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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: 30th April, 2019.
+ **O.M.P. 376/2008, I.A. 10087/2018, 10088/2018, 10089/2018 and 1293/2019**
DELHI DEVELOPMENT AUTHORITY Petitioner
Through: Mr. Arjun Pant, Advocate (M: 9811071260).

versus

M/S MADHU KISHAN GUPTA Respondent
Through: Mr. Sanjoy Bhaumik, Advocate.

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The present petition was dismissed for non-prosecution on 25th November, 2016. The DDA has moved an application seeking restoration of the petition. The reasons given in the restoration application are that the counsel who was handling the matter on behalf of the DDA had resigned and since the matter was in the final list, it was missed out. Though no ground has been made out for such a long delay of almost 521 days, the petition is restored and heard on merits subject to payment of Rs. 10,000/- as costs.

2. Both parties have addressed their submissions on the merits of the objection petition. This petition under Section 34 has been filed challenging award dated 22nd February, 2008 passed by the Id. Sole Arbitrator. The Respondent-contractor was awarded work for “*construction of 64 SFS DU (32 Cat III and 32 Cat II Flats) and 48 Scooter Garages at Alaknanda near Pkt B and C (Opposite Yamuna Co-operative housing Building Society).*”

The agreement was entered into between the parties in 1983-1984.

3. The date of commencement of the work was 9th February, 1986 and the stipulated date of completion of work was 8th November, 1986. There was delay in completion of the work, until 31st January, 1989 which was the actual date of completion. The contractor raised several claims as disputes had arisen between the parties. Initially, a sole Arbitrator Mr. G.S Rao was appointed on 20th September, 1990. However, since the said Arbitrator had expired, a new Arbitrator, namely, Mr. K.S. Chauhan, who was appointed as the sole Arbitrator, has rendered the impugned award. Various claims from claim Nos. 1 to 14 were raised by the contractor and were decided by Id. Arbitrator. A total sum of Rs. 3,26,275/- was awarded in favour of the contractor along with interest @ 10% from the date of appointment of the first Arbitrator. The Arbitrator has awarded following claims in favour of the contractor:-

- (i) **Claim No. 1:** On Account of short measured/short paid, less measured/less paid, not measured/not paid, both in agreement items and EI/SI items – Rs. 67,849/- awarded
- (ii) **Claim No. 2:** On account of non-payment of cutting, straightening of agreement item 3.9 i.e. steel reinforcement - Rs. 18,000/- awarded
- (iii) **Claim No. 3:** On account of extra recovered against the issue rate - Rs. 4,400/- awarded
- (iv) **Claim No. 4:** On account of quantity executed beyond deviation limit- Nil award.
- (v) **Claim No. 6:** On account of market rate in the extended period of contract - Nil award.
- (vi) **Claim No. 5 and 7:** On account of loss of profits - The Arbitrator has

come to the conclusion that the contractor had the option of stopping the work which he did not, as a result of good relations with the DDA and hence the Arbitrator did not award loss of profits.

(vii) **Claim No. 8:** On account of deterioration of shuttering material etc. – Nil award

(viii) **Claim No. 9:** On account of wrongful deduction of rebates - Rs. 16,838.90/- awarded

(ix) **Claim Nos. 10 and 11:** On account of wrongful deduction/deduction items - Rs. 1,15,029/- awarded

(x) **Claim No. 12:** On account of sum deducted towards penal recovery - Rs. 28,559/- awarded

(xi) **Claim No. 13:** On account of extra cost of watch and ward to be maintained till flats were taken over by the department -Rs. 75,600/- awarded

(xii) **Claim No. 14:** Present, pendente lite and future interest- 10% simple interest per annum from 20th September, 1990 till realisation awarded.

4. The submission of Mr. Arjun Pant, ld. counsel for the Petitioner is that the DDA has only challenged Claim Nos.1, 2, 10, 11, 13 and 14.

5. The challenge to Claim No. 1 is based on the fact that when the final bill was passed by the Department, the contractor did not dispute the measurement done by the engineer in-charge. Thus, under Clause 25, this amount could not have been awarded. Claim No. 2 is challenged on the ground that it is contrary to judgement in ***DDA v Anant Raj Agencies (2009) 2 Arb. L.R. 325***. Claim No. 3 has been challenged on the ground that the Department is entitled to recover on a penal basis under Clause 42 of the agreement.

6. In respect of Claim No. 11, the submission is that the same constitutes “excepted matter” matter under Clause 25B of the contract. On Claim No. 14, Mr. Pant submits that the rate of interest and the period for which it has been awarded are quite high and unreasonable, as the Department cannot be made to compensate from the date of the appointment of the first Arbitrator and the DDA cannot be made to bear the entire burden of delay in the arbitration proceedings.

