

\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on : 13th September, 2018

Date of decision : 8th January, 2019

+

O.M.P. 371/2007

DELHI DEVELOPMENT AUTHORITY

..... Petitioner

Through: Mr. Arun Birbal and Mr. Ajay Birbal,
Advocates. (M:9810029802)

versus

M/S SANYUKT NIRMATA & ANR.

..... Respondents

Through: Ms. Anusuya Salwan, Ms. Nikita
Salwan and Ms. Shreya Sharma,
Advocates. (M:9811225368)

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. The present Section 34 petition has been filed challenging the award dated 22nd November, 2004 passed by the Learned Sole Arbitrator.
2. The Respondent/Contractor was awarded the work: "*C/O 480 Cat. II & III S.F.S. houses at Shalimar Bagh Block 'B' Pocket 'W'.SH: C/O 208 SFS houses. (Balance work)*". The estimated cost of the project was Rs.89,93,538/-. Tender was called for the said work and vide agreement dated 10th April, 1987, Sanyukt Nirmata - the contractor was awarded the works. The time allowed for completion was twelve months. The rates that were to be awarded were to be based on Delhi Schedule of Rates -1977 (*hereinafter 'DSR-1977'*). The tender amount was Rs.2,24,38,877/-. Disputes arose between the parties and the disputes were referred to a Sole Arbitrator.
3. Various claims were made by the contractor being claims 1 to 5.

Within claims 2, 3 and 4, there were multiple sub-claims. Claim 5 related to interest. The Ld. Arbitrator held in favour of the Contractor and awarded various sums under different heads. In the present petition, the objections of the DDA are restricted to claims 4(a)2, 4(a)3, 4(a)6 and interest. The DDA however raises the following 3 preliminary objections:

- i) that the claims were barred by limitation;
- ii) that the partnership firm was not registered under Section 69 of the Partnership Act;
- iii) that the award passed by the Learned Arbitrator was in connivance with the contractor.

4. The said three preliminary objections are considered hereinbelow:

A. Barred by Limitation

5. The said objection is based on clause 25 of the contract, the relevant extract of which is as under:

“It is also a term of the contract that if the contractor does not make any demand for arbitration in respect of any claim in writing within 90 days of receiving the intimation from the Engineer-in-charge that he is ready for payment, the claim of the contractor’s will be deemed to have been waived and absolutely and that Authority shall be discharged and release all liabilities under the contract in respect of those claims.”

6. As per the DDA, the claims ought to have been filed within 90 days of receiving intimation of preparation of the final bill by the Engineer-in-charge. Any claims beyond 90 days are not liable to be entertained. On the other hand, the contractor argues that this objection was not raised before the Learned Arbitrator, and hence cannot be raised afresh now. It is further submitted that the clause is not applicable since no intimation of the final

bill being ready was ever given by the Engineer-in-Charge. The 90 days period is to be reckoned from the date when the said intimation was received.

7. There is no doubt that clause 25 existed in the contract between the parties. However, it is a matter of fact, judicial notice of which needs to be taken, that such a clause could be considered to be in restraint of legal proceedings as per Section 28 of the Contract Act, 1872, especially post the amendment and the addition of Sub-section (b) to Section 28, which has been inserted w.e.f. 8th January, 1997. The said provision was considered by the Supreme Court in ***Union of India v. Indusind Bank Ltd. (2016) 9 SCC 720*** (hereinafter, '*Indusind Bank*') in which it has held that this provision i.e. the amendment, would apply prospectively and not retrospectively. Therefore, strictly speaking the clause would not be void under Section 28 of the Contract Act, as it then stood.

8. From a reading of the letter dated 29th January, 1992 written by the contractor itself, it is clear that from the DDA's side the final bill was ready. The text of the said letter is set out herein below:

"Sir,

The subject work was completed on 10.11.89. The houses have since been allotted and under occupation. Despite compliance of your letter dated 16/4/91 we have not yet been paid our final bill nor has our security been released. We request payment of our final bill amounting to approximately Rs.1 lac, as prepared by the department, which is already in the Division Office. We request that our security may also be released at the earliest as we are incurring avoidable interest costs.

*Thanking you,
Your's faithfully.*

for SANYUKT NIRMATA ”

9. Despite not receiving the payments for the final bill, no claims were raised by the Contractor within a period of three months, under clause 25 of the contract. The letter on record i.e. dated 17th September, 1992, states that the final bill was prepared by the Department and is lying in the office for payment. The extract of the said letter is set out herein below:

“Sir,

Further to our letter No SN(P)/SB/742 dated 29.1.92 we are to state that the Work was completed on 10.11.89. The final bill and security should have been released by 9.5.90. The Bill has not been paid till date.

2. The final Bill as prepared by the department has been lying in the Divisional Office (Accounts) for the past 5 months. Our repeated visits to the office have been of no avail.

3. You are once again requested to issue necessary instructions for completion of all formalities and fix a target date for payment of our final Bill and release of security.

4. Since the department has not paid our final Bill no released our security on time it loses it entitlement for the rebate offered by us for timely payment of these. The rebate should, therefore, not be deducted from our bill.

5. As already intimated we shall be entitled to interest @ 20% per annum on amounts due to us till paid.

Assuring you of our continued co-operation.

Yours faithfully,

for SANYUKT NIRMATA ”

10. Subsequent to this, on 16th November, 1992, the contractor raised a plea that three claims, including of items not paid or paid at lower than due rate, amounts wrongly recovered/withheld by the Department as also interest

compensation and damages including escalation, expenditure on overheads and loss of profits during the estimated period, were not paid. Thus, for the first time claims were raised on 16th November, 1992 with the DDA and the arbitration was invoked on 10th July, 1993.

