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

\+ **Date of Decision: 20.12.2021**

% **FAO(OS) (COMM) 179/2021**

DELHI DEVELOPMENT AUTHORITY ..... Appellant

Through: Mr. Ashim Vachher, Standing Counsel, DDA with Mr. Vaibhav Agnihotri, Mr. Kunal Lakra & Mr. P. Piyush, Advs..

versus

M/S. SWASTIC CONSTRUCTION CO. ..... Respondent

Through: Mr. Vivekanand and Mr. Abhishek Semwal, Advs.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE JASMEET SINGH

JASMEET SINGH, J. *(ORAL)*

1. The present appeal has been filed under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 ("Act") read with Section 13(1A) of the Commercial Courts Act, 2015 to assail the judgment/order dated 01.09.2021 passed by the learned Single Judge in OMP (COMM.) 17/2021.
2. The learned Single Judge has dismissed the objections of the appellant, while upholding the award dated 28.07.2020 passed by the Sole Arbitrator.
3. Briefly stating, the facts giving rise to filing of the present petition are as under:-

a) The respondent M/s. Swastic Construction Company, being the L-1 bidder, was awarded a tender by the appellant for "*development of 443.44 hectares of land in Sectors 34 & 35, Rohini, Delhi*" for the purposes of building a sewage treatment plant, vide Letter of Acceptance tender dated 05.06.2017. In terms thereof, an Agreement No. 09/FF/RPD-7/DDA/2017-18 dated 07.07.2021 was signed between the parties. The said Agreement also contained an arbitration clause under which the present dispute has arisen.

b) In accordance with the tender and agreement, the work was started by the respondent on 12.06.2017 and was to be completed in 11 months, and the scheduled date of completion was 11.05.2018 (hereinafter called the "stipulated date").

c) Since there was a delay in the completion of the work, on 11.05.2018, the respondent sent a notice to the appellant stating that it had encountered several hindrances during execution of the work which were not attributable to the respondent. It was further stated that due to an increase in the rates of labour and material since the submission of the tender bid on 30.03.2017, the respondent was entitled to be paid by the appellant at market rates for the execution of the work, after the stipulated date.

d) The work was finally completed on 15.02.2019, after 9 months from the stipulated date.

e) The final bill was prepared on 20.04.2019, imposing liquidated damages under Clause 2 of the agreement (Compensation for Delay) for 38 days at the rate of 1.5 % per month as determined by the Superintendent Engineer ("SE"). Even though as per Clause 9 of the agreement, the time to make payment was six months from the date of the final bill i.e., by 19.10.2019, however, the final bill was paid on 11.11.2019.

4. Since there were disputes between the parties regarding quantities of items, rates of items, delay, damages etc., the respondent invoked the arbitration clause and filed its statement of claim 29.10.2019. The claimant made nine claims, plus three additional claims. The Sole Arbitrator vide Award dated 28.07.2020 awarded amounts in favour of the respondent as indicated below. The claims challenged by the appellant/ petitioner in the OMP are as under:-

CLAIMS	***CLAIM DETAIL***	***AMOUNT AWARDED IN FAVOUR OF SWASTIC***
Claim No. 1	*Amount due on account of payment of Final Bill (Rs.1,18,41,004/-)*	*Rs. 28,46,020/-*
Claim No. 2	*Amount due on account of balance payment for extra items, substituted items, deviated items executed but not paid as per rate due in term of Clause 12 (Rs. 14,42,597/-)*	*Rs.13,45,184/-*
Claim No. 3	*Amount due on account of balance payment for extra items, substituted items, deviated items executed but not paid (Rs. 2,09,70,043/-)*	*Rs.1,07,49,740/-*
Claim No. 4 & 5	*Not challenged by DDA*	

