2024:DHC:8968-DB

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 20.11.2024

\+ **FAO (COMM) 169/2023 & CM No.43577/2023**

MUNICIPAL CORPORATION OF DELHI ..... Appellant

versus

SH. SATYA PAL GUPTA ..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr Sanjeev Sagar and Ms NaziaParveen, Advs. with Mr MukeshKumar Meena, JE

For the Respondent : Mr Avinash Trivedi, Mr AnuragKaushik and Mr Rahul Aggarwal,Advs.

CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU
HON'BLE MR JUSTICE SACHIN DATTA

JUDGMENT

VIBHU BAKHRU, J.

1. The Municipal Corporation of Delhi (hereafter the *MCD*) has filed the present appeal under Section 37(1)(c) of the Arbitration & Conciliation Act, 1996 (hereafter the *A&C Act*) impugning an order dated 19.04.2023 (hereafter the *impugned order*) passed by the learned Commercial Court in OMP(COMM) No.17/2019 filed by the North Delhi Municipal Corporation (since merged with MCD) under Section 34 of the A&C Act assailing the arbitral award dated 15.05.2019

(hereafter *the impugned award*) passed by an Arbitral Tribunal comprising of a Sole Arbitrator (hereafter *the Arbitral Tribunal*).

2. The impugned award was rendered in the context of the disputes that have arisen between the parties in connection with the work of "construction of a poly clinic in Bawana (Narela Zone Delhi)", which was constructed by the respondent (hereafter *the Contractor*) at an aggregate value of ₹1,41,42,502/- in terms of the Work Order No. E.E.(PR)/TC/05-06/32 dated 10.06.2005 (hereafter *the Agreement*). In terms of the Agreement, the work was to commence on or before 19.06.2005 and to be completed within a period of eighteen months, that is, on or before 18.12.2006. The execution of the work was inordinately delayed and the same was completed on 05.10.2011, that is, after more than seventy-six months from the stipulated date of commencement of the work.

3. The Contractor claimed that he had commenced the work in right earnest immediately after the same was awarded to him. However, the MCD (erstwhile North Delhi Municipal Corporation) had failed to fulfil its reciprocal promises thus disabling him to complete the work within the stipulated period. The Contractor further alleged that the MCD had failed to provide (a) hinderance free site for the execution of the work; (b) drawings / details / designs for the work; (c) necessary instructions and designs in time; and, (d) timely payments for the work executed including the additional/extra work as required.

4. The disputes between the parties were referred to arbitration before the Arbitral Tribunal constituted by this Court by an order dated 28.03.2014 in a proceeding passed in ARB. P. No.58/2014. The arbitration was required to be conducted in accordance with the Rules of the Delhi International Arbitration Centre (DIAC). Before the Arbitral Tribunal, the Contractor filed a Statement of Claims raising several claims which are summarized below:

"**Claim No.**	**Particular**	**Amount (in Rs.)**
1.	Amount for extra deviation of executed work	28,85,934/-
2.	Amount for execution of extra item	4,54,708/-
3.	Security Amount	5,00,000/-
4.	Arrears of 10C	10,21,016/-
5.	Damages for prolongation of contract from the stipulated date of completion to actual date of completion	47,14,167.30
6.	Interest @18% on delay payment of running bills	6,76,696/-
7.	Interest @18% on the total claim amount	
	Total	1,02,52,521/-
8.	Cost"	

5. The Arbitral Tribunal framed the following issues for consideration:

> "1. Whether the Claimant is entitled to recover an amount of Rs.1,02,52,521/- from the Respondent as per the details given in para 31 of the Statement of Claim?
>
> 2. Whether the Respondent was responsible for delay in completion of the contract for the reasons pleaded in the

Statement of Claim? Or Whether the claimant was responsible for the delay in the execution of the Work?

