

\$~5

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

Date of Decision: 30th April, 2019

+ **CS(COMM) 580/2016**

M/S VED PRAKASH MITHAL AND SONS Plaintiff

Through Mr. Peeyoosh Kalra and Mr. L. S.
Aincol, Advocates (M: 7042729055)

Versus

KIRORIMAL COLLEGE & ORS. Defendants

Through Mr. Santosh Kumar, Mr. Bibin
Kurian and Mr. Sarthak Agarwal,
Advocates for D-1 & D-2 (M.
No.9818309301)

Mr. Hardik Rupal and Mr. Prang
Newmai, Advocates for University of
Delhi (M.No.9811151216)

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The Plaintiff has filed the present suit for recovery of a sum of Rs. 2,59,95,243/- along with interest against the Principal, Kirorimal College – Defendant no.1 and its Chairman Secretary, The Management/Governing Body of Kirorimal College – Defendant no.2.

2. No relief is pressed for against Defendant no.3 – Vice Chancellor, Delhi University. Accordingly, Defendant No.3 is deleted from the array of parties.

3. A tender was floated by Kirorimal College, University of Delhi, for construction and renovation of the second floor at the college campus vide letter dated 13th January, 2009. Pursuant to the said letter, agreement dated 14th January, 2009 was entered into between the parties, which contains the

following clauses:-

“9. Apart from the agreement, terms and conditions mentioned in the bidding document and General Conditions of Contract for Central P.W.D. Works 2008 are also part of the agreement.

10. All disputes arising out of or in any way connected with this Agreement shall be deemed to have arisen in Delhi and only the court in Delhi shall have jurisdiction to determine the same.”

4. The work was to be completed by 19th January, 2010. However, there was some delay and finally the work was completed on 31st July, 2010, as per the Plaintiff. According to the contractor, it was entitled to various claims towards extra works, escalation and also refund of the security deposit which was, however, not acceded to by Defendant No.1. Hence the present suit. Initially the plaint was filed in 2014 however, thereafter some amendments were sought in the plaint. Vide order dated 6th December, 2018, the amendments were allowed and the amended written statement was directed to be filed within 30 days.

5. Defendant Nos. 1 and 2, vide the amended written statement, have raised an objection that there is an arbitration clause in the contract in view of the General Conditions of Contract for Central P.W.D. Works 2008. The Defendants have also moved an application under Section 8 of the Arbitration and Conciliation Act, 1996. The said IA was listed on 15th April, 2019. The plaintiff was directed to file its reply, however, no reply was filed and the matter was listed today. Ld. counsel for the Defendant had pointed out to the Court the various clauses, beginning with the tender. The counsel for the Defendant has pointed out that Clause 25 of the GCC which clearly provides for reference of suit arbitration. Learned counsel for the

Defendants, submits that the averment in the plaint in paragraph 8A shows that the Plaintiff has itself relied upon the GCC. As per the GCC, the Chief Engineer is the appointing authority. However, the Plaintiff has also agreed in paragraph 8A that the powers of the Engineer are to be exercised by the Principal, Kirorimal College, University of Delhi, which was the employer. In any event, he submits that his client has no objection if an independent Arbitrator is appointed.

6. Mr. Peeyoosh Kalra, Ld. counsel for the Plaintiff submits that the objection as to the existence of the arbitration clause was not taken in the initial written statement which the Defendant Nos.1 and 2 had filed before this Court. Thus, the Defendants have waived the arbitration clause since the first statement of defence has already been filed. He further submits that the amendment cannot give a new right to the Defendant to rely on the arbitration clause as the amendment was limited to the extent of adding an amount which was missed out and nothing more.

7. It is a matter of fact that the plaint was amended and the amendment application was allowed on 6th December, 2018. The Defendant Nos. 1 and 2 have not taken objections as to the arbitration clause in the amended written statement. Once an amendment is allowed, the amendment relates back to the date of filing of the suit and so the filing of the written statement would relate back to the initial stage. In any event, the amendment in respect of an amount of Rs.81,71,122/-, which was added, gave an opportunity to the Defendant to raise the plea of arbitration in its amended written statement, as also by filing of an application under Section 8. Once an arbitration clause is pleaded qua one of the amounts claimed, then part reference to arbitration is not permissible. This is clear from a reading of the

judgment of the Supreme Court in ***Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya (2003) 5 SCC 531.***

The order dated 6th December, 2018, allowing the amendment reads as under:

“The instant suit for recovery is based on a construction contract by which the Plaintiff Contractor was engaged by the Defendants No.1 College. Disputes had arisen under the agreement dated 14th January, 2009. The works were completed on 31st July, 2010. It is submitted by learned counsel for the Plaintiff that part payment was released on 11th November, 2011. Present suit was filed on 4th September, 2014. The suit prays for recovery of sum of Rs.1,78,24,131/-. By way of the present amendment application filed on 29th April, 2016, the Plaintiff seeks to add an additional claim for recovery of Rs.81,71,122/-.