Claim No. 6	*Amount due on account of losses & damage suffered due to prolongation of contract (Rs.27,85,032/-)*	*Rs.8,87,716/-*
Claim No. 7	*Declaratory award that levy of Compensation is bad in law, and its consequences (Rs. 9,76,488/-)*	*DDA directed to release BG submitted by Swastic as per interim order.*
Claim No. 8	*Amount due on account of interest @ 18% p.a. for the period of (a) pre-reference, (b) pendent lite, and (c) future*	*Rs. 2,06,41,542/- (being Simple Interest @ 9% pa for pre-award period, and future interest on one count)*
Claim No. 9	*Cost of Arbitration (Rs. 5,00,000/-)*	*Rs.3,00,000/-*
Additional Claim No. 1	*Amount due on account of balance payment under Clause 10CA of the Agreement (Rs. 5,04,187/-)*	*Included in and decided with Claim No. 1*
Additional Claim No. 2 & 3	*Not challenged by DDA*	

5. The submission of the learned counsel for the appellant as regards the awarded claims are as under:

<u>Claim No.1 and Additional Claim No. 1:-</u>

6. Claim No. 1 was for amount due on account of final bill. The work was to be completed by 11.05.2018, instead it was completed after a delay of nine months and four days beyond the stipulated date, that is on 15.02.2019. Since, the work could not be completed within the stipulated date, the Respondent Swastic sent a letter to DDA informing

that it would be claiming market rates on the works/quantities executed beyond the agreed stipulated date. Therefore, the Claimant/Respondent submitted its analysis of rates based on market rates to the Appellant herein in respect of all the balance quantities of agreement items. Claim No. 1 is in three parts:

(a) Labour escalation for extended period, calculated as per Clause 10C;

(b) Cement and steel escalation for extended period, calculated as per Clause 10CA formula, which is also part of Additional Claim No. 1;

(c) Material escalation for extended period, for other than cement and steel, calculated as per Clause 10CC formula.

7. The arbitrator, to decide the claim no.1, proceeded to decide on the aspect of delay and more particularly, who is responsible for the said delay.

The arbitrator in his award observed:

"*40. AT examined the EoT Note sheet submitted by the Respondent as RD-2 and find that the Respondent calculated for the delay of 242 (actually 246 days as there is calculation mistake of 4 days) days for which the Claimant is not responsible and 38 days for which the Claimant is held responsible. As per the Claimant application the entire delay was due to the preventions by the Respondent and the extension for 280 days is claimed as justified. The amount of extra work is also considered for justified extension of time, for which the Claimant submitted that if extra items claimed under claim-2 and claim-3 are awarded, the period of extension can be calculated by taking into account the time taken for those extra items. Also, the Claimant has submitted claim-7, for declaratory award wherein AT has to*

> *decide the justifiability of the EoT granted vis a vis EoT entitlement of the Claimant. Hence, before deciding on this claim, AT has to finalize its decision on claim-2, claim-3 and claim-7. [AT findings and decision/award in the next para is written after concluding its decision on claim-2, claim-3 and claim-7.]*
>
> *41.In reference to the decisions and awards made under claim-2, claim-3 and claim-7 (mentioned separately in this award), AT finds that once the project got delayed without any fault of the Claimant and the extension of time is justified for the required 280 days based on the extra works and preventions by the Respondent as decided under claim-2, claim-3 and claim-7, the Claimant is entitled for this claim.*"

8. After considering the documents on record, the learned Arbitrator came to the conclusion that the project got delayed without any fault of the respondent and it was entitled to extension of time based on extra work and prolongation by appellant.
9. Additional claim no. 1 was for balance payment due under clause 10 CA.
10. Following is the finding for Additional Claim no. 1 as per the Arbitrator:

> "*The Claimant submitted that the claim is based on the price escalation of all material in the prolongation period, which is a claim of damages based on the calculation done using formula mentioned in clause 10CA. AT finds that use of the formula mentioned under clause 10CA for calculating and claiming damages is not prohibited. It is clear from the submission by the Claimant that this is not a claim of escalation as per the contract. Hence, the objection raised by the Respondent based on Clause 10CA of the contract is not tenable as this claim is not made for any provision under the contract but as a claim of damages. AT finds that this amount is payable to the Claimant.*"

11. The Appellant's submission is that as per clause 10CA, the contract amount can only be varied if there is any escalation in the price within the stipulated period of contract for some particular material as per schedule F of the contract. Therefore, by awarding this claim, the arbitrator went beyond the terms of the agreement. The Ld. Arbitrator and Single judge have failed to correctly apply the formula for computation of damages. Therefore, Ld. Arbitrator and the Single Judge have failed to note that claim no. 1 was beyond the terms of the contract.

