, there shall be a stay of recovery of the impugned amount by the respondents.”

4. This order was confirmed vide order dated 2nd February, 2012. In the meantime, issues were framed in the suit filed vide order dated 6th January, 2009 which reads as under: -

“1. Whether the order levying penalty has not been made by the authority entitled to do so under the agreement and if so, to what effect? OPP

2. Whether the delay in completion of works by the plaintiff leading to the levy of penalty by the defendants was attributable to the defendants and not attributable to the plaintiff? OPP

3. If the issue No. 2 is decided against the plaintiff whether the defendants are not entitled to levy penalty? OPP (this issue will be decided also in the light of observations of the Apex court in ONGC vs. Saw Pipes Ltd, 2003 (5) SCC 705 paras 66 and 67 relating to proof of loss in respect of public works)

4. Whether the levy of penalty is in excess of the amount provided for under the agreement and if so to what extent? OPP

5. Whether the plaintiff is not entitled to the relief of declaration and injunction for the reason of having not approached the Supdt. Engineer against the levy of penalty? OPD

6. Whether the suit for declaration and injunction with respect to such levy is maintainable? OPPr

7. Relief.”

5. As can be seen from the above, one of the main issues which was framed by the Court was as to who was responsible for the delay in the completion of the works. The said issue reads as under: -

“2. Whether the delay in completion of works by the plaintiff leading to the levy of penalty by the defendants was attributable to the defendants and not attributable to the plaintiff? OPP”

6. The suit then proceeded for recordal of evidence. Parallely, the arbitral proceedings also continued in respect of the various claims raised by the contractor. The impugned award dated 30th November, 2012 was passed. The operative portion of the impugned award reads:

“ORDER

Considering the pleadings of both the parties, documentary evidences on record, arguments made by the learned counsels, examination/consideration of the case laws/ judgments referred by the parties and taking the totality of the circumstances into the consideration and for the reasons aforesaid, I make the following awards:

- i. The respondent do pay to the claimant, the sum of Rs.33,97,190/-*
- ii. The claimant shall also be entitled to simple interest at the rate of 10% per annum on the said amount of Rs.33,97,190/- provided the respondent fails to make the payment of award within 60 days from the date of publication of the Award i.e. 15th November, 2012 till the date of payment by the respondent or realization thereof by the respondent.*

iii Counter - Claim of the Respondent

(a) Recoveries of Rs 15. 09. 416/- from the final bill:

Respondent is entitled to recover this amount of Rs.15,09,416/- from the final bill after adjudication of this issue of recovery of Rs.23,12,400/- u/c 2 of the contract agreement is decided in his favour, He will also be entitled to claim interest as claimed under counter claim 2&3.

(b) Respondent is entitled to forfeit the security of Rs 5,00,000/- of the claimant u/c 3 of the

contract agreement after the issue of compensation of Rs.23,12,400/- u/c 2 of the contract agreement from the claimant is decided in his favour by the Hon'ble Delhi High Court in suit no.734/2008

(c) The respondent is also allowed to place his counter-claim "A" of Rs 1,92,800/- before Delhi High Court for consideration & order."

7. The objections pressed by learned counsel for the Plaintiff are in respect of the following claims: -

- (a) Claim 1, the objections in respect of extra items 11, 12 and 13 are being pressed.
- (b) Claim 2 is not pressed.
- (c) Claim No. 4, is a claim in respect of fee paid to IIT Delhi, in respect of approval of design mix formula and its thickness which has been rejected by the Arbitrator.
- (d) Claim No. 5 relates to works claimed to be executed by the contractor beyond the stipulated quantities.
- (e) Claim No. 7 is a claim in respect of idle labour, equipment and running of office etc.
- (f) Claim No. 8 is in respect of loss of profits.
- (g) Claim No. 9 is a claim towards increase in labour and material for prolongation of the contract beyond the date of completion.
- (h) Claim No. 7, 8 and 9 were rejected by the Arbitrator and the objections in respect of the same are being pressed.

8. Subsequent to the award being passed, the suit of the contractor came to be decreed vide order dated 1st August, 2016. The findings qua issue nos. 2 and 3 are relevant in the said judgement. The Trial Court, which was

seized of the final hearing of the matter, recorded a finding that the delay in the execution was due to the MCD.

9. Thus, as per the above judgement, the MCD was at fault and was responsible for the delay in the execution of the works. No appeal has been filed in respect of the said judgement passed by the Trial Court. The judgement and the findings therein have thus attained finality.

