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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of Decision: 22nd January, 2019

+ **O.M.P. 60/2013**

ARUN JAIN PROP M/S VISHESH BUILDERS Petitioner

Through: Mr. Sanjay Bansal, Advocate.
(M:9810959432)

versus

NEW DELHI MUNICIAPL COUNCIL Respondent

Through: Ms. Kanika Agnihotri, Standing
Counsel with Mr. Preet Singh Oberoi
and Ms. Sneha Jheetay, Advocates.
(M:9634441287)

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh (Oral)

1. The present petition under Section 34 of the Arbitration & Conciliation Act, 1996 has been filed challenging the Award dated 23rd August, 2012 passed by the learned Sole Arbitrator.
2. The Petitioner - Shri Arjun Jain, Prop. M/s. Vishesh Builders (*hereinafter 'Contractor'*) was awarded the work of "*Improvement of Footpath at Sikandra Road, Hailey Road, and Mandi House Roundabout and its Channelizers*" vide agreement No.2/EE(R-1)/2010-11. The stipulated date for commencement of the contract was 12th March, 2010 and the time allowed for completion was 6 months. The actual date of completion was not recorded as the same was one of the disputes raised. The amount for which the contractor had tendered was Rs.1,39,27,351/-. The case of the contractor was that it had executed and performed its part of the contract and thus the contract ought to be treated as having been completed. Disputes had arisen during the currency of the contract itself. There were some works

which had to be executed by the contractor, in respect of which letters were exchanged by the parties. Even as of December, 2010 the contract was neither terminated nor foreclosed, and sometime in March, 2011, the contractor invoked arbitration. The Arbitrator entered reference and then passed the impugned award. Some corrections to the award were made by means of corrigendum dated 21st September, 2012. The said award has been challenged before this Court.

3. The only issue on which objections have been pressed today is in respect of release of the performance bank guarantee. It is submitted by learned counsel for the Petitioner that the Arbitrator having arrived at a finding that the extended period of the contract would be treated to be up to 11th December, 2010, the security deposit, also having been returned to the contractor, the Arbitrator erred in not releasing the performance bank guarantee. It is submitted on behalf of the contractor that the performance bank guarantee could have been invoked/forfeited only under the conditions specified in clause 1 (iii) of the contract and under no other circumstances. Learned counsel submits that the validity of the contract being neither terminated nor extended, the performance guarantee could not have been invoked.

4. It is further submitted that only if the termination of the contract was done under clause 3 (xii) (a), could the performance bank guarantee have been forfeited. It is his submission that the Arbitrator having arrived at a finding that the contract was extended only till 11th December, 2010, any works which the contractor did not perform post the said date could not have been taken into consideration for the purposes of forfeiting the amount of the performance guarantee. Specific reliance is placed on the discussion in

the award under claim No.4.

5. On the other hand, Ms. Kanika Agnihotri, learned counsel appearing for the Respondent-NDMC, submits that in the findings under claim No.1, the learned Arbitrator has held clearly that the contractor was guilty of non-performance and had failed to execute the works which it had agreed to. Specific reliance is placed on the conclusions of the Arbitrator at internal page 8 of the award where the Arbitrator held that the Claimant did not execute a major agreement item of work despite agreeing to do so.

6. The Court has heard the submissions on behalf of the parties. The first and the foremost issue is as to the interpretation of clause 1 read with clause 3 of the agreement. For the sake of convenience, clause 1 and 3 are set out herein below: -

“Clause 1

Performance Guarantee

- (i) *The contractor shall submit an irrevocable PERFORMANCE GUARANTEE of 5% (Five Percent) of the tendered amount in addition to other deposit mentioned elsewhere in the contract for his proper performance of the contract agreement, (not withstanding and/or without prejudice to any other provision in the contract) within 15 days of issue of letter of acceptance. This period can be further extended by the Engineer-in-Charge up to a maximum period of 7 days on written request of the contractor stating the reason for delays in procuring the Bank Guarantee, to the satisfaction of the Engineer-in-Charge. This guarantee shall be in the form of Cash/Deposit-at-Call receipt. Banker's Cheque/Demand Draft pay order of any scheduled bank or Fixed Deposit Receipts or guarantee Bonds of any scheduled Bank or the State Bank of India in accordance with the form*

annexed hereto. In case a fixed deposit receipt of any Bank is furnished by the contractor to the NDMC as part of the performance guarantee and the Bank is unable to make payment against the said fixed deposit receipt, the loss caused thereby shall fall on the contractor and the contractor shall forthwith on demand furnish additional security to the NDMC to make good the deficit.

(ii) The performance guarantee shall be initially valid upto the stipulated date of completion plus 60 days beyond that. In case the time for completion of work gets enlarged, the contractor shall get the validity of performance guarantee extended to cover such enlarged time for completion of work. After recording of the completion certificate for the work by the competent authority, the performance guarantee shall be returned to the contractor, without any interest.

