

Mcd vs.anil Gupta and Ors

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Court : Delhi

Decided On : Dec-12-2018

Appellant : Mcd

Respondent : Anil Gupta and Ors

Advocate for Def. : Mr. Ankur Chhibber, Mr. Aditya Chhibber

Advocate for Pet/Ap. : Ms. Supreet Bimbra, Mr. Sunil Goel, Mr. Madan Lal

Judgement :

\$~28 * + IN THE HIGH COURT OF DELHI AT NEW DELHI Date of Decision:

12. h December, 2018 MCD O.M.P. 709/2011 Through: Ms. Supreet Bimbra, Proxy counsel for Mr. Sunil Goel, Standing Counsel for MCD along with Mr. Madan Lal, Executive Engineer (M-9810215488).

... Petitioner

versus ANIL GUPTA AND ORS

... RESPONDENTS

Through: Mr. Ankur Chhibber & Mr. Aditya Chhibber, Advocates for R-1 (M-9810233548) CORAM: JUSTICE PRATHIBA M. SINGH Prathiba M. Singh, J.

(Oral) 1. The present petition under Section 34 has been preferred challenging the award dated 1st April, 2011 passed by the Learned Sole Arbitrator who is a retired

Chief Engineer of Municipal Corporation of Delhi (hereinafter MCD).

2. The construction contract relates to the zonal building of the MCD in Narela, which was originally awarded to one M/s Satish Chander Ramesh Kumar in the year 1998. The said contractor had not completed the work and only the basement had been constructed by him. The remaining work was awarded to the Respondent on 28th August, 2004. The value of the contract was Rs.4,29,00,830/- . The date of commencement of the work and the date of completion as per the agreement were 3rd September, 2004 and 4th September, 2006 respectively. The actual date of completion however was 3rd September, 2007 i.e. with a delay of one year. O.M.P. 709/2011 Page 1 of 9 3. The constructed building was handed over to the MCD and payments were demanded. However, since the entire payment was not made by the MCD and even the escalation, watch and ward expenses, etc. were not paid to the contractor, the contractor invoked the arbitration clause on 6th July, 2008.

4. Mr. Amrit Lal Aggarwal, Chief Engineer (Retd.), MCD was appointed as the Sole Arbitrator for adjudicating the disputes between the parties.

5. The main claims raised by the contractor are in respect of escalation under clause 10CC, watch and ward expenses, substituted items, interest and costs. The claims raised and the amounts awarded in respect thereof are set out herein below: Claim No.1: Escalation as per clause 10 CC The contractor claimed a sum of Rs.62,48,150/-, which was awarded by the Arbitrator. Claim No.2: Reimbursement of amount spent in keeping watch/ward after the completion of the work The contractor claimed a sum of Rs.2,40,000/- under this claim, which was awarded. Claim No.3: Less payment of Extra and substitute items Claim of Rs.39,014/- was made on the ground that the same was liable to be paid towards extra and substituted items. On this, the Arbitrator levied a penalty of Rs.4,000/- i.e. 10% on the contractor for misleading the Arbitrator. Claim No.:

4. Interest @ 18% on Pre suit and pendente lite and future The arbitrator awarded interest @ 18% from the date of cause of action i.e. O.M.P. 709/2011 Page 2 of 9 8th March, 2004, which was the date when the contractor claimed interest @ 24% in case monthly payments were not made, till the date of filing of suit date of

decree and date of payment. The cause of action arose on 8.03.2004, when the claimant gave in writing to have his right to claim interest @ 24% in case monthly payments are not made. The Honble Supreme Court of India has upheld this version in the case of Major (Regd) Inder Singh Rekhi V/s DDA (Decision on 24.03.1988) This version has also been upheld by the Honble Supreme court of India in the case of Union of India and other V/s L.K. Ahuja and Company decided on 05.04.1988. It is therefore concluded that the stand of the respondent has no standing and is turned down and the claim of the claiming for demand of interest @ 24 % w.e.f. 8.03.2004 holds good without any shadow of doubt, for all intents and purchases and up to date of payment in the interest of justice. But at the time of submission of claim and in his correspondence, the claimant has stuck to interest @ 18% only. Therefore his claim of interest @ 18% w.e.f. the date of cause of action i.e. 08.03.2004 till the date of filing suit, date of degree and date of payment holds goods as per law. It will be worth pointing out that the respondent has never objected to the rate of interest of 18%, claimed by the claimant repeatedly in almost all letters. The details of the claim worked out is attached.

Claim No.5: Cost of proceedings For costs of proceedings, the Arbitrator awarded a sum of Rs. 2 lakhs.

6. The objections raised by the MCD in respect of Claim no.1 i.e. escalation as per Clause 10CC is that the contractor was never given an extension and hence Clause 10CC was not applicable. It is submitted that the O.M.P. 709/2011 Page 3 of 9 contractor failed to even show any evidence of actual amounts which were spent for claiming the escalation. The MCD is only liable to pay compensation under Clause 10CC during the stipulated period of contract and not beyond that. Some of the letters written by the contractor are disputed by the Ld. Counsel. It is further argued by the MCD that no evidence was placed to show that the guards were actually employed for claiming watch and ward expenses. It is further argued that the interest granted is too high.

7. On the other hand, it is submitted by Ld. Counsel for the Respondent No.1 that the evidence by way of affidavit filed by the MCD clearly admits that provisional extension was granted. The further submission is that it is a matter of record that though the project was completed almost two years after the stipulated date of

completion, no liquidated damages or compensation was levied. This is because the MCD knew very well that the delay was not on account of the contractor, but due to various factors attributable to the MCD itself. Thus, the delay being attributable to the MCD and provisional extension having been admitted to have been granted, the stipulated contractual period would be the actual date of completion and hence Clause 10CC would be applicable.