10. In support of her objections, learned counsel for the Petitioner submits that since the issue of delay has been held in favour of the Petitioner, claims 7, 8 and 9 are liable to be allowed in her client's favour. She further submits that insofar as Claim 1 and the extra works which were executed by the contractor are concerned, the execution of the work itself is not in dispute. The bills which were submitted by the contractor gave the complete details of the work executed and rates at which payment was liable to be made. However, despite the extra work having been undertaken, the claims have not been allowed. In respect of Claim 4, she submits that the MCD was to obtain the approval of the design formula. Though the follow up etc. is done by the contractor, it is a well - established position that IIT Delhi does not accept any application from private parties and hence the payment made to IIT Delhi for the approval of the design formula is liable to be paid to the contractor. Claim 5 relates to work executed beyond the stipulated quantities, which, according to the counsel for the Petitioner, have been wrongly disallowed by the arbitrator. It is submitted that regular running bills were raised by the contractor and usually the contractor is not permitted to accept the payments under protest. The fact that no protest was shown by the contractor, cannot be considered as an abandonment or waiver of the claims by the contractor. It is further submitted that the extra work was

carried out in terms of the design approved by the IIT Delhi. On Claim Nos. 7, 8 and 9, it is emphasised that the finding of the Trial Court in the suit ought to be applied and the same amounts sought ought to be awarded as the claims therein are based on the delay caused in execution.

11. On behalf of the Respondent, it is submitted that the work order was very clear that any extra work could not have been executed without the prior approval of the competent authority. Reliance is placed on the text of the work order which requires that the competent authority has to pass an order before execution of the extra work in order to avoid any further complication. Since the Arbitrator has come to a conclusion that the rates and the quantities were not approved by the competent authority, the objections are not sustainable. In so far as Claim 7, 8 and 9 are concerned, learned counsel for the MCD admits candidly that the judgement dated 1st August, 2016 has not been challenged by the MCD. However, she submits that the findings in the said judgement would be applicable only for the issues raised in the said suit.

12. The Court has considered the rival contentions of the parties. Insofar as Claim Nos. 7, 8 and 9 are concerned, clearly, they arise out of delays caused during the execution of the contract. Claim No. 7 relates to idle labour and staff during the extended period of the contract. Claim No. 8 is in respect of loss of profits due to prolongation of the contract and Claim No. 9 was expenses towards labour and material for prolongation of the contract. The finding of the Trial Court in respect of delay i.e. issue no. 2 and 3 framed in the suit is as under: -

“Issue nos 2 and 3:

The work order dated 21-12-2005 is Ex. PW1/ 1. The

work was to start immediately and was to be completed within 12 months. Certain letters of the defendants such as Ex. PW1/7 are containing admissions that site upon which work was to be done by the plaintiff was containing lot of silt and garbage, removal of which is a continuous process. Again para no. 3 of another letter of defendant dated 20-6-2006 clearly mentions that de-silting is a continuous process and whole reach is not possible to provide at one time. There was no condition in the contract entered into between plaintiff and defendant that it was the responsibility of the plaintiff to remove the garbage and silt from the site before starting work. Defendants due to these admissions also extended time several times to complete the work. Thus, it is clear, the defendants were at fault for not providing silt free site to the plaintiff and accordingly he was not able to start the work. The delay in completion the work had happened due to negligence and fault on the part of the defendants themselves and plaintiff cannot be blamed for it. In such situation, defendants had no right to impose any penalty upon the plaintiff.

The deadline to complete the work was 12 months. Defendants were required to approve some designs and materials used by the plaintiff but no action was taken in this regard for about 6 months. Plaintiff has given letter dated 15-7-2006 Ex. PW1/5 for approval of designs but no immediate action was taken on the same so he himself approached the concerned agency and got the necessary designs approved by making payments from his own pocket. The design for rigid pavement was approved by IIT only on 23-8-2006 vide letter Ex. PW1/3 and Ex. PW1/4 which was communicated to him on 6-9-2006. Giving of such approval at later part of the period fixed for completion of the work or at fag end fortifies the plea of the plaintiff that there was delay in giving necessary approval of designs on the part of the defendants.

Apparently due to these difficulties faced by the plaintiff and keeping in view his various representations, provisional extension of time was granted to the plaintiff to complete the work by 31-3-2007 vide letter of defendants Ex. PW1/6, further for another 7 days vide letter dated 27-4-2007 Ex. PW1/14, again upto 15-7-2007 vide Ex. PW1/17 and lastly upto 15-12-2007 vide Ex. PW1/25. It means that defendant despite alleged breach wanted to work done through plaintiff only.

