

\$~4 (2020)

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

**Date of Decision: 25<sup>th</sup> August, 2021**

+ O.M.P. (COMM) 489/2020 & I.A. 8844/2020

DELHI DEVELOPMENT AUTHORITY ..... Petitioner

Through: Ms. Kanika Singh, Advocate.

versus

SATYA PRAKASH AND BROS PVT. LTD. .... Respondent

Through: Mr. Aseem Mehrotra, Advocate.

**CORAM:**

**HON'BLE MR. JUSTICE SANJEEV NARULA**

**JUDGMENT**

**[VIA VIDEO CONFERENCING]**

**SANJEEV NARULA, J. (Oral):**

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 [*hereinafter*, '**the Act**'] has been filed by the Petitioner [*hereinafter*, '**DDA**'] seeking setting aside of the impugned Arbitral Award dated 22<sup>nd</sup> April, 2020 [*hereinafter*, '**Award**'] passed the Sole Arbitrator, in so far as it awards the amount qua Claim No. 3 and interest thereon under Claim No. 5 in favour of the Respondent herein – M/s. Satya Prakash & Bros. Pvt. Ltd. (being the Claimant therein) [*hereinafter*, '**SPBPL**'].

**BRIEF FACTS**

2. The facts giving rise to the present petition are summarized as

follows: -

*The Contract:*

- 2.1 SPBPL being the L-1 bidder, was awarded contract for work of “*Construction of UER-II Master Plan Road in Rohini (SH- C/o 100m R/W Road (UER II) Western Yamuna Canal to Kanjhawala road near village Karala Mazari for part of alignment passing through Rohini*”, by DDA, under Agreement No. 03/EE/MPR1/DDA/2012-13 for a value of Rs. 56,16,62,727/-. The stipulated commencement date was 14<sup>th</sup> January, 2013 and completion date was 13<sup>th</sup> April, 2014.
- 2.2 A separate Supplementary Agreement - No. 3A/EE/MPR-1/DDA/2012-13 was also executed between the parties.

*The Dispute:*

- 2.3 Agreement Item no. 4 of Bill of Quantities [*hereinafter, ‘BOQ’*] pertained to construction for embankment by getting earth from “*all leads and lifts, transporting to site*”. The tender estimate rate for the same was fixed by DDA as Rs. 171.10/- [calculated taking the transportation lead of 20 kms]; SPBPL quoted the rate of Rs. 234/-; the same was accepted by DDA; it was applicable to any/ all distances.
- 2.4 During the execution of the work SPBPL expressed inability to source the material (earth) and requested DDA for helping/ arranging procurement of earth for execution of work, as ‘earth’ was not available in nearby areas, on account of ban imposed by the Supreme Court on excavation of earth from cultivated land in NCR Delhi.

Acting upon the request of the SPBPL and in the interest of work, DDA requested DSIIDC to allow earth to be procured from its site which was at a distance of 8 kms. SPBPL was put to notice that it would be treated as a substituted item relying on Clause 12 the Agreement<sup>1</sup> SPBPL, on the other hand, refuted DDA's substitution of the agreed 'rates' and contended and it had never agreed or consented to the same. Disputes finally arose when, SPBPL received the final bill from DDA and after scrutiny thereof, it was observed that payments against some claims, were not included.

*The Arbitration:*

- 2.5 In the afore-noted background, when SPBPL invoked arbitration *vide* letter dated 16<sup>th</sup> March, 2019, DDA appointed Mr. Sarvagya Kumar Srivastava as the Sole Arbitrator. The arbitration proceedings have now culminated into the Award dated 22<sup>nd</sup> April, 2020. DDA assails the same qua following claims: -

***Claim No. 3 – Rate of payment relating to embankment work under the Agreement.***

- i. The Claim No. 3, pertains to agreement Item No. 4 dealing with construction of embankment with approved material (earth) obtained from borrow pits with all lifts and leads. The exact description contained therein reads as under: -

*“Construction of embankment with approved material (earth) obtained from borrow pits with all lifts and leads, transporting to site, spreading, grading to required slope and compacted to meet the requirement of Table 300-2 of MoRT&H specifications for Road & Bridge works – 2001”*

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<sup>1</sup> Relevant portion of the Clause 12 of the Agreement is provided in the succeeding paras

- ii. The Arbitrator found the decision of ‘substitution’ by DDA to be arbitrary, not in sync with the spirit of the contract and awarded the amount of Rs. 34,64,663/- to SPBPL.

