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

Date of decision: 23rd April, 2019

\+ **O.M.P. 287/2010 & I.A. 3912/2019, 3913/2019**

GOVT OF NCT OF DELHI ..... Petitioner

Through Mr. Angad Mehta, Advocate (M. No.9560956484) along with A.O. of GNCTD.

versus

AYUB ALI & ORS. ..... Respondent

Through Mr. Rajesh Pandey, Advocate for R-1 along with Mr. Sarfaraz – son of R-1 (M-9717940440)
Mr. Prakash Rawat, Advocate (M. No.9446515711)

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The matter was listed for hearing of the restoration application and also on merits as was directed on 29th March, 2019. Since the execution proceedings were pending and the Petitioner has already submitted a cheque in favour of the executing Court, which is yet to be encashed, the matter was heard on merits itself.

2. The dismissal of the petition on 18th January, 2017 was due to non prosecution. The petition is accordingly restored and heard on merits.

3. The present petition has been filed under Section 34 read with Section 28 (3) of the Arbitration and Conciliation Act, 1996 directing setting aside of the award dated 2nd March, 2009. The Respondent-contractor was awarded a contract for *"Widening of Marginal Band Road from ITO Bridge (Chungi Junction) to old Yamuna Bridge from 2 lanes to 4 lanes Sh. Widening of Road from RD 1340 to RD 1740 and from RD 2410 to RD*

3140."

4. The total value of the contract was Rs.77,64,953/-. The works were to be executed within a period of five months to be reckoned from the 10th day after the date of award of the contract i.e. 13th February, 1998. Accordingly, the work was started from 13th February, 1998 and date for completion was 12th July, 1998. Extension of time was granted by the NCT without any liquidated damages and the work was finally completed on 23rd December, 1999.

5. During the currency of the contract, the contractor raised various Claims with the Chief Engineer, which are as under:

> **Claim No. 1** : Agreement Item No.1.1 (i) provides for 16 KM lead, where as department fixed a source of earth 24 km away from the site from where the earth was carted. Accordingly, extra payment for 8 km extra lead is claimed, which works out to Rs.1,68,801.00
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> **Claim No. 2** : Fly ash was carted from a distance of 11 km instead of 8 km as provided in the agreement. Accordingly, extra payment for 3 km extra lead is claimed which works out to Rs.17309.44.
>
> **Claim No. 3** : Cost of excavation of fly ash at source which is not included in the agreement and this claim amount works out to Rs.3,22,952.61 (agreement item No.1.2).
>
> **Claim No. 4** : Rs.12,23,283.00 towards the cost of excavation of earth at source, which is not included in the agreement (agreement item No.1.1(i))
>
> **Claim No. 5** : An amount of Rs.1,50,702.52 for an extra item regarding excavation of earth and banking, executed as per the instructions of the department.
>
> **Claim No. 6** : Reimbursement of the cost incurred in lifting excavated

Fly Ash from 1.5 m depth to 3.00 m depth the Agreement item (No 1.2) provides only lift upto 1.5 m. The amount of this claim works out to Rs.22013.08.

Claim No.7 : 20% escalation on the work executed after the stipulated date of completion and amount of this claim works out to Rs.15,50,991.00

Claim No. 8 : Rs.7,80,000.00 under agreement clause 10-CC.

Claim No. 9 : Rs.3,43,120.40 as compensation for the loss suffered due to washed away earth.

Claim No. 10 : Interest claim for all the above claims @ 24% for the period 03.10.98 to 31.8.99

Claim No. 11 : 24% interest on other due amounts from the due date of payment.

Claim No.12 : Rs.50,000/- as costs of arbitration.

6. Thereafter, further additional claims were raised by the contractor. All the claims were adjudicated by the Ld. Arbitrator.

7. The Ld. Arbitrator, vide award dated 2nd March, 2009 awarded some of the claims to the contractor. Thereafter, a correction award was also passed on 13th April, 2009. The present objection petition has been preferred against the said impugned award. The only claims against which objections have been raised are:

i. Claim No.4 and Additional Claim No.3;
ii. Claim No.7 and Claim No. 8, which were adjudicated together;
iii. Claim Nos.10 and 11 – on account of interest.

8. None of the other claims are challenged.

9. Claim No.4 and Additional Claim No.3 relate to the cost of excavation of earth. According to the contractor, though the source for the earth was to be arranged by the PWD, only the transport of the earth from the source to the site was the contractor's responsibility. The contractor was not responsible for excavation. In fact, according to the contractor, the excavated earth was to be made available to the contractor. The total claim raised by the contractor was Rs.12,23,283/- and Rs.4,78,088/- i.e. a total of Rs.17,01,371/-. The Ld. Arbitrator, after relying upon item no.1.1 of the contract, held that the PWD had an obligation to provide excavated earth to the contractor and since it did not do so, the cost of excavation was liable to be paid to the contractor. However, insofar as the rate was concerned, the Ld. Arbitrator, after applying DSR-1993 held that the net rate payable, as against what was claimed by the contractor, was only Rs.5.43/cum. Thus, the Ld. Arbitrator, as against the claimed amount of Rs.17,01,371/-, awarded a sum of Rs.2,69,107/-.