Record further shows that plaintiff has written various letters to the defendants to remove silt from the site and provide him silt free site so that he can start and complete the work in time but no effective response of the same was given. Plaintiff tried to remove silt at his own level at some stretch of the space by engaging his own labour and machines and requested for sanction of extra money for it but he was not heard on it. Without removal of such silt and without providing him silt free space, it was not possible for the plaintiff to complete the work. Thus, plaintiff was justified to claim extra amount for work done beyond the tender and when he was not heard about it, then there was no reason available with him to remove the silt at his expenses which was not a part of the tender. The representations of the plaintiff to sanction extra money were unheard despite the fact that defendants admitted various lapses and lacunas in the original tender and felt need for extra work. There is no requirement to deal with the judgment of Supreme Court given in ONGC's case as decision of issue no. 2 and 3 is not going against plaintiff. Otherwise also, there is no proof what loss has been suffered by the defendants due to which they assessed the maximum penalty at 10%. In such circumstances, these two issues are decided in favour of the plaintiff and against the defendants."

13. In view of the findings of the Trial Court in the suit filed by the

Plaintiff, Claims 7, 8 and 9 would have to be reconsidered by the Arbitrator. This Court has not gone into the tenability or the quantification of any of the claims and whether any or all of them are liable to be granted. However, since the issue of delay has been decided in favour of the Plaintiff in the suit, the Plaintiff is entitled to agitate its claims for prolongation of the contract and for idle labour and machinery before the Arbitrator. The said claims would be decided by the learned Arbitrator in accordance with law. Secondly, the judgement of the Trial Court is subsequent to the impugned award. The finding of the Trial Court having attained finality, there cannot be a contradiction between the award and the judgment. The award and the claims relating to delay would have to be reconsidered in light of the judgement passed by the Trial Court.

14. Insofar as claims for extra works and additional quantities are concerned, Id. counsel for the Respondent is right in contending that the work order required prior approval by the authorities. Relevant portion of the work order dated 21st December, 2005, is extracted below:

“Your tender for the above mentioned work has been accepted on behalf of the Commissioner, MCD at your tendered percentage of below/above estimated cost, tendered amount of Rs. 1,87,99,995/-

You are requested to attend this office to complete the formal agreement within seven days fo then receipt of this letter. You are also requested to start the work at once. Please note that the time allowed for carrying out the work as entered in the tender shall be reconed from the 10th day after the date of this order to commence work.

It should be noted that as and when order is given for the execution of any extra / substitute item, prior orders from the competent authority are to be

obtained before the execution of same to avoid any further complication.”

15. A perusal of the above condition in the work order clearly shows that before executing any extra work or substitute item, the prior approval of the competent authority has to be obtained. The contention of the Ld. counsel for the Petitioner is that the payments are not normally accepted under protest because, if the contractor protests to the non-payment of the final bill, then the payments are likely to be stopped. Further, the execution of the extra works is not disputed.

16. The running bills which are raised by the contractor are usually approved and payments are made towards the running bills. The running bills contain the extra works and extra items/quantities, if any, executed by the contractor. The work order was very clear that prior approval had to be obtained before execution of any work. There being no prior approval to the extra quantities or the rates which were contained in the running bills, Claim Nos. 1 and 5 have been rightly rejected and the award does not require any interference.

17. Insofar as Claim No. 4 is concerned, the learned Arbitrator has come to the conclusion that the contractor was responsible for getting the approval done from IIT Delhi, and the mere fact that MCD may have forwarded the approval application does not take away the responsibility of the contractor in getting the same approved from IIT Delhi. Further, the Respondent's contention that there was no provision in the contract for the MCD to reimburse the said amount paid to IIT Delhi, the rejection of this claim is valid and justified. The Arbitrator's finding on this count is as under:-

“On going through the pleadings & records placed before me by both the parties, I hold that the claimant is responsible for getting the approved Mix Design from IIT- Delhi. Thus the claim of the claimant for reimbursement of Rs 28,160/- plus Rs 100/- as bank charges for getting approved design mix is set aside as the claimant has failed to establish the responsibility of the respondent to provide Design Mix for RMC from IIT- Delhi or otherwise.

I declare that the claimant is not entitled for reimbursement of Rs 28, 160/- paid to IIT- Delhi for Design Mix of RMC.”

This being a factual finding by the Arbitrator, the award cannot be interfered with.

18. It is submitted by Ld. counsels for both sides that the Sole Arbitrator who dealt with the present dispute has passed away. The Commissioner of MCD may appoint an alternate Arbitrator to decide Claim Nos. 7, 8 and 9 in light of the judgement dated 1st August, 2016 passed in suit No.31/2016. The appointment be made within a period of four weeks from today. The Arbitrator shall merely hear both the parties on Claim Nos. 7, 8 and 9 and pass the award. No further pleadings/evidence would be entertainable.

19. The OMP is disposed of in the above terms.

**PRATHIBA M. SINGH
JUDGE**

APRIL 08, 2019

MR

(corrected and released on 15th April, 2019)