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

Date of Decision: 01st September, 2021

\+ **O.M.P. (COMM) 17/2021 & I.A. Nos. 467-468/2021, 2597/2021 & 5312/2021**

DELHI DEVELOPMENT AUTHORTY ..... Petitioner
Through: Mr. Gunjan Kumar, Advocate.

versus

SWASTIC CONSTRUCTION COMPANY ..... Respondent
Through: Mr. Vivekanand, Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J. (Oral):

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 [*hereinafter referred to as* '***the Act***'] has been filed by Delhi Development Authority [*hereinafter* '***DDA***'] seeking setting aside of arbitral award dated 28th July 2020 [*hereinafter referred to as* the '***Impugned Award***'], whereby the learned Sole Arbitrator has allowed certain claims of the Respondent herein – M/s. Swastic Construction Co (being the Claimant before the Arbitrator) [*hereinafter referred to as* '***Swastic***']

BRIEF FACTS

2. The facts giving rise to the dispute are summarized as follows:

2.1. Swastic, being the L-1 bidder, was awarded a tender by DDA, for *"development of 443.44 hectare of land in Sector 34 & 35, Rohini, Delhi"* for the purpose of building a sewage treatment plant, *vide* Letter of Acceptance of Tender dated 05th June 2017 [*hereinafter referred to as* '***theWork***']. In terms, thereof, an Agreement No. 09/FF/RPD-7/DDA/2017-18 dated 7th July 2017, was signed between the parties, which also contained an arbitration clause. [*hereinafter referred to as* ***'the Agreement***'].

2.2. The Work was started by Swastic on 12th June 2017. It was to be completed in 11 months, and the scheduled date for completion of Work was 11th May 2018 [*hereinafter referred to as the* '***Stipulated Date***']

2.3. However, since there was a delay in the completion of the Work, on 11th May 2018 itself, Swastic sent a notice to DDA stating that it encountered several hindrances during execution of the Work, unattributable to itself. Swastic further stated that due to an increase in the rates of labour and material since the time of submission of its tender bid on 30th March 2017, it was entitled to be paid by DDA at market rates, for the execution of Work after the Stipulated Date.

2.4. The Work was finally completed on 15th February 2019 [*hereinafter referred to as* '***Completion Date***'] as per Clause 5 of the Agreement (i.e., Time and Extension of Delay), after 9 months from the Stipulated Date.

2.5. Swastic submitted its final bill to DDA on 20th April 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 Superintending Engineer of the Work.

2.6. As per Clause 9 of the Agreement, time to make payment was 6 months from the receipt of the final bill by the Engineer-in-Charge (i.e. by 19th October 2019). However, the final bill was paid on 11th November 2019.

2.7. Disputes arose regarding items, rate of items, delay, damages etc. Swastic claimed damages for delay on part of DDA as well as compensation due to prolongation of contract under Section 73 of the Indian Contract Act, 1872 [*hereinafter referred to as the "**Contract Act**"*] and arbitration proceeding were initiated.

2.8. On 28th July, 2020, the impugned award was passed in favour of Swastic. For the purpose of the petition, the award with respect to the claims which have been challenged by DDA, are summarised as follows:

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/-

Claims 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) pendente 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*	

3. The Court has heard Mr. Gunjan Kumar, counsel for DDA, and Mr. Vivekanand, counsel for Swastic, at length. For the sake of convenience, and considering the common and overlapping grounds of challenge urged by both the counsel, claims which are challenged in the present petition are clubbed, and shall be dealt with likewise.

I. *CLAIMS NO. 1, 6, 7 AND ADDITIONAL CLAIM NO. 1*

4. DDA impugns the award *qua* the aforenoted claims on the following

grounds:

4.1. Swastic's claims were based on enforcement of various provisions of the Contract, however, the learned Sole Arbitrator erred by assuming these claims to be for damages. While considering these claims, the Arbitrator, on the basis of oral submissions, held 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".* As per Clause 10CA of the Agreement, price escalation was available only till the scheduled date of completion i.e., beyond that, price variation was not permissible.

4.2. The Arbitrator travelled beyond contractual provisions, overlooking the specific terms of the Agreement.

4.3. The singular observation of the Arbitrator, that *"the project got delayed without any fault of the Claimant"*, cannot amount to a finding that DDA breached the contract. For the purpose of awarding damages under Section 73 of the Contract Act the Arbitrator ought to have given a finding of breach. In absence of any specific finding against DDA holding it to be in breach, the award of damages is bad in law and against the provisions of the Contract Act.