11. The question of limitation under a clause based on a contract is a legal ground. This has in fact been pleaded in the written submissions filed by the DDA (Page no. 205 of Vol.III of the Arbitral Record), before the Arbitrator which are extracted herein below:

“The claimant M/s Sanyukt Nirmata vide there letter dated 10.07.94 ANNEXURE to the Statement of claim invoked clause No.25 of the Agreement for appointment of Arbitrator i.e. the said letter was issued by the Claimant M/s Sanyukt Nirmata after expiry of almost three years and eight months from the date of completion of work. As such the claim of the Claimant M/s Sanyukt Nirmata is barred by law of limitation and is liable to be rejected, as no steps were taken by the Claimant M/s Sanyukt Nirmata between three years from 10.11.89 i.e. the actual date of completion.”

12. The contractor claims that the said written submissions were undated and in any event, the said ground having not been raised in the statement of defence is not liable to be considered.

13. The judgment of the Supreme Court in **IndusInd Bank (supra)** is clear and categorical. Though the amendment was inserted due to various developments which took place including the Law Commission's report, in Section 28 of the Contract Act, the finding is clear to the effect that the changes in the law are substantive and cannot have retrospective effect. Thus, clause 25 is clearly applicable to the facts of the present case, and the claims are barred by limitation. The findings of the Supreme Court are as

under:

“18. What emerges on a reading of the Law Commission Report together with the Statement of Objects and Reasons for the Amendment is that the Amendment does not purport to be either declaratory or clarificatory. It seeks to bring about a substantive change in the law by stating, for the first time, that even where an agreement extinguishes the rights or discharges the liability of any party to an agreement, so as to restrict such party from enforcing his rights on the expiry of a specified period, such agreement would become void to that extent. The amendment therefore seeks to set aside the distinction made in the case law up to date between agreements which limit the time within which remedies can be availed and agreements which do away with the right altogether in so limiting the time. These are obviously substantive changes in the law which are remedial in nature and cannot have retrospective effect.”

Claim 4(a)2 and 4(a)3

14. Even on merits, claims 4(a)2 and 4(a)3 are based on escalation for material and labour costs. Insofar as escalation is concerned, the same is an integral part of the formula contained in clause 10C. Thus, no labour escalation is liable to be granted. Admittedly, the DDA states that by applying the formula under clause 10C, the payments to the contractor have already been made. The Learned Arbitrator comes to the conclusion that since extension of time was granted without levy of any compensation, the contractor is entitled for labour escalation for the entire period. Since, the claims are held to be barred by limitation, the award is set aside and objections are allowed. The reasoning of the Learned Arbitrator on the fact that labour escalation was to be based on the entire period of the contract cannot be faulted with. As per clause 10C the escalation is liable to be

granted only if it is beyond the 10% threshold as given in clause 10C, and as held in *Associate Builders v. DDA (2015) 3 SCC 49*. The Supreme Court, has categorically held as under:

“58. Clause 10-C concerns itself with the price of material incorporated in the works or wage or labour increases. It has been seen that Claims 9, 10 and 11 have nothing to do with either of the aforesaid subjects. In seeking to apply this clause to Claim 15, the simple answer is that this clause will not apply when a claim for damages is made. Further, the arbitrator considered this clause in detail and only awarded amounts under this clause in excess of 10 per cent as required by the clause when it came to awarding amounts under Claims 2, 3 and 4, which fell within the ambit of Clause 10-C. The DDA in the appeal before the Division Bench correctly gave up any challenge to these claims as has been recorded in Para 4 of the order under appeal.”

The observation of the Supreme Court is clear that amounts can be awarded only when the increase is beyond the 10% limit and not otherwise. The Ld. Arbitrator in the impugned award has not considered the 10% condition at all. Thus, the award for claim 4(a)3 is liable to be set aside.

15. Insofar as claim 4(a)2 is concerned, it relates to escalation cost of material and labour for work done during the extended period of the contract. Once the claim of escalation is granted under clause 10C, there was no occasion for the Learned Arbitrator to apply the CPWD cost indices and take 12% as a measure of the cost of escalation. The Learned Arbitrator notes in the initial part of award itself that the cost was to be governed by DSR-1977. The Learned Arbitrator notes that it is DSR -1977 and not the CPWD cost indices that govern the contract. Thus, CPWD cost indices

could not have been adopted as a measure by the Learned Arbitrator. Thus, the award in terms of claim 4(a)2 is also liable to be set aside.

Clause 4(a)6

16. This is a claim for damages for the delayed period towards expenditure overheads. Firstly, the said claim is barred by limitation. The reasons for the grant of this claim by the Learned Arbitrator is merely on the ground that the Learned Arbitrator scrutinized the evidence of payment i.e. copy of vouchers which were filed on record and also supplied to the DDA. There is no discussion as to whether the said claim of overheads was over and above 10% of escalation as contained in clause 10C. When damages have to be awarded for the delayed period, the Learned Arbitrator has to take into consideration as to whether the claimed amounts are within the 10% range as held in *Associate Builders (supra)*. Thus, the said claim is also not sustainable. For all the above reasons, the objections are allowed and the impugned award is set aside.

17. Insofar as non-registration under the Partnership Act, 1932 is concerned, since the claims are being rejected, the said objection is not gone into. In respect of the allegation of collusion, since the Learned Arbitrator has passed away during the pendency of the Section 34 petition, this Court does not deem it appropriate to go into the said issue. The claims having been set aside, no question of interest arises.

18. The OMP is allowed. No order as to costs.

**PRATHIBA M. SINGH
JUDGE**

JANUARY 8, 2019/Rahul