12. As regards Additional Claim no. 1, it is submitted that the same has been allowed under the specific provision of Clause 10CA, vide which the escalation could not be granted beyond the stipulated date of completion. The said condition of Clause 10CA was beyond challenge before the Sole Arbitrator. The grant of relief in contradiction of a provision of the agreement is patently illegal. For the said reason, the award merits to be set aside.

Claim No.6 & 7:-

Claim no. 6 was amount due on account of losses & damage suffered by the Respondent due to prolongation of contract and the said prolongation was attributable to the Appellants herein. Claim no. 7 was for a declaratory award that levy of compensation by the Appellant and its consequences was bad in law. It is the contention of the Claimant/Respondent that Appellant did not decide regarding extension of time. Further, that if the extension of time had been decided properly as per the Extension of Time ("EoT") Part-1 submitted by the Claimant/Respondent, then there would not have been any delay on part of the Claimant/Respondent and extension of time would have been granted for days more than 280 as was required.

13. The finding of the Arbitrator with regard to Claim no. 6 is the following:

> "*98. AT has gone through the claims and finds that to decide the amount claimed under this claim, AT has to decide first the nature of the delays and who is responsible for the delays. The Claimant, though, claimed for the entire prolongation period but the Claimant is entitled for damages only for the compensable period. AT examined the EoT Note sheet submitted by the Respondent as RD-2 and find that the Respondent calculated for the delay of 242 days for which the Claimant is not responsible and 38 days for which the Claimant is held responsible. There is calculation mistake of 4 days. As per the Claimant application the entire delay was due to the preventions by the Respondent and the extension required for 280 days is claimed as justified. As per Schedule F, the SE is the competent authority to grant extension of time but AT finds that finally extension of time was not granted by the SE under clause 5, before the notice was issued to the claimant. The provisional extension of time granted by the Executive Engineer at two occasions have also been disputed by the claimant. These letters were filed by the respondent on last date of hearing. As per clause 12, the amount of extra work is also considered for justified extension of time, for which the Claimant submitted that if extra items claimed under claim-2 and claim-3 are awarded the period of extension can be calculated by taking into account the time taken for those extra items.*
>
> *99. AT already awarded under claim 2, an amount of Rs.13,45,184/- and under claim 3, an amount of Rs.1,07,49,740/- total to Rs 1,20,94,924/ The amount of extra work done under this contract as awarded by AT, itself justifies the delay period of 97 days. The extension granted for the extra work done and paid by the Respondent comes to 42 days as per EoT sanctioned by the Respondent. Hence, total extension against extra work done comes to 133 days. Further, after examining the delay events as*

per submission under RD- 2, AT finds that the delay due to force majeure condition comes around to 8 days.

100. As evident from the examination of RA bills/final bill that the claimant deployed necessary technical representatives in compliance of clause 36 as per page 213 of the contract in the extended period and no recovery has been made by respondent on this account. In the prolongation period, the claimant had to maintain the site establishment and incur cost. BG charges are to be paid for extending BG due to prolongation.

101.The total delay was of 280 days, out of which 147 days of delay is covered under extra work and force majeure conditions. Damages incurred by the Claimant in respect of the onsite and offsite expenses under this claim is actually incurred effectively for days (280-147) only. Hence, AT finds that the Claimant is entitled for damages compensation in respect of the onsite and offsite expenses for 133 days only. Overhead component as per CPWD is 7.5%. The claimant has considered 6.5% over head charges for calculation of damages after discounting for fixed charges. The claimant was required to take mitigation measures. Considering the mitigation, I consider 5% overhead charges as appropriate for quantification of claim. AT calculates the damages compensation for 133 days as below-Prime cost (page 187 of S0C) -Rs. 4,46,90,531/

Compensation for 9.2 months delay- (5 x 4,46,90,531x9.2)/(100 x11)- 18,68,876/- Compensation for 133 days (18,68,876 x133)/280 Rs. 8,87,716/-

Therefore, I award the Rs. 8,87,716/- against claim no. 6."