(iii) The Engineer-in-Charge shall not make a claim under the performance guarantee except for amounts to which the NDMC is entitled under the contract (notwithstanding and/or without prejudice to any other provisions in the contract agreement) in the event of

(a) Failure by the contractor to extend the validity of the performance Guarantee as described therein above, in that event the Engineer-in-Charge may claim the full amount of the performance guarantee.

(b) Failure by the contractor to pay the NDMC any amount due, either as agreed by the contractor or determined under any of the clauses/Conditions of the agreement, within 30 days of the service of notice to this effect by Engineer-in-Charge.

(iv) In the event of the contract being determined or rescinded under provision of any of the clause/condition of the agreement, the performance guarantee shall stand forfeited in

full and shall be absolutely at the disposal of the NDMC.

Clause 3

When contract can be determined

Subject to other provisions contained in this clause, the Engineer-in Charge may, without prejudice to any other rights or remedy against the contractor in respect of any delay, inferior workmanship, any claims for damages and/or any other provisions of this contract or otherwise and whether the date of completion has not elapsed by notice in writing absolutely determined the contract in any of the following cases:-

- i) If the contractor having been given by the Engineer-in-charge a notice in writing to rectify, reconstruct or replace any defective work or that the work is being performed in an inefficient or otherwise improper or unworkman like manner shall omit to comply with the requirements of such notice for a period of seven days thereafter.*
- ii) If the contractor has, without reasonable cause, suspended the progress of the work or has failed to proceed with the work with due diligence so that in the opinion of the Engineer-in-Charge (which shall be final and binding) he will be unable to secure completion of the work by the date for completion and continues to do so after a notice in writing of seven days from the Engineer-in-Charge.*
- iii) If the contractor fails to complete the work within the stipulated date or items of work with individual date of completion, if any stipulated, on or before such date (s) of completion and does not complete them within the period specified in a notice given in writing in that behalf by the Engineer-in-Charge.*
- iv) If the contractor persistently neglects to carry out his obligations under the contract and/or commits default in complying with any of the terms and conditions of the contract and does not remedy it or take effective steps to remedy it within 7 days after a notice in writing is given to him in that behalf by the Engineer-in-Charge.*

v) *If the contractor shall offer or give or agreed to give to any person in NDMC service or to any other person on his behalf any gift or consideration of any kind as and inducement or reward for doing or for bearing to do or for having done or for born to do any act in relation to the obtaining or execution of this or any contract for NDMC.*

vi) *If the contractors shall enter into a contract with NDMC in connection with which commission has been paid or agreed t paid by him or to his knowledge, unless the particulars of any such commission and terms of payments thereof have been previously disclosed in writing to the Engineer in Charge.*

vii) *If the contactor shall contract with NDMC as a result of wrong tendering or other non-bonafide method of competitive tendering.*

viii) *If the contactor being an individual, of a firm or any partner thereof shall act any time be adjudge in solvent or have a receiving order or order of administration of his estate made against him or shall take any proceeding for liquidation for composition (Other than A voluntary liquidation for the purpose of amalgamation for reconstruction) under any Insolvency Act for the time being enforce or make any conveyance or assignment of his effect or composition or arrangements for the benefits of his creditors or purport so to do if any application be made under in any solvency acts for the time being in force for the sequestration of his estate or if a trust did be executed by him for benefit of his creditors.*

ix) *If the contractor being a company shall pass resolution or the court shall make an order that the company shall be wound up or if a receiver or manager on behalf of the creditor to appoint a receiver or a manager for which entitled a court to make a winding up order.*

x) *The contractor shall suffer and execution being levied on his goods and allow it to be continued for a period for a period of 21 days.*

xi) *If the contractor assigned, transfers, sublets (Engagement of labour on piece work basis or of labour*

with material not to be incorporated in work, shall not be deemed to be subletting) or otherwise parts with the entire works or any portion thereof without the prior written approval of the Engineer in Charge

xii) If the work is not started by the contractor within 1/8th of the stipulated time. When the contractor made him self liable for action under any of the cases aforesaid, the engineer in charge on behalf of NDMC shall have powers.

a) To determine or rescind the contract as aforesaid (of which termination or rescission notice in writing to the contract under the hand of the Engineer-in-Charge shall be conclusive evidence). Upon such determination or rescission, the earnest money, security deposit already recovered and performance guarantee under the contract shall be liable to be forfeited and shall be absolutely at the disposal of the NDMC.

b) After giving notice to the contractor to measure up the work of the contract and to take such whole, or the balance of part thereof as shall be un-executed out of his hands and to give it to another contractor to complete the work. The contractor whose contract is determined or rescinded as above shall not be allowed to participate in the tendering process for the balance work.