7. Ld. counsel appearing for the Respondent submits that the ground of Clause 25B has never been raised during the Arbitral proceedings. Further, it is also submitted that in so far as interest is concerned, the contractor has not been able to enjoy the fruits of the awarded amount for so many years and has been deprived of the said amount. Accordingly, the interest awarded by the Arbitrator is quite reasonable.

8. The Court has perused the award. The only challenge that the DDA makes to the award is a specific averment in paragraph 4 of the petition which reads as under:-

“4. That upon receipt of the aforesaid award by the petitioner, the same was placed before the Competent Authority where the same was perused in reference to the pleadings submitted before the Arbitrator and was placed before the Arbitration Scrutiny Board of DDA for its approval. During the meeting of the Board held on 22.5.08, after due deliberation it has been decided to challenge the Award of the Arbitrator with respect claim Nos. 1,2,10,11, 13 and 14 and to accept the award in respect of Claim Nos. 3,4 to 9, 12 and 15.”

9. Thus, the challenge that subsists is only in respect of Claim Nos. 1, 2,

10, 11, 13 and 14. In so far as Claim Nos. 1 and the various sub-claims are concerned, the Arbitrator has discussed in detail the various sub-Claims in Claim No. 1 and has awarded only in respect of those Claims where the Arbitrator has found that the measurements show that the contractor had in fact carried out the work. Thus, the award of amounts within Claim No. 1 are not liable to be interfered with. In so far as Claim No. 2 is concerned, after referring to various exhibits placed on record including the letters, the Arbitrator has come to the conclusion that the contractor had clearly notified the DDA that it had carried out certain extra work of straightening and cutting out of steel. In view of the fact that the said work was carried out by the contractor and no objection was raised by the DDA at the stage when the work was executed, on the basis of actual work carried out, the Arbitrator has awarded Rs. 18,000/-. The said award is also not liable to be interfered with.

10. In so far as Claim Nos. 10 and 11 are concerned, the reliance by Id. counsel for the DDA is on Clause No. 25B, which reads as under:-

“25.B The decision of SE regarding the quantum of reduction as well as justification thereof in respect of rates for sub-standard work which may be decided to be accepted will be final and would not be open to arbitration.”

11. It is the well settled position as laid down in the various cases, that the engineers’ decision though being final, the arbitrator would be entitled to adjudicate the validity and reasonableness of the engineers’ decision. In ***JG Engineers Private Limited versus Union of India and Another, (2011) 5 SCC 758***, the Supreme Court held as under:-

“19. In fact the question whether the other party committed breach cannot be decided by the party

alleging breach. A contract cannot provide that one party will be the arbiter to decide whether he committed breach or the other party committed breach. That question can only be decided by only an adjudicatory forum, that is, a court or an Arbitral Tribunal.”

Thus, no interference is called for in the said Claims on the ground of Clause 25B.

12. Finally in respect of Claim 14 which is the interest claim, the Arbitrator granted interest as under:-

“I must add that I was appointed as Arbitrator by the Hon’ble Delhi High Court under the new Act and to take up the matter from the stage it was left by Late G.S. Rao. Hence my appointment is in continuation to the original appointment. Both parties had agreed to be guided under the new Act (hearing dated 12.04.04). Hence, there is no doubt that the Arbitrator is empowered under Section 31(7) to grant interest from the date of cause of action till date of payment.

I have considered the arguments and I allow simple interest @ 10% p.a. from the date of appointment of Arbitrator by DDA vide their letter dt. 20.9.90 till date of payment.

Hence I allow simple interest @ 10% per annum on the awarded amount from the dated of appointment of Arbitrator i.e. 20.9.1990 till its realization.”

13. A perusal of above extract clearly shows that initially, Mr. G.S. Rao, was appointed as the Arbitrator who expired and thereafter the present sole Arbitrator was appointed. The initial appointment took place in 1990 and the present sole Arbitrator was appointed in 2004. It also appears that the family of late Mr. G.S. Rao was not able to make the records available. The award therefore, of simple interest at 10% from 1990 would not be

reasonable in the facts in as much as DDA cannot be made to bear the burden of the entire period from when the first arbitrator was appointed including the delays in the arbitration process and the accessing of records after his demise. Accordingly, the award of interest is modified to simple interest @5% on the amount awarded from 20th September, 1990 till the date of award 22nd February, 2008. From 22nd February, 2008 onwards, 10% simple interest would be liable to be paid by the DDA.

14. The OMP is disposed of in the above terms. All pending IAs stand disposed of.

PRATHIBA M. SINGH
JUDGE

APRIL 30, 2019

MR

(Corrected and released on 3rd May, 2019.)