4.4. On the basis of the pleadings advanced by Swastic and other materials placed on record, it becomes apparent that there was no allegation of breach or delay against DDA.

4.5. The award for claims no. 6 and 7 is without evidence. Swastic has assumed that the delay of 133 days was on account of DDA. This is based purely on assumption, and therefore, is liable to be set aside.

Analysis

5. The claim No. 1 was for damages for losses suffered on account of increased rates of labour and material, resulting from work executed after stipulated period of completion. It comprises of 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.

6. The period for completion of the Work was eleven months – which expired on 11th May, 2018. The work was completed after a delay of nine months and four days beyond the Stipulated Date – on 15th February, 2019.

7. Since the work could not be completed by the Stipulated Date, Swastic *vide* letter dated 11th May, 2018 put DDA to notice that it would claim market rates on the works/ quantities executed beyond the agreed stipulated date. There was no reply to the said communication from DDA.

8. Swastic's final bill dated 20th April, 2019 was not paid within the stipulated period of three months as per Clause 9 of the Contract.

9. The learned Arbitrator, while giving his finding dealing with claim No. 6, delved into the question as to who is responsible for the delay or prolongation. In para 98 of the award, after considering the EoT note sheet (time extension analysis) filed by DDA as RD–2, held that Swastic was not responsible for delay even as per document emanating from DDA itself.

Thus, the learned Arbitrator did not find any delay attributable to Swastic – a finding rendered on the basis of the evidence and material placed before him.

10. In para 99 of the award, the learned Arbitrator proceeded on the basis of his findings rendered *qua* claims no. 2 and 3 and observed that as per EoT (RD–2) for the extra work done, Swastic was entitled to extension of 42 days.

11. The learned Arbitrator held that the project got delayed without any fault of Swastic and thus it was entitled to extension of time-based on the extra work and prolongation by DDA. In these circumstances, since Swastic was not held liable for any delay, the Arbitrator was justified in awarding damages by way of increased rates of material and labour for prolongation of contract, for the work done beyond the stipulated date, under Section 73 of the Contract Act.

12. The aforesaid finding of fact determined by the learned Arbitrator on the basis of the material placed before him cannot be re-appreciated in the present proceedings. Admissibility 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.

13. Although, Swastic had initially claimed damages on the basis of market rates analysis, however, it assessed the loss and calculated the amount as per the formulas adopted by DDA for making payments under Clause 10C, 10CA and 10CC. The aforenoted clauses are applied for determining price escalation. Thus, this serves as a good benchmark for

calculating damages.

14. Claim no. 1 under Clause 10CA, comprised of three parts, as enumerated above. The learned Arbitrator has awarded damages by relying upon the formula provided under Clause 10C, 10CA and 10CC. The Court does not find merit in DDA's objection that by awarding Claim No. 1, the Tribunal has violated the aforenoted clauses for assessing damages. Reliance on these clauses cannot be held to be perverse. This Court in ***Anurodh Constructions v. DDA***,[1]while deciding a similar petition arising from an award passed in a similar contract, held that the Arbitrator is well within its right to award damages even *dehors* Clause 10CC, since the amount could be awarded under Section 73 of Contract Act. Further, in ***DDA v. N.N. Buildcon Pvt. Ltd.***,[2] this Court upheld that award of damages for escalation for prolonged period, based on formula provided under Clause 10CC. The aforenoted judgments indicate that the Courts have accepted the formula adopted by the Arbitral Tribunal in making such assessment. The aforesaid provisions could thus be used by the Arbitrator to assist him to work out the amount of damages. The use of the applicable formulas as provided under the aforenoted clauses, is a discretion and prerogative of the Arbitrator for assessing damages.

15. From the judgments referred above, it clearly emerges that the formula provided under Clause 10C, 10CA and 10CC can be relied upon for assessment of damages, even if the said clauses are not specifically made applicable. The Court does not find the findings to be perverse or completely

[1]2005 SCC OnLine Del 867.

[2]2018 (246) DLT 314.

unreasonable. The award of damages is thus, as per contractual terms.