10. Ld. Counsel for GNCTD submits that a perusal of Clause 2.2.1 and Clause 2.9 makes it clear that only the source of the earth was to be provided by PWD and all the other arrangements were to be made by the contractor at his own expense. On the other hand, Ld. Counsel for the Respondent submits that this is not correct as only the expense for transportation was to be borne by the contractor.

11. Though, at first blush, the submission of Ld. Counsel for GNCTD appears appealing, a perusal of item no.1.1 in the scope of work clearly shows that the work itself included supplying and banking of excavated earth in layers. Clause no.2.2.1 would accordingly have to be read with item no.1.1. They read as under:

Item 1.1

> "*Supplying and Banking* ***excavated earth*** *in layers not exceeding 20 cm in depth, breaking clods, watering, rolling each deposited layer with 8 to 10 Tonnes power road roller (and sheep foot roller if required). Under O.M.C. condition to give a density not less than 100% in top 50 cm of subgrade and 95% for the rest of the embankment to give proper slopes etc. Complete for roads, flood banks, guide banks or filling up ground depression including royality, carriage, loading, unloading etc. Complete for all leads and lifts (earth to be brought from outside source approved by Engineer-in-Charge).*

Clause 2.2.1

> *"The earth is to be supplied from some suitable outside source to be arranged by the contractor at his own expense. The source of such earth shall be got approved from the Engineer-in-Charge before start of work."*

This clearly meant that the transportation of the *excavated earth* was to be borne by the contractor. Thus, the Ld. Arbitrator's interpretation that Clause No.2.2.1 has to be read with item no.1.1 is correct as the earth which was to be transported by the contractor was *`excavated earth'*. If excavation had to be done by the contractor, the same was not covered in the contract and hence the contractor is entitled to reimbursement of the expenses. Thus, in respect of this claim, no interference is called for and the award is upheld.

Claim Nos. 7 and 8

12. In claim no.7, the contractor raised a claim for 20% escalation after the stipulated date of completion and in Claim No.8, the contractor has raised a claim for Rs.7,80,000/- under Clause 10CC of the agreement. These

two claims were clearly overlapping and thus the Ld. Arbitrator considered them together. Since the contract had a specific clause for escalation and the formula was given in Clause 10CC, the general escalation claim i.e. Claim no.7 was rightly not awarded by the Ld. Arbitrator. Insofar as the escalation claim under Clause 10CC is concerned, the Ld. Arbitrator has awarded a sum of Rs.3,30,359/-. The manner in which the Ld. Arbitrator has determined the said amount is by calculating what would be the reasonable compensation for the price during the extended period of contract. In order to determine what is reasonable compensation, the Ld. Arbitrator took the base index which was prevailing at the stipulated date of completion and thus did not apply Clause 10CC strictly. Thereafter, the Ld. Arbitrator has adopted the gross value of the work done as per the final bill of i.e., Rs.89,33,792/- and considered the various running bills and differences between the final bill and the previous bill. On the said basis, the Ld. Arbitrator has calculated in Appendix-I the compensation for the price rise in materials. The said Appendix has taken into consideration all the amounts from the first RA Bill to the Seventh RA Bill and determined the total amount payable.

13. The methodology adopted by the Ld. Arbitrator is of applying the total period which was consumed in the execution of the contract and the actual stipulated period for execution. Though, the said formula is different from Clause 10CC, the Ld. Arbitrator’s methodology is a reasonable method for calculating reasonable compensation to be awarded to the contractor. Admittedly, extensions were granted in the present case without any levy of liquidated damages. Since there was no fault of the contractor for the delay in execution of the contract, the Ld. Arbitrator has awarded escalation of

Rs.3,30,359/- which includes the labour component of approximately Rs.2,21,513/- and the material component of Rs.1,08,846/-. No interference is called for on this count.

14. Insofar as interest is concerned, under Claim Nos.10 and 11, the claim of the contractor was for 24% per annum. The Ld. Arbitrator has awarded interest @ 9% Simple Interest which is again a reasonable rate of interest. The pendente lite and future interest @ 9% does not deserve to be interfered with.

15. The award is accordingly upheld. The cheque which is lying with the executing court shall be replaced by the Petitioner with a cheque in favour of the contractor. Upon the fresh cheque being handed over to the contractor, the previous cheque lying with the executing court shall be returned to the Petitioner.

16. Both parties agree that the sum payable to the contractor is Rs.27,58,814/-. Upon a cheque for this amount being given to the contractor before the executing court, the cheque lying in the name of the ADJ shall be returned to the Petitioner.

17. Let the matter be listed before the executing court. No further interest or costs would be payable. The executing court shall ensure that the Petitioner shall pay the above amount on or before 15th May, 2019.

18. OMP is disposed of.

19. Order *dasti.*

PRATHIBA M. SINGH
JUDGE

APRIL 23, 2019/*Rahul*
(corrected and released on 1st May, 2019)