***Claim No. 5 – Interest on Claim No. 3***

The Arbitrator fixed the rate of interest @ 10% per annum (simple) on the sum awarded under Claim No. 3, from 16<sup>th</sup> March, 2019 to 22<sup>nd</sup> April, 2020, plus future interest @ 12% per annum (simple) from 22<sup>nd</sup> April, 2020 till the date of payment.

**CONTENTIONS OF THE PARTIES**

3. Ms. Kanika Singh, counsel appearing on behalf of DDA, assails the award by making the following submissions: -

3.1 The impugned Award qua Claim No. 3 and interest thereon awarded under Claim No. 5 is perverse and liable to be set aside on account of being: (a) contrary to the terms of the contract executed between the parties; (b) barred by principles of waiver and acquiescence; (c) barred by time; (d) against public policy of India; and (e) vitiated by patent illegality.

3.2 SPBPL *vide* letter 25<sup>th</sup> February, 2013 expressed its inability to source/ procure ‘earth’ and requested for assistance of DDA for procurement since ‘earth’ was not available to be carted from nearby sites, on account of ban imposed by Supreme Court of India on excavation of earth from cultivated land in Delhi NCR. The Agreement mandated SPBPL to procure/ arrange ‘earth’. Yet in the interest of work and on request made by SPBPL, DDA arranged ‘earth’ to be procured through DSIIDC; from a

site at a distance of 8kms only.

3.3 DDA was entitled to substitute any item and derive rates thereon in terms of Clause 12 of the Agreement. Thus, DDA *vide* letter dated 30<sup>th</sup> November, 2013 intimated to SPBPL that the quantity of earth carted by SPBPL (from distance of 8kms.) would be treated as a 'substituted item' by DDA; to this, no response was received. Due notice was given to SPBPL, and yet they did not refute the same and continued to cart earth from the source identified and arranged by DDA. The Claim is contrary to the terms of the Agreement and the award to that extent is, therefore, patently illegal.

3.4 SPBPL raised the objection regarding substitution at a belated stage *vide* letter dated 11<sup>th</sup> April, 2014. All this while, SPBPL continued to accept payments for the said quantity of 'earth' lifted from DSIIDC in its running bills, where Item no. 4 was treated as a substituted item. This becomes evident from 6<sup>th</sup> running bill dated 29<sup>th</sup> October, 2013, wherein Respondent has affixed its signatures. Even the 16<sup>th</sup> running bill was issued with categorical endorsement- '*bill and measurement accepted*' and thus, the Claim is barred by the principles of waiver and acquiescence.

3.5 DDA while calculating rate of the item, took average transportation lead at a higher side i.e., 20 kms. Tender estimate prepared for this item, shows lead of 20 kms. The rate as per tender estimate was Rs. 171.10/- against which rate submitted by SPBPL was Rs. 234/-. SPBPL *vide* letter dated 11<sup>th</sup> April, 2014 acknowledged that the rate as per Item no. 4 was taken at an average transportation lead of 20 kms (as per Tender estimate).

3.6 SPBPL, eventually carted 'earth' from a mere distance of 8kms. In

case payment is made to SPBPL as per Item no. 4, instead of the substituted item (as in the present case), it would lead to unjust enrichment to. Allowing this unjustified enrichment, at the cost of public funds, is against the public policy of India.

3.7 Reliance is placed upon the judgment of the Supreme Court in *Patel Engineering Ltd. v. North Eastern Electric*<sup>2</sup>, and the judgment of the High Court of Bombay in *M/s. Angerlehner Structurals & Civil Engineering Co. and Ors. v. The Municipal Corporation of Greater Mumbai and Ors.*<sup>3</sup>

3.8 Substitution was as per agreement. No plea has been taken that rate has been derived wrongly or that there was no power with DDA to substitute– the only difference in Agreement Rate (Rs. 234/- per cum) and Substituted Rate (Rs. 161.10/- per cum) is on account of difference in transportation and actual transportation. Thus, to this extent the award is against the specific term of the contract providing for substitution.

3.9 The impugned Award qua Claim No. 3 is barred by limitation. Despite refutation of claims by DDA *vide* letters dated 22<sup>nd</sup> December, 2014 and 2<sup>nd</sup> February, 2015, arbitration was invoked after expiry of the period of three years i.e., on 17<sup>th</sup> December, 2018 and is therefore, barred by limitation.

3.10 The findings of the Arbitrator do not consider any of the submissions of DDA and rather allows the claim based on rejection of another claim which were not even subject of arbitration proceedings.