14. For claim no. 7, the Arbitrator noted that the Appellant herein gave only provisional extension of time and no final extension of time. Therefore, imposition levy of compensation was not correct as the decision for extension of time had to be communicated before taking any action under clause-2.

15. As regards, Claim Nos. 6 and 7, it has been argued that the Single Judge has failed to appreciate the Claim Nos. 6 and 7 have been awarded by the learned Arbitrator, without any evidence. It is submitted that the Arbitrator has burdened the appellant with delay for 133 days, which was not on account of the respondent, and hence, the Award of the learned Arbitrator was without any evidence and patently erroneous. The Single Judge failed to appreciate that a singular observation of the Arbitrator, that "*project got delayed without any fault of the Claimant*", cannot amount to a finding that DDA breached the contract.

Claim Nos. 2 and 3: Claim no. 2 was towards amount due on account of balance payment for extra items, substituted items, deviated items executed by the Respondent but not paid for, as per the rate due in terms of Clause 12 of the contract. Claim no. 3 was towards amount due on account of balance payment for extra items, substituted items, deviated items executed by the Respondent but not paid.

16. As regards, Claim No.2 and 3, it is the submission of Appellant that the Respondent was not entitled to damages at market rate, and the market rates could only be considered for the purpose of arriving at a reasonable price for the items executed by the Respondent. It is also the submission of the learned counsel of the appellant that the Arbitrator has, in effect, modified the agreed terms contained in Clause 12 of the contract, to hold that Chief Engineer delayed in finalizing the rates. It was argued that there was no time limit fixed in Clause 12 for finalization of the rates, and by holding that Chief Engineer has delayed the finalization of rates, the Sole Arbitrator has rewritten the terms of

the contract. It has further been argued that the Sole Arbitrator has accepted the rates claimed by the respondent without calling upon the respondent to prove the rates claimed by it. The same is without evidence and proof.

17. Further, it is submitted that the learned Arbitrator proceeded to determine the price of the deviated, varied extra items by relying upon office notings on the file of the appellant. It is submitted that the internal file notings of the appellant could not have been made the basis for granting relief. Internal notings are only for the purpose of discussion between the officers, and until and unless the same have been communicated to the respondent, the same cannot be relied upon.

18. It is further submitted that those internal notings were in the nature of deliberations, were neither approved nor created any rights in favour of the person concerned (in this case, the respondent). The Arbitrator as well as the single judge has failed to appreciate the meaning and effect of section 73 of the Contracts Act.

Claim No. 8 and 9:

Claim no. 8 related to amount due on account of interest at the rate of 18% per annum for the period – a) Pre-reference b) Pendente Lite and c) Future Interest. Claim no. 9 was on account of cost of arbitration.

19. As regarding claim no. 8, the Respondent had claimed "*Amount due on account of interest @ 18% p.a. for the period of (a) pre-reference, (b) pendent lite, and (c) future*". The Arbitral Tribunal awarded simple interest at 9% p.a. for pre-award period, and future interest. Under

claim no. 9, the Respondent had claimed Rs. 5 lakhs as the cost of arbitration, and the arbitral tribunal awarded Rs. 3 lakhs.

20. No serious arguments were addressed against award of these claims. The award against both the claims is reasonable, and we find no reason to interfere with the same.

SCOPE OF ANALYSIS:-

21. We have heard learned counsels for the parties, and gone through the record. Before we move to the analysis, it is necessary to highlight the scope of interference in an Appeal under section 37 of the Arbitration and Conciliation Act, 1996, against a judgment dealing with a petition under Section 34 of the said Act.