16. The Court also finds merit Mr. Vivekanand's contention that the approach of the Arbitral Tribunal has been reasonable while awarding damages. The Court notes that, for damages due to prolongation of contract, the escalation has been awarded only on 85% of the value of work done during extended period, for agreed items, considering that Swastic had made separate claim for damages due to prolongation of contract. (See: para 45 of the Impugned Award).

17. There is no merit in any of the grounds of challenge with respect to Claims no. 1, 6, 7 and additional claim no. 1. The same are accordingly rejected.

II. CLAIMS NO. 2 & 3

18. With respect to the aforenoted heads, DDA's contentions are as follows:

18.1. The learned Arbitrator has wrongly relied upon conditions that do not form part of the agreed terms between the parties.

18.2. Swastic was not entitled to damages at market rates. The market rates could only be considered for the purpose of arriving at a reasonable price for the items executed by Swastic. The same were to only assist for determination of the price for the deviated/ varied/ extra items.

18.3. Clause 12 of the Agreement prescribes the method of determining the price for deviated/ varied/ extra items. As per the said Clause, Swastic was to be submit a rate analysis for the work. The Engineer-in-Charge would then take the same into consideration and determine the rates

on the basis of market rates.

18.4. The observation of the Arbitrator on market rates is misconceived. The Arbitrator did not proceed to determine the price of the deviated/ varied/ extra items, and instead, only relied upon the office notings to conclude that Swastic was justified apropos the observations made by the Engineer-in-Charge. The rates worked out by the Engineer-in-Charge were communicated internally for the purpose of making assessment and final corrections. The internal communication, was never communicated to Swastic and therefore, does not bind DDA. It is a settled principle of law that in matters of contract, only communications which have been communicated to the other party are held to be binding. The office notings could not form the basis for concluding that the market rates had been submitted by Swastic and consequently, accepted by DDA.

***Analysis*:**

19. Clause 12 of the Agreement specifies the Engineer-in-Charge as the authority empowered to determine the market rates. The Engineer-in-Charge's decision is being assailed on the ground that the same was only an "internal communication" and not shared with Swastic. Regardless, relevance of the same cannot be discredited. The same has been examined by the Arbitrator under Section 19 of the Act. 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.

20. The Arbitrator has also considered the reasons for reduction of the rates by DDA, and did not find the same to be justified. He has given reasons for accepting the market rates determined by the Engineer-in-Charge. Those findings, again based on facts, cannot be reappreciated in the present proceedings. Besides, the Court has found that the reason given by the Tribunal is sufficiently justified for giving the award with respect to Claim No. 2.

21. Similarly, for extra items under Claim no.3, the Arbitral Tribunal has provided sufficient reasons for disallowing the change. Such reasons and finding can be seen in paras no. 70 to 74 of the Impugned Award, where he has given specific reasons as to why he disagreed with the view taken by the higher authorities. The said justification is not amenable to challenge in the present proceedings. Besides, the Arbitral Tribunal has also given specific reasons for accepting the rates and quantities claimed with respect to the awarded items in Para 79 of the Impugned Award. DDA has not challenged this particular finding of the Arbitrator. Para 79 of the award is reproduced hereinbelow:

> *"79. The parties are not it dispute in respect of the quantities against these extra items. Also, there is no objection or comment submitted by the Respondent on the calculation part for these claims even after specifically asked for the same by the AT on 5.05.2020. Hence, it is concluded that there is no dispute, as such, on the calculation part of the claims."*

22. The Court does not find any ground to interfere in the fact-finding exercise done by the Arbitral Tribunal in determining the rates. Thus, the challenge to the same is also rejected.

III. CLAIMS NO. 8 AND 9

23. Swastic had claimed interest at 18% p.a., for the period of pre-reference, *pendente lite*, and future interest. Instead, the Tribunal awarded simple interest at 9% p.a. for the Claim, which the Court finds reasonable, and therefore, no interference of this Court is warranted.

24. Apropos Claim No. 9, as against the claimed cost of arbitration of Rs. 5 lakhs, the Tribunal has awarded Rs. 3 lakhs, which too is found reasonable. There is no ground for interference.

25. In view of the foregoing, the present challenge fails. The petition is disposed of, along with all pending applications.

SANJEEV NARULA, J

SEPTEMBER 1, 2021
v/*nd*

(corrected and released on 16th October, 2021)