3. Relief."

6. Both the parties led evidence. The Contractor (Satya Pal Gupta) examined himself as CW1 and furnished an affidavit in lieu of examination-in-chief (Ex.CW1/A). He also tendered various documents which were exhibited as Ex.CW1/1 to Ex.CW1/96. The MCD examined Sh. B.S. Meena, Executive Engineer (Project) as RW1. He also tendered his affidavit in lieu of examination-in-chief (Ex.RW-1/A) and tendered various documents which were exhibited as Ex.RW-1/1 to Ex.RW-1/30.

7. The Arbitral Tribunal considered the rival contentions including that it did not have the jurisdiction to entertain the claims.

8. The Arbitral Tribunal rejected the MCD's contention that the claims were barred by limitation or it did not have the jurisdiction to adjudicate the same. Additionally, the Arbitral Tribunal rejected the MCD's contention that the time was the essence of the Contract. Insofar as the question as to who was responsible for the delay, the Arbitral Tribunal held that the delay of about eight months with effect from 19.06.2005 to 26.02.2006 was attributable to the MCD. In addition, the time taken for laying the foundation stone of the building on 26.02.2006 was also held to be attributable to the MCD. However, the Arbitral Tribunal held that the Contractor was not entitled to any damages for the said period as he had not commenced the work by that time.

9. The Arbitral Tribunal also found that the MCD was responsible for the delay of about eleven months with effect from 27.02.2006 to 10.01.2007 on account of removal of trees (nineteen in numbers) falling within the alignment of the building as well as the delay of approximately thirty-nine months in furnishing the drawings.

10. The Arbitral Tribunal rejected Claim Nos.1 and 2 – claim of ₹28,85,934/- for extra deviations and ₹4,54,708/- on account of extra items. The Arbitral Tribunal noted that the said claims were raised only in the final bills and there was no communication regarding the same at the material time. The Arbitral Tribunal also found that the Contractor had failed to prove the same and held that mere statement by the Contractor was not sufficient to accept the said claims.

11. Insofar as Claim No.3 is concerned, the Arbitral Tribunal held that the Contractor was entitled to refund of the security deposit of the ₹5,00,000/- and accordingly awarded Claim No.3 in his favour.

12. The Arbitral Tribunal also decided Claim Nos.4 and 5 in favour of the Contractor. The Arbitral Tribunal held that Clause 10C of the General Conditions of the Contract (GCC) was applicable and the Contractor was entitled to escalation on account of rise in price of material and labour. The Contractor produced evidence to establish that the labour wages had increased from time to time and also furnished the calculations based on the formula provided under Clause 10C of the GCC. The Arbitral Tribunal noted that the MCD had failed to produce any material to counter the Contractor's claim in this regard.

Accordingly, the Arbitral Tribunal awarded a sum of ₹10,21,016/- in favour of the Contractor on account of increase in wages as notified by the Central and State Governments.

13. Insofar as the Contractor's Claim No.5 is concerned, the Arbitral Tribunal allowed the same to the extent of ₹35,35,625/-. The Arbitral Tribunal reasoned that the total value of the work was ₹1,41,42,502/- which was required to be completed within a period of eighteen months. Thus, on an average, the Contractor was required to complete the work of a value of ₹7,85,694.56 on every month. The Arbitral Tribunal assumed that on the said amount of work, the Contractor would earn a profit of approximately 10% which was computed at ₹78,569.46 per month. Since the MCD was found responsible for the delay of forty-five months, the Arbitral Tribunal reasoned that it would be liable to pay an amount of ₹78,569.46 per month on account of loss of profits due to prolongation of the work. The said amount was computed at ₹35,35,625/-. The tabular statement setting out the summary of the claims awarded by the Arbitral Tribunal and as set out in the impugned award is reproduced below:

"**Claim No.**	**Particulars**	**Amount (in Rs.)**
1.	For extra deviation of executed work Rs. 28,85,934/- (Disallowed)	-
2.	For execution of extra items – Rs.4,54,708/- (Disallowed)	-
3.	Refund of Security Amount – Rs.5,00,000/- (Allowed)	5,00,000.00
4.	Arrears of 10C – Rs.10,21,016/-	10,21,016.00

