



2024:DHC:5959-DB



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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of decision: 31st July, 2024

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FAO(OS) (COMM) 158/2024**HOTEL CORPORATION OF INDIA**

.....Appellant

Through: Mr Narender Hooda, Sr Advocate
with Ms Neetika Sharma, Mr Naman
Saraswat, Advocates.

versus

M/S NS ASSOCIATES PVT. LTD

.....Respondent

Through: Mr M Tarique Siddiqui, Mr Sunil
Verma, Mr Abhishek Kumar Tanwar,
Ms Lakshmi, Mohd. Bilal, Mr Fajallu
Rehman, Advocates.

CORAM:**HON'BLE MR. JUSTICE RAJIV SHAKDHER****HON'BLE MR. JUSTICE AMIT BANSAL****[Physical Hearing/Hybrid Hearing (as per request)]****RAJIV SHAKDHER, J. (ORAL)****CM APPL. 43397/2024**

1. Allowed, subject to just exceptions.

CM APPL. 43395/2024 *[Application filed on behalf of the appellant
seeking condonation of delay of 1 day in filing the appeal]*

2. This application has been filed on behalf of the appellant seeking condonation of delay in filing the appeal.

2.1. According to the appellant, there is a delay of one (1) day.

3. Having regard to the period involved, we are inclined to condone the delay.

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FAO(OS) (COMM) 158/2024**Page 1 of 4**



2024:DHC:5959-DB



3.1. It is ordered accordingly.

4. The application is disposed of.

FAO(OS) (COMM) 158/2024 and CM APPL. 43396/2024[Application filed on behalf of the appellant seeking interim relief]

5. This appeal is directed against the judgment and order dated 29.04.2024 passed by the learned Single Judge.

6. Mr Hooda, learned senior counsel, on instructions, confines his submissions to claim no.1. We may note that claim no.17 relates to costs, and therefore, Mr Hooda says that he does not press his arguments concerning the same.

7. It is Mr Hooda's submission that the learned Single Judge relied upon the findings returned by the learned Arbitrator in paragraph 49 of the Award dated 19.10.2019 without adverting to Clause 26.4 of the Special Conditions of Contract [in short 'SCC'].

8. Briefly, claim no.1 relates to payments sought by the respondent concerning extra items executed by it. The respondent, *vis-a-vis* claim no.1, has claimed Rs.1.08 crores which was reduced by the appellant to Rs.34 lakhs.

9. It is important to note that the learned Arbitrator awarded the balance amount, i.e., Rs. 74 lakhs in favour of the respondent on two counts: firstly, before the finalisation of the amount concerning the extra items, the Architect appointed by the appellant had been removed and secondly, that there was no material on record which would demonstrate as to why the claim made by the respondent had been reduced from Rs.1.08 crores to Rs.34 lakhs. It is in this context that Mr Hooda relied upon Clause 26.4 of

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FAO(OS) (COMM) 158/2024

Page 2 of 4



2024:DHC:5959-DB



the SCC. For convenience, the said clause is extracted hereafter:

*“26.4 The Contractor is bound to carry out any items of work necessary for the completion of the job even though such times are not included in the schedule of quantities and rates. **Schedule of instructions in respect of such additional items and their quantities will be issued in writing by the Architect with the prior consent from the Owner.** Rates for such items of work will be approved by the Architects on the basis of Analysis of Rates which will be derived from actual prevailing market rates of similar item along with 15% as contractor’s profit & overhead. The rates approved by the Architects in such cases will be final.”*

[Emphasis is ours]

10. A bare perusal of Clause 26.4 of the SCC would show that the Contractor is obligated to execute items of work necessary for the completion of the job, even if they are not included in the schedule of quantities and rates.

10.1 The schedule of instructions concerning additional items had to reach the Contractor, *albeit*, in writing through the Architect with the prior consent of the Owner. Furthermore, the Clause goes on to state that rates for such items of work would be those as approved by the Architect on the basis of Analysis of rates, which in turn, would be derived from actual prevailing market rates of similar items along with 15% as contractor’s profit and overhead. Lastly, the rates approved by the Architects would be final.

11. Clearly, in the instant case, Clause 26.4 of the SCC ceased to be operative as the Architect had already been removed by the appellant.

11.1 It is in this context that the learned Arbitrator allowed the claim for the balance sum, as Clause 26.4 of the SCC could only have been triggered by an Architect appointed by the appellant.

11.2 The fact that the extra items had been executed by the respondent

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FAO(OS) (COMM) 158/2024

Page 3 of 4



2024:DHC:5959-DB



does not appear to have been an issue in contestation.

11.3 The witness tendered by the appellant would have known that he could not have relied upon Clause 26.4 of the SCC as the operable condition did not exist.

11.4 The failure of the witness to testify as to why the amount claimed had been reduced from Rs.1.08 crores to Rs.34 lakhs persuaded the Arbitrator to award the claim for the balance amount.

11.5 The learned Single Judge, having taken into account these aspects, has rejected the appellant's petition preferred under Section 34 of the 1996 Act on this score.

12. In our view, no fault can be found either with the approach adopted by the learned Arbitrator or by the learned Single Judge.

13. The appeal is, accordingly, dismissed. The pending application shall stand closed.

14. Parties will act based on the digitally signed copy of the order.

**RAJIV SHAKDHER
(JUDGE)**

**AMIT BANSAL
(JUDGE)**

JULY 31, 2024/PB

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FAO(OS) (COMM) 158/2024

Page 4 of 4