22. This Court in *Jhang Cooperative Group Housing Society Ltd. v. Pt. Munshi Ram*[1], has also laid down the extent of scrutiny. Following are the relevant extracts:

> "***16.*** *If the Arbitrator has taken a view which the court finds reasonable and plausible, the court would certainly not interfere.*
>
> ***17.*** *The extent of judicial scrutiny under Section 34 of the Arbitration Act 1996 is limited and scope of interference is narrow.* ***Under Section 37, the extent of judicial scrutiny and scope of interference is further narrower. An appeal under Section 37 is like a second appeal, the first appeal being to the court by way of objections under Section 34. Where there are concurrent findings of facts and law, first by the Arbitral Tribunal which are then confirmed by the court while dealing with objections under Section 34, in an appeal under Section 37, the Appellate Court would be very cautious and reluctant to***

[1] 2013 SCC OnLine Del 1886.

interfere in the findings returned in the award by the Arbitral Tribunal and confirmed by the court under Section 34.

18. *As laid down by the Apex Court, the supervisory role of the court in arbitration proceedings has been kept at a minimum level and this is because the parties to the agreement make a conscious decision to exclude the courts jurisdiction by opting for arbitration as the parties prefer the expediency and finality offered by it.*"

23. It is with this limited scope of scrutiny we will proceed with the case.

ANALYSIS:-

Claim no. 1 and Additional Claim no.1:-

24. The learned Single Judge in the impugned order has come to the conclusion that the scope of enquiry before the court under Section 34 is very limited. The court, while deciding objections, cannot re-appreciate the evidence, or the documents. If the Arbitrator has arrived at its findings on the basis of material placed before him, admissibility of a document is an aspect which is within the exclusive domain of the Arbitrator, and finding based thereupon should not be interfered with lightly. That being the position, the findings of the Arbitrator were upheld by the learned Single Judge, that the delay was not attributable to the respondent. The legal principle invoked and applied by the learned Single Judge is unexceptionable.

25. As regards the amount of damages awarded for Claim No. 1 is concerned, the learned Arbitrator has awarded damages by relying on the formula provided under Clause 10C, 10CA and 10CC. The learned Single Judge has correctly relied on *Anurodh Construction v. DDA*

[2005 SCC OnLine Del 867] and on *DDA v. N.N. Buildcon Pvt. Ltd.*, [2018 (246) DLT 314] to uphold the award of damages for escalation of prolonged period based on the formula provided under clause 10CC. We see no error in the approach of the learned Arbitrator in relying on the formula for assisting in calculation of damages. The respondent has to be compensated for delays which are not attributable to the respondent. Hence, the learned single judge correctly upheld the reliance of the on the formula under Clause 10C, 10CA and 10CC for assessment of damages.

26. Since the claim for additional claim no. 1 was included in claim no. 1, and since we are of the view that the aspect of delay was correctly decided in the favour of the Respondent, we see no reason to interfere with the award on the abovesaid claims

<u>Claim no. 6 and 7:-</u>

27. The arbitrator as well as the learned single judge have correctly attributed the delay to the Appellant. The only question that remains is the quantification of Claim Nos. 6 and 7. Claim No. 7 is only with regard to return of bank guarantee as levy of compensation was bad in law, which in view of the findings as noted by us, has to be returned to the respondent. The quantification of Claim No. 6 is found in para 101 of the impugned Award. The learned Single Judge has correctly found no reason to interfere with the same while observing that finding of delay was "*determined by the learned Arbitrator on the basis of the material placed before him cannot be re-appreciated in the present proceedings. Admissability of a document is an aspect which is within*

the exclusive domain of the Arbitrator and the findings based thereon cannot be interfered with lightly". We are in total agreement with the learned Single Judge on this account, and hold that evidence cannot be re-appreciated at this stage, especially when there is nothing patently illegal that needs our examination.

Claim no. 2 and 3:-

28. As regards award on claim nos. 2 and 3, the Appellant has raised 3 contentions:

a) Respondent not entitled to damages at market rate.

b) There was no delay in finalization of the rates by Engineer-in-Charge.

c) Arbitrator cannot rely on office notings for calculating the rates.