	(Allowed)	
5.	Loss of profit for delay in the execution of the contract attributable to the respondent (Partly Allowed)	35,35,625.00
6.	Interest on delayed payment of running bills (Disallowed)	--
Total (Rupees fifty lakhs fifty six thousand six hundred forty one only)"		50,56,641.00

14. In addition, the Arbitral Tribunal also awarded *pendente lite* interest at the rate of 9% per annum from the date of filing of the Statement of Claims (24.04.2014) till the date of the impugned award. Additionally, the Arbitral Tribunal also awarded future interest at the rate of 9% per annum on the amount as found due and payable from the date of the award till the date of recovery.

15. It is pertinent to note that the Contractor had preferred an application [OMP (COMM) 17/2019] under Section 34 of the A&C Act before the learned Commercial Court assailing the impugned award to the extent that its Claim Nos.1, 2, 6 and 8 were rejected. Thus, the Contractor accepted partial rejection of its Claim No.5.

16. The learned Commercial Court by an order dated 19.04.2023 disposed of the said application [OMP (COMM) 17/2019] filed by the Contractor and observed that the Arbitral Tribunal had erred in observing that Claim Nos. 1&2 were not raised by the Contractor in any of his letters during the execution of the work in question. It further observed that the Contractor had been corresponding with the MCD in regard to the extra deviation in the executed work even before raising

the final bill and had also submitted the bill qua the extra items through speed post on 17.03.2010 exhibited as (Ex.CW1/96). The learned Commercial Court held the Contractor to be entitled to a sum of ₹ 28,85,934/- and ₹4,54,708/- under Claim Nos. 1&2 respectively. It also awarded a sum of ₹1,50,000/- to the Contractor in respect of Claim No. 8 towards the costs of the arbitration proceedings.

17. The MCD had preferred an appeal [being FAO(COMM) 165/2023] under Section 37(1)(c) of the A&C Act impugning the said order dated 19.04.2023 passed by the learned Commercial Court which was allowed by an order dated 09.08.2023. This Court set aside the observations and directions as rendered by the learned Commercial Court in respect of Claim Nos. 1,2 and 8 with the liberty to the Contractor to initiate proceedings afresh before the Arbitral Tribunal.

PROCEEDINGS UNDER SECTION 34 OF THE A&C ACT

18. The MCD filed a petition [being OMP(COMM) 17/2019] under Section 34 of the A&C Act assailing the impugned award before the learned Commercial Court. During the course of the said proceedings, MCD did not press its challenge to the Arbitral Tribunal's findings in respect of Claim No.3 – that is refund of security deposit of ₹5,00,000/- . It is apparent from the impugned order that the MCD had pressed its challenge to the Arbitral Tribunals findings in respect of claim Nos.4&5. It is contended that the Arbitral Tribunal had erred in allowing the Contractor's claim under Clause 10C of the GCC inasmuch the Contractor had not led any evidence to prove that he had

paid wages at the enhanced rates. Insofar as Claim No.5 is concerned, it was contended on behalf of the MCD that the Contractor had failed to establish that the delay in completion of the work was attributable to the MCD.

19. The learned Commercial Court referred to the decisions of the Supreme Court in ***PSA SICAL Terminals Pvt. Ltd. v. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin: 2021 SCC OnLine SC 508*** and in ***MMTC Ltd. v. Vedanta Ltd.: (2019) 4 SCC 163*** and observed that the findings of the Arbitral Tribunal could not be held to be in conflict with the basic notions of justice and / or in contravention to the fundamental policy of Indian law. The learned Commercial Court held that it finds no infirmity with the arbitral award which would give rise to any grounds to set aside the same.

REASONS & CONCLUSION

20. At the outset, it is relevant to note that the MCD's challenge to the impugned award is required to be confined to Claim Nos.4&5. As noted above, the MCD had not pressed its challenge to the Arbitral Tribunal's decision in respect of Contractor's Claim No.3 for refund of its security deposit.