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<sup>2</sup> (2020) 7 SCC 167. Reliance is placed on para 25-27.

<sup>3</sup> MANU/MH/0554/2017. Reliance is placed on para 55.

4. Mr. Aseem Mehrotra, counsel appearing on behalf of SPBPL, defended the award by making following submissions: -

4.1 The Arbitrator has carefully examined the terms of the Agreement and passed a well reasoned award which does not merit interference. The plea taken by DDA that it had arranged 'earth' from DSIIDC for SPBPL, as justification for substitution of agreement Item no. 4 is fallacious and patently wrong. In response to DDA's letter whereby it alleged to have substituted Item no. 4, SPBPL *vide* letter dated 28<sup>th</sup> March, 2014 unequivocally stated that- *'We will abide by the agreement conditions, if earth is made available to us'*. That apart, SPBPL – at no point of time – agreed/ consented for substitution of rate of Item no. 4. Thus, the Arbitrator rightly finds that the act of substitution by DDA to be arbitrary.

4.2 SPBPL was entitled to payment at the agreed rate of Rs. 234/- per cum instead of the payment at the rate applied for the alleged substituted item i.e., Rs. 161.10/- per cum. The rate for Item no. 4 covered *"all leads and lifts"* and thus, the question of reducing the rate, on the ground of earth being carted from a distance of 8 kms, is arbitrary and not in sync with spirit the Agreement, as rightly noted by the Arbitrator.

4.3 Clause 12 of the Agreement relied upon by DDA is not applicable. No notice substituting the agreement Item no. 4 was given and furthermore, no substitution of agreement Item no. 4 took place. The said item, as specified in the BOQ, remains the same. DDA only sought to vary the rate. That also remained tentative/ provisional in nature, until the final Bill was drawn up. Acceptance of payments, under the running bills, cannot amount to any admission and/ or novation of the alleged "substitution" done by DDA.

4.4 The Arbitrator rightly observed, upon consideration of the facts placed before it, that the rate for agreement Item no. 4 is binding on both the parties; it could not be reduced. This finding of the Arbitrator goes to the root of the matter, however, the same has not been assailed and finds no mention in the grounds of challenge in the present petition.

4.5 The challenge to the Award does not fall within the ambit of Section 34 of the Act. Reliance is placed upon *Associate Builders v. Delhi Development Authority*<sup>4</sup>.

#### **ANALYSIS/ FINDINGS OF THE COURT**

5. The Court has considered the contentions of the counsels. The findings of the Arbitrator qua Claim No. 3, which is the subject-matter of dispute before this Court, is given as under: -

##### ***“4.3.6. My findings:***

*4.3.6.1. The agreement item was for all lead and lift and the claimant had quoted their rate factoring in all eventualities. On this ground only the respondent rejected the claim of extra lead when the claimant carted the earth from a distance of 35km in Haryana. However, substitution of this Item of work for the quantity of earth carted by the claimant from lesser lead (DSI IDC site at a distance of 8 km) on the plea that earth was arranged by the respondent on the request of the claimant and that they had informed the claimant that they would have to pay the royalty to DSI IDC and the Item would be substituted is not in sync with the spirit of the contract. The action of substitution of part of item no. 4 of the work by the respondent is arbitrary and incorrect.*

##### ***4.3.7. Award:***

*I award an amount of Rs 34,64,663/- for this claim based on following calculation:*

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<sup>4</sup> (2015) AIR 620 (SC).

| S. No. | Details                                |                                               |
|--------|----------------------------------------|-----------------------------------------------|
| 1.     | Total quantity of the substituted item | 47,526.25 cum<br>[E/sub item 2 of final bill] |
| 2.     | Agreement rate                         | Rs. 234/- per cum                             |
| 3.     | Rate at which payment was made         | Rs. 161.10 per cum                            |
| 4.     | Difference of (2) and (3)              | Rs. 72.90 per cum                             |
| 5.     | Amount involved (1) x (4)              | Rs. 34,64,663/-                               |

6. DDA has argued that the reasoning given by the Arbitrator, as reproduced above, is not found to be in accordance with the terms of the Agreement and has strongly relied upon Clause 12 of the Agreement, which for the reference, is extracted hereinbelow: -