29. The Appellant for point (c) has relied on the judgment of *Sethi Auto Service Station v. DDA*[2] wherein the Supreme Court has observed the following:

> "***14.*** *It is trite to state that notings in a departmental file do not have the sanction of law to be an effective order. A noting by an officer is an expression of his viewpoint on the subject. It is no more than an opinion by an officer for internal use and consideration of the other officials of the department and for the benefit of the final decision-making authority. Needless to add that internal notings are not meant for outside exposure. Notings in the file culminate into an executable order, affecting the rights of the parties, only when it reaches the final decision-making authority in the department, gets his approval and the final order is communicated to the person concerned.*

[2] (2009) 1 SCC 180.

> ***17.** In view of the above legal position and in the light of the factual scenario as highlighted in the order of the learned Single Judge, we find it difficult to hold that the recommendation of the Technical Committee of DDA fructified into an order conferring legal right upon the appellants.*
>
> ***18.** We may note that during the course of hearing of the writ petitions, the learned Single Judge had summoned the original records wherein the representations of the appellants were dealt with. On a perusal thereof, the learned Judge observed that the proposal for resitement was apparently approved up to the level of the Commissioner and the matter was placed before the Technical Committee which approved it on 28-11-2002. Thereafter, DDA took further steps on the basis of field inspection to earmark the two sites; the entire matter was placed before the Screening Committee and the Screening Committee in its decision sometime in 2003 noted that the matter had to be placed for disposal in accordance with the policy."*

30. Additionally, they have relied on *Pimpri Chinchwad New Township Development Authority v. Vishnudev Cooperative Housing Society and Others*[3] for the same reason that is to state the following:

> **"*36.*** *.....a mere noting in the official files of the Government while dealing with any matter pertaining to any person is essentially an internal matter of the Government and carries with it no legal sanctity; second, once the decision on such issue is taken and approved by the competent authority empowered by the Government in that behalf, it is required to be communicated to the person concerned by the State Government. In other words, so long as the decision based on such internal deliberation is not approved and communicated by the competent authority as per the procedure prescribed in that behalf to the person concerned, such noting does not create*

[3] (2018) 8 SCC 215.

> *any right in favour of the person concerned nor it partake the nature of any legal order so as to enable the person concerned to claim any benefit of any such internal deliberation. Such noting(s) or/and deliberation(s) are always capable of being changed or/and amended or/and withdrawn by the competent authority*."

31. We are of the view that at this stage, the relevance of the office notings as evidence cannot be discredited only because it was an internal communication. The Single Judge has rightly held that evidence has been examined by the arbitrator under Section 19 of the Act, and that "*the Arbitral Tribunal is not bound by the provisions of the Indian Evidence Act, 1872. Rather, under sub-Clause 4 of Section 19 of the Act, the Arbitral Tribunal has the power to determine the admissibility and relevance of any document. The Arbitral Tribunal, thus, proceeded on the basis of recommendation by Engineer-in-Charge and not by the rates changed later by DDA.*"

32. The Arbitrator has given reasons for accepting the market rates and– as noted by the single judge, these findings, based on facts, cannot be appreciated in either the proceeding before the single judge, or before us.

33. As regards claim no.3, the Arbitrator has correctly noted in para 73, that denial of claims by the Respondent is not supported by any evidence, whereas, internal notings clearly support the claims of the Respondent. Arbitrator found that the Appellant agreed to the extra work required but failed to pay for the same.

Claim no. 8 and 9:

34. As stated above, the cost and interest imposed for both these claims are reasonable in nature and therefore, we find no reason to interfere

CONCLUSION:-

35. From the aforesaid analysis, we find that the learned single judge has rightly refused to interfere in the award dated 28.07.2020 of the sole arbitrator, as the learned single judge was of the view that substantial challenges to the award are in the nature of reappreciation of evidence and documents which cannot be done under 34 of the Act. For the reasons as stated above, we find no reason to interfere in the impugned judgment dated 01.09.2021 and the appeal is dismissed.

JASMEET SINGH, J

VIPIN SANGHI, J

DECEMBER 20, 2021
S. Sharma