21. It is necessary to note that the finding of the Arbitral Tribunal that the delay in execution of the work was attributable to the MCD was based on appreciation of evidence and material placed on record. Undisputedly, a court cannot reappreciate the evidence and material on record as the First Appellate Court and supplant its opinion in place of

the Arbitral Tribunal. In our view, the findings of the Arbitral Tribunal to the effect that the delay in execution of the work (approximately eleven months with effect from 27.02.2006 to 10.01.2007) for removal of trees and a further delay of about thirty-nine months on account of the MCD's failure to supply architectural and structural drawings of the building cannot be interfered with in this proceeding. To the said extent, we concur with the learned Commercial Court that there are no grounds to set aside the said findings.

22. The next question to be examined is the consequence of the said delay. The Contractor had claimed a sum of ₹10,21,016/- on account of escalation resulting from the statutory wage revisions. The Contractor had referred to certain notifications issued by the Government of NCT of Delhi to establish that there was revision in the minimum wages in scheduled employment under the Minimum Wages Act, 1948. The Arbitral Tribunal had taken the said documents on record. The Contractor had claimed that he was compelled to pay the higher wages for execution of the work, which was inordinately delayed for reasons attributable to the MCD. He had also furnished a statement of computation (Ex.CW1/78) quantifying the said amount. The learned counsel for the MCD did not dispute that the computation as provided by the Contractor was in accordance with the formula specified in Clause 10C of the GCC as applicable to the Agreement. He however contended that the Contractor had not produced any material to establish that he had in fact paid the enhanced wages to the extent of the

aforesaid amount. He submitted that the Arbitral Tribunal had awarded the said claim without the necessary evidence.

23. We are unable to concur with the said contention. Concededly, the Contractor had placed on record the material to establish that there was an increase in the minimum wage rate in terms of the various notifications issued under the Minimum Wages Act, 1948.

24. The impugned award records that the Contractor had produced the details of the gross amount, labour component and the percentage increase, which were worked out and shown as part of the extra expenses incurred against each of the running bills. The Arbitral Tribunal also noted that there was nothing on record to contradict the said conclusion. The MCD has not filed the documents that were placed before the Arbitral Tribunal. It has also not filed the copy of the relevant clauses of the GCC. However, the learned counsel appearing for the MCD did not dispute that Clause 10C of the GCC, as applicable to the Contract in question required the escalation to be computed on the assumption that 25% of the value of the work would constitute the labour component. It is also not disputed that calculating of escalation under Clause 10C of the GCC was required to be computed on the basis of the prescribed formula, on normative basis. It was also not disputed by the MCD that the said formula has been correctly applied. However, it was contended on behalf of the MCD that the Contractor has not produced books of accounts to prove that the increase in wages was paid.

25. It is material to note that the learned counsel for the MCD did not dispute the correctness of observations of the Arbitral Tribunal that the MCD had not controverted the calculation of the computation of escalation under Clause 10C of the GCC as filed by the Contractor. In view of the above, since it is not disputed that the escalation was required to be worked out on the labour component of the work done and that the computation produced by the Contractor before the Arbitral Tribunal was not disputed, we are unable to accept that the impugned award in regard to the award of escalation is required to be interfered with. The learned Commercial Court had rightly noted the limited scope of examination under Section 34 of the A&C Act. In the given circumstances, we are unable to accept that the view of the Arbitral Tribunal can be faulted on the ground that the same is perverse or is an improbable one. In view of the above, the MCD's challenge to the award of escalation under Section 10C of the GCC is rejected.