**“CLAUSE 12**

***Deviations / Variations Extent and Pricing***

*The Engineer-in-Charge shall have power (i) to make alteration in, omissions from, additions to, or substitutions for the original specifications, drawings, designs and instructions that may appear to him to be necessary or advisable during the progress of the work, and (ii) to omit a part of the works in case of non-availability of a portion of the site or for any other reasons and the contractor shall be bound to carry out the works in accordance with any instructions given to him in writing signed by the Engineer-in-Charge and such alterations, omissions, additions or substitutions shall form part of the contract as if originally provided therein and any altered, additional or substituted work which the contractor may be directed to do in the manner specified above as part of the works, shall be carried out by the contractor on the same conditions in all respects including price on which he agreed to do the main work except as hereafter provided.*

*12.1 The time for completion of the works shall, in the event of any deviations resulting in additional cost over the tendered value sum being ordered be extended, if requested by the contractor, as follows:*

*i) In the proportion which the additional cost of the altered, additional or substituted work, bears to the original tendered value plus*

*ii) 25% of the time calculated in (i) above or such further additional time as may be considered reasonable by the Engineer-in-Charge.*

## **12.2 Deviation, Extra Items and Pricing**

In the case of extra item(s) (items that are completely new and are in addition to the items contained in the contract), the contractor may within fifteen days of receipt of order or occurrence of the item(s) supported by proper-analysis, for the work and the Engineer-in-Charge shall within one month of the receipt of the claims supported by analysis, after giving consideration to the analysis of the rates submitted by the contractor, determine the rates on the basis of the market rates and the contractor shall be paid in accordance with the rates so determined.

In the case of substituted items (items that are taken up with partial substitution or in lieu of items of work in the contract), the rate for the agreement item (to be substituted) and substituted item shall also be determined in the manner as mentioned in the following Para.

### **Deviation, Substituted Items, Pricing**

- a) If the market rate for the substituted item so determined is more than the market rate of the agreement item (to be substituted) the rate payable to the contractor for the substituted item shall be the rate for the agreement item (to be substituted) so increased to the extent of the difference between the market rates of substituted item and the agreement item (to be substituted).
- b) If the market rate for the substituted item so determined is less than the market rate of the agreement item (to be substituted) the rate payable to the contractor for the substituted item shall be the rate for the agreement item (to be substituted) so decreased to the extent of the difference between the market rates of substituted item and the agreement item (to be substituted).

### **Deviation, Deviated Quantities, Pricing**

In the case of contract items, substituted items, contract cum substituted items, which **exceed the limits laid down in schedule F**, the contractor may within fifteen days of receipt of order or occurrence of the excess, claim revision of the rates, supported by proper analysis, for the work in excess of the above mentioned limits, provided that if the rates so claimed are in excess of the rates specified in the schedule of quantities the Engineer-in-Charge shall within one month of receipt of the claims supported by analysis, after giving consideration to the analysis of the rates submitted by the contractor, determine the rates on the basis of the market rates and the contractor shall be paid in accordance with the rates so determined.

*12.3 The provisions of the preceding paragraph shall also apply to the decrease in the rates of items for **the work in excess of the limits laid down in Schedule F**, and the Engineer in-Charge shall after giving notice to the contractor within one month of occurrence of the excess and after taking into consideration and reply received from him within fifteen days of the receipt of the notice, revise the rates for the work in question within one month of the expiry of the said period of fifteen days having regard to the market rates.*

*12.4 The contractor shall send to the Engineer-in-Charge once every three months an up to date account giving complete details of all claims for additional payments to which the contractor may consider himself entitled and of all additional work ordered by the Engineer-in-Charge which he has executed during the preceding quarter failing which the contractor shall be deemed to have waived his right. However, the Engineer in Charge may authorize consideration of such claims on merits.*

*xx ... xx ... xx”*

7. The crux of the matter is whether DDA had the right to vary the agreed rates after the execution of the agreement and further, if due notice was given by DDA to SPBPL towards the alleged “substitution” of rate agreement for Item no. 4. Clause 12 of the Agreement entitled the Engineer-in-Charge (DDA) to alter/ vary any items and derive rates thereon. It deals with ‘variation, addition and substitution’. The concept of variation is a common feature of a work contract and terms like above are not impermissible in law. Although, the above referred clause gives power to DDA to unilaterally vary the contract quantities, but that right is not absolute or unlimited; it has to be exercised strictly in terms of the afore-noted Clause. Significantly, in the instant case, the Court finds that the agreement Item no. 4 in the BOQ remained the same. There is no alteration in, omissions from, additions to, or substitutions for the original specifications. Rather on account of arranging the source of ‘earth’ from its resource, DDA

has sought to insist that it would apply the principles of Clause 12 for altering the rate. This becomes evident from the communication dated 30<sup>th</sup> November, 2013, the relevant portion is reproduced hereinbelow: -