*It is submitted by learned counsel for the Defendants that the claim, sought to be added is barred by limitation and hence the amendment ought not to be permitted. On the other hand, learned counsel for Plaintiff relies on ***Rajesh @ Raj Choudhary and Ors. v. Asha Choudhary and Ors, 2015 SCC OnLine Del 13936*** and ***A.G. Neochem Pvt. Ltd. v. Chandra Kant Arora and Ors. 2011 LawSuit (Del) 4345*** to submit that so long as the subsequent claim is within the same cause of action, which was basis of the suit, the amendment is liable to be allowed.*

This Court has perused the application for amendment. Plaintiff seeks to add paragraph 8A and modify paragraphs 11 & 14 as also add prayer clause (i). All the averments are towards adding the claim of Rs.81,71,122/-.

Keeping the objections of limitation open, in respect of the amount of Rs.81,71,122/-, the amendment is allowed. Amended plaint, as per the Rules, ought to have been filed with the application for amendment.

Plaintiff is now directed to file the amended plaint, within two week, only by incorporating paragraph 8A and modifications in paragraphs 11 & 14 and prayer clause (i). No other amendment would be incorporated in the plaint.

I.A. is disposed of in the above terms.

CS(COMM) 580/2016

Amended plaint be filed within two weeks. Amended written statement be filed within thirty days thereafter, At the time of framing of issues, the question of limitation in respect of the sum of Rs.81,71,122/- shall be framed as an issue. All the pleadings shall be accompanied with the affidavits of admission/denial, if any. Any unjustified denial of documents will be liable to be burdened with costs.

.....”

8. Upon the amendment being allowed, the Defendant got a right to file an amended written statement, in respect of the said amendment. The Defendant has raised an objection that there existed an arbitration clause between the parties in paragraph 5 of the amended written statement. The said written statement would relate back to the filing of the suit itself.

9. The amended written statement which would date back to the stage of filing of suit would have to be reckoned as the first statement of defence and it is sufficient if an objection is taken in the same under Section 8 of the Act. Recently, a Ld. Single Judge of this Court in ***Parasramka Holdings Pvt. Ltd. v. Ambience Pvt. Ltd. [CS(OS) 125/2017 decided on 15th January, 2018]*** has held that once a plea is taken in the written statement, even an application under Section 8 of the Arbitration and Conciliation Act, 1996 is not required.

10. The notice inviting tender dated 6th November, 2018, contains the

following note:-

Note:

1. The general condition of contract mentioned here should be read in conjunction of the CPWD General Condition of contract 2008. In the eventuality of a conflict in conditions the CPWD GCC 2008 shall be applicable.

2. The Earnest money in the form of Bank Draft drawn in favour of the: "Principal, Kirorimal Collage" should be accompanied with the tender

3. Successful contractor will have to execute an agreement with the Kirorimal College Printed Form.

4: The tender should quote the rates for different sub head separately in the following manner:

Total Amount

Rs.

5. The Kirorimal Collage however reserves the right to award the work either as a whole or in parts as per above sub heads.

11. A similar clause also is contained in the agreement dated 14th January, 2009 being, Clause 9. The said clause reads as under:-

"9. Apart from the agreement, terms and conditions mentioned in the bidding document and General Conditions of Contract for Central P.W.D. Works 2008 are also part of the agreement."

12. A perusal of the above two clauses shows that the contract is clearly governed by the GCC. Clause 25 of the GCC clearly provides for reference to arbitration in the event of any dispute. The said clause reads as under:

"Clause 25: Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, design, drawings and

instructions here-in before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter.

(i) If the contractor considers any work demanded of him to be outside the requirements of the contract, or disputes any drawings, record or decision given in writing by the Engineer-in-Charge on any matter in connection with or arising out of the contract or carrying out of the work, to be unacceptable, he shall promptly within 15 days request the Superintending Engineer in writing for written instruction or decision. Thereupon, the Superintending Engineer shall give his written instructions or decision within a period of one month from the receipt of the contractor's letter.

If the Superintending Engineer fails to give his instructions or decision in writing within the aforesaid period or if the contractor is dissatisfied with the instructions or decision of the Superintending Engineer, the contractor may, within -15 days of the receipt of Superintending Engineer's decision, appeal to the Chief/Engineer who shall afford an opportunity to the contractor to be heard, if the latter so desires, and to offer evidence in support of his appeal. The Chief Engineer shall give his decision within 30 days of receipt of contractor's appeal. If the contractor is dissatisfied with this decision, the contractor shall within a period of 30 days from receipt of the decision, give notice to the Chief Engineer or

appointment of arbitrator failing which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator.

(ii) Except where the decision has become final, binding and conclusive in terms of Sub-Para(i) above, disputes or difference shall be referred for adjudication through arbitration by a sole arbitrator appointed by the Chief Engineer, CPWD, in charge of the work or if there be no Chief Engineer, the Additional Director General of the concerned region of CPWD or if there be no Additional Director General, the Director General of Works, CPWD. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever, another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

It is a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such dispute along with the notice for appointment of arbitrator and giving reference to the rejection by the Chief Engineer of the appeal.

It is also a term of this contract that no person, other than a person appointed by such Chief Engineer CPWD or the administrative head of the CPWD, as aforesaid, should act as arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitration at all.

It is also a term of this contract if the contractor does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the intimation from the

Engineer-in-charge that the final bill is ready for payment, the claim of the contractor shall be deemed to have been waived and absolutely barred and the Government shall be discharged and released of all liabilities under the contract in respect of these claims.

The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) or any statutory modifications or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause.

It is also a term of this contract that the arbitrator shall adjudicate on only such disputes as are referred to him by the appointing authority and give separate award against each dispute and claim referred to him and in all cases where the total amount of the claims by any party exceeds Rs. 1,00,000/-, the arbitrator shall give reasons for the award.

It is also the term of the contract that if any fees are payable to the arbitrator, these shall be paid equally/by both the parties.

It is also a term of the contract that the arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties calling them to submit their statement of claims and counter statement of claims. The venue of the arbitration shall be such place as may be fixed by the arbitrator in his sole discretion. The fees, if any, of the arbitrator shall, if required to be paid before the award is made and published, be paid half and half by each of the parties. The cost of the reference and of the award (including the fees, if any, of the arbitrator) shall be in the discretion of the arbitrator

who may direct to any by whom and in what manner,' such costs or any part thereof shall be paid and fix or settle the amount of costs to be so paid."

13. In addition to the above clauses in the NIT and the agreement, the Plaintiff, in paragraph 8A of the plaint has averred as under:

"8A. It is submitted that the agreement dated 14.01.2009 clearly stipulated in clause 9 that apart from the agreement, terms & conditions in the bidding documents & conditions mentioned in the bidding documents & general conditions of the Central PWD Works 2008 would also form the part of the agreement. It is a matter of record that the work executed by the Plaintiff exceeded beyond the scope of the limits specified by the said agreement. In such a scenario clause 12.2 of the Central PWD Works 2008 becomes applicable and in terms of the said, the Plaintiff is entitled to payment towards the deviated quantity at the market rate prevailing at that point of time. As per the approved and admitted measurements, the quantities deviated from the agreed limits notified as per the agreement and therefore, for the said deviated quantities, the Plaintiff is entitled to payments at the market rate. The Plaintiff is filing a detailed chart showing deviation in the quantities beyond limits and as per the said chart a sum of Rs. 81,71,122/- (Rupees Eighty One Lacs Seventy One Thousand One Hundred and Twenty Two only) is due and payable to the Plaintiff by the Defendants."

14. Thus, the Plaintiff's case in the Plaint is that the General Conditions of Contract for CPWD 2008 (*hereinafter*, 'GCC') are part of the agreement. The Plaintiff has on the one hand relied upon various stipulations in the GCC in respect of extra works, deviations, escalation etc. On the other hand

it chooses to ignore the arbitration clause contained in the GCC. Such a partial reliance on the GCC is impermissible. Since the Plaintiff itself admits that the contract is governed by GCC, the arbitration clause is fully applicable. Though under CPWD – GCC 2008, the Chief Engineer would be the appointing authority, who in the present case, could be the Defendant no.2 who is the employer, the Defendant has no objection to an independent arbitrator being appointed.

15. Under these circumstances and also in view of the consent given by Defendant Nos. 1 and 2, an independent Arbitrator is appointed to adjudicate the disputes between the parties. **Hon'ble Mr. Justice S. P. Garg (Retd) – (M: 9910384631, Add: D-72, Saket Court Residential Complex, Saket, New Delhi - 110017)** retired judge of this Court is appointed as the Sole Arbitrator to adjudicate the disputes between the parties. The claims raised by the Plaintiff in the amended plaint, shall be treated as the Claims before the Arbitrator. Both parties agree that the arbitration may be conducted under the aegis of the Delhi International Arbitration Centre (DIAC) and its Rules.

16. None of the observations made, either in the order dated 6th December, 2018 or in today's order would bind the Arbitrator in terms of the adjudication of issues which may arise. All issues and objections are left open to both the parties.

17. In view of the fact that the matter is now been referred to Arbitration, keeping in mind the provisions of Section 89 CPC this court deems it appropriate to refund 50% of the court fee of Rs.2,60,000/- and direct refund of Rs.1,30,000/- in favour of the Plaintiff. The refund be processed within four weeks.

18. The suit is, accordingly, disposed of. All pending applications also stand disposed of.

PRATHIBA M. SINGH
JUDGE

APRIL 30, 2019/b

(corrected and released on 7th May, 2019)