26. The next question to be considered is in regard to the Arbitral Tribunal's decision to award loss of profit on account of prolongation of the Contract. The Contractor had claimed a sum of ₹47,14,167.30 on account of damages for prolongation of the Contract. The Contractor had claimed that the execution of the work had been prolonged due to the reasons attributable to the MCD and therefore he was entitled to claim compensation for the same. The claim of ₹47,14,167.30 as articulated by the Contractor in his Statement of Claims is set out below:

> "36. That so far as claim No.5 is concerned, the claimant claims prolongation of contract for the period of date of completion to actual date of completion. The

> work was awarded by the respondent on 10-06-05. The claimant is bound to complete the work within 18 months as per agreement which comes to an end on 18-12-06 and the work was actually completed on 20-12-11. The claimant is entitled for damages of the amount which he was forced to lose / spend due to prolongation of contract which is 60 months. The total contractual amount of total work Rs.1,41,42,502/- (+) 18 months i.e. contractual period (=) Rs.7,85,694.56/-. The claimant earned profit 10% on Rs.7,85,694.56/- per month which comes to Rs.78,569.46/- (x) the prolong period of 60 months comes to Rs.47,14,167/-. Hence the claimant is entitled for this amount."

27. A plain reading of the claims indicates that the Contractor had based its computation on the assumption that his profit margin was 10% of the value of the Contract. He, accordingly, worked out the quantum of profit that he would have earned per month by dividing the value of the work over the term of the Contract. He then multiplied the hypothetical figure of monthly profit with the period of delay in completion of the Contract. According to the Contractor, the delay was for a period of sixty months. Therefore, he claimed that he was entitled to the quantum of monthly profit as worked out above multiplied by the period of sixty months. It is at once clear that the computation of quantum of damages as calculated is flawed. First of all, there is no evidence or material to indicate that the Contractor would have earned 10% profit on the value of the work. Secondly, there is no material to indicate that if the Contract had not been prolonged, the Contractor would have been gainfully employed in another profitable contract. In ***Bharat Coking Coal Ltd. v. L.K. Ahuja: (2004) 5 SCC 109***, the Supreme Court had held as under:

> "23. Claim 8 has been rejected by the arbitrator. Now we proceed to consider Claim 9 for loss arising out of turnover due to prolongation of work. The claim made under this head is in a sum of Rs 10 lakhs. The arbitrator rightly held that on account of escalation in wage and prices of materials compensation was obtained and, therefore, there is not much justification in asking for compensation for loss of profits on account of prolongation of works. However, he came to the conclusion that a sum of Rs 6,00,000 would be appropriate compensation in a matter of this nature being 15% of the total profit over the amount that has been agreed to be paid. While a sum of Rs 12,00,000 would be the appropriate entitlement, he held that a sum of Rs 6,00,000 would be appropriate. He also awarded interest on the amounts payable at 15% per annum.
>
> 24. Here when claim for escalation of wage bills and price for materials compensation has been paid and compensation for delay in the payment of the amount payable under the contract or for other extra works is to be paid with interest thereon, it is rather difficult for us to accept the proposition that in addition 15% of the total profit should be computed under the heading "Loss or Profit". It is not unusual for the contractors to claim loss of profit arising out of diminution in turnover on account of delay in the matter of completion of the work. What he should establish in such a situation is that had he received the amount due under the contract, he could have utilised the same for some other business in which he could have earned profit. Unless such a plea is raised and established, claim for loss of profits could not have been granted. In this case, no such material is available on record. In the absence of any evidence, the arbitrator could not have awarded the same. This aspect was very well settled in *Sunley (B) & Co. Ltd.* v. *Cunard White Star Ltd.* [(1940) 1 KB 740 : (1940) 2 All ER 97 (CA)] by the Court of Appeal in England. Therefore, we have no hesitation in deleting a sum of Rs 6,00,000 awarded to the claimant."

28. It is apparent from the above that the Arbitral Tribunal has awarded claim for loss of profit for the period the Contract was prolonged without any evidence or material to support the claim. Thus, the impugned award is vitiated by patent illegality. In view of the

above, the impugned award to the extent that the Arbitral Tribunal has awarded the Contractor's Claim No.5 is set aside.

29. The present appeal is disposed of in the aforesaid terms.

VIBHU BAKHRU, J

SACHIN DATTA, J

NOVEMBER 20, 2024
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