*“As per the agreement item Nos. 3,4&5 of the contract, the earth was to be carted by you for all leads, lifts and royalty etc. In the instant scenario, the cost (royalty) is payable to you and the actual lead from the source identified by DSIIDC will be payable. In other words, for the quantity of earth obtained from DSIIDC, the concerned Item shall be substituted taking into the above principle as per clause 12 of the contract.”*

This communication makes it clear that DDA was conscious that Clause 12 does not apply and therefore, it sought to borrow the concept of variation from the said Clause. Pertinently, the afore-said communication did not spell out the altered/ modified/ substituted rate, that was to be applied because of the distance of carriage being reduced. SPBPL, in its prudence gave no immediate response, and continued to excavate ‘earth’ from the site for completion of the work under the Agreement. Since the modified rates had not been specified, failure to respond cannot be read against SPBPL.

8. SPBPL has received the payments under the running bills wherein the rate levied by DDA was found to be in variance with the stipulated/ agreed rate given in the BOQ. The signatures affixed on the running bills, while receiving payment is only an acknowledgement of receipt. The Court does not find merit in the contention of the DDA that acceptance of partial payment, despite non-fulfilment of obligations would amount to implied waiver or acquiescence. The bills were being settled on a running basis and were provisional in nature. SPBPL, therefore, cannot be estopped from raising claim(s) once the final Bill was drawn up. At that stage, it is entitled to contend that there was short payment, contrary to the terms of the

Contract/ Agreement. Even otherwise, the rates specified in the running bills continued to vary and thus, cannot be treated as final.

9. The act of 'substitution', or the alteration of the specified rates remained vague, unspecific, and indecisive. Even in Clause 12, the mechanism for determination of the rates for the 'extra items' or 'substituted items' is elaborate and involves contractors' inputs, participation and reference to market rates. Herein, DDA has unilaterally altered the agreed rates after the execution of the agreement. If DDA intended to alter or modify the rates, it was obligated to bring the same to the notice of SPBPL. The parties had to be *ad idem* and the new rates cannot be thrust upon at will, by DDA. The award thus, cannot be held to be contrary to the terms of the contract.

10. Although the reasoning in the impugned award, given by the Arbitrator, is brief, yet is sufficient to justify the award. The Arbitrator did not find any condition(s) in the Agreement which would enable DDA to alter the rates after the execution of the Agreement. The other factor that has weighed with the Arbitrator was the inconsistent stand taken by DDA. He notes that when SPBPL made a claim for payment of carting 'earth' at a distance of 35 kms, the same was rejected by DDA on the basis of the rate agreed upon in Item No. 4. The same reasoning would also apply, if the distance is less than the average distance (given in the tender estimate), as calculated/ factored by DDA for fixing the rate in Item no. 4. We cannot lose sight of the fact that when SPBPL bid in the contract, it had to offer reasonable rates calculated taking the lead of 20 kms (tender estimate).

These rates also applied to a situation where the earth had to be carted from a distance more than the estimated lead, which may not be economically viable. Thus, there is inherent averaging of rates based on the distance of carting, which could be both profitable and non-profitable. This rationale forms the basis of the conclusion of the Arbitrator. This interpretation of the terms of the Contract falls within the exclusive domain of the Arbitrator. The same cannot be interfered with, even if the view taken is a plausible one.

11. The Court does not find merit in the contention of the SPBPL that the upholding the award would amount to unjust enrichment. The principle of unjust enrichment is founded on unjustified retention, something that has been unfairly received which is against the principles of justice, equity or good conscience. Here, the Court finds the analysis/ findings in the impugned award to be as per the terms of the contract. Therefore, the plea of unjust enrichment is untenable. The judgments relied upon on this issue are thus, inapplicable.

12. The contention of DDA that the impugned award is barred by limitation is untenable. DDA contends that arbitration was invoked after the expiry of the period of three years i.e., on 17<sup>th</sup> December, 2018 and is, therefore, barred of limitation. It is noticed that this objection was not raised before the Arbitrator and that the 20<sup>th</sup> and the final Bill was paid on 31<sup>st</sup> August, 2018 which prompted SPBPL raised its claims. The petition was thus filed within time.

13. In view of the foregoing, the Court does not find anything grossly perverse or patently illegal in the view taken by the Arbitrator which warrants interference by this Court under Section 34 of the Act.

14. Accordingly, the present petition along with pending applications are dismissed.

**AUGUST 25, 2021/nk**

**SANJEEV NARULA, J**