In the event of above courses being adopted by the Engineer-in-Charge, the contractor shall have no claim to compensation for any loss sustained by him by reasons if his having purchased or procured any materials or entered into any engagements or made any advances on account or with a view to the execution of the work or the performance of the contract. And in case action is taken under any of the provisions aforesaid, the contractor shall not be entitled to recover or be paid any sum for any work there-of not actually performed under this contract unless and until the Engineer-in-Charge has certified in writing the performance of such work and the value payable in respect thereof and he shall only be entitled to be paid the value so certified.”

7. A perusal of clause 1 makes it clear that the performance guarantee submitted, which is 5% of the tendered amount, is liable to be returned to the contractor without any interest only after recording of the completion certificate for the work executed by the contractor. The circumstances in which the Performance Guarantee can be forfeited are stipulated in clause 3. Admittedly, the completion certificate has not been issued in the present case and by their conduct, the parties have brought the contract to a halt. The correspondence discussed by the Arbitrator clearly shows that, as of May, 2010, one of the major items of work i.e. Item No. 27.23, which was agreed to be executed, was not executed. The said item related to instalment of MS railing on the MS Verge of Shershah Road. The Arbitrator has, after perusing the various letters written by the NDMC including the reminders issued thereon to the contractor, come to the conclusion that the contractor deliberately did not execute this item of work. In fact, the learned Arbitrator has held that the contractor appears to have lost interest in executing this work as it had most likely incurred losses. The finding of the Arbitrator is clear that even on 28th May, 2010, the sample of railing was agreed to be produced. However, the same was not done. Finding of the Arbitrator is that the performance of the contract cannot be treated as having been discharged and the relevant paragraph in this regard is set out herein below: -

“My findings as above leave me in no doubt that the claimant deliberately did not execute a major agreement item of work (item no.27.23) after it had consciously and willingly agreed to execute the same at the mutually agreed site (Shershah Road), even though ample time was available to execute it, before the extended contract period expired on 11.12.2010. In fact, despite promising on 28.05.2010 to provide sample of railing very soon and regular reminders by the respondent, bringing the

sample of railing to site on 16.12.2010, that is, nearly 7 months after the instruction was given through site order book on 28.05.2010 which was accepted by the claimant without any reservation, constitutes unassailable evidence of claimant's intention and strategy to avoid execution of the said Item of work. I, therefore hold that the claimant has failed to properly perform the contract agreement and that the agreement cannot be treated as discharged."

8. On the basis of the above finding, the Arbitrator, under claim 4, holds that since the performance guarantee is to be released only after the completion of work, the contract having not been performed, the performance guarantee is not liable to be released.

10. In order to enable the Engineer to issue the completion certificate as per clause 8, the contractor had to give notice of completion which was not done. The finding on this aspect is extracted herein below: -

"(vii) The claimant's belated assertion vide notice dated 09.02.2011 (C-10) that it had completed the work by 11.12.2010 too does not appear to be convincing as it did not give any notice to the respondent to this effect as was required as per clause 8 of the agreement according to which, within 10 days of completion of work, the contractor shall give notice of such completion to the Engineer-in-Charge."

9. Learned counsel for the Petitioner submits that he in fact does challenge the finding under claim no.1 as the contractor had fully executed the work. Even if it is taken that the contractor challenges the finding of the Arbitrator under claim No.1, the Award clearly shows that the Arbitrator has considered the correspondence and the evidence on record in detail. Each of the letters are specifically mentioned by the Arbitrator, who has thereafter

come to the conclusion that one of the major items of the work was not executed by the contractor.

10. The performance bank guarantee is to ensure that the contractor executes the work to the satisfaction of the entity awarding the work. In the present case, there is no serious challenge to the findings given under claim No.1. Even the discussion by the Arbitrator clearly shows that the repeated letters written by the NDMC did not elicit a positive response from the contractor in respect of the unexecuted work. The NDMC has raised a counter claim to enable it to forfeit the performance guarantee. The claim and the counter claim thus have to be read together. The Arbitrator's finding that the contractor failed to perform and failed to discharge its obligations under the contract cannot be faulted with. The performance guarantee was liable to be returned only after the satisfaction having been recorded by the Engineer on completion of work by the contractor. In the absence of a completion certificate and the satisfaction by the Engineer, and the Arbitrator having given a contrary finding, the performance guarantee is not liable to be returned. Thus, the award of the Arbitrator cannot be faulted with, in the facts and circumstances of the present case. The finding of the Arbitrator that the contractor failed to discharge its obligations is also not liable to be interfered with. Thus, award under Claim no.1 is upheld.

11. The Petition is, accordingly, dismissed with no orders as to costs.

PRATHIBA M. SINGH
JUDGE

JANUARY 22, 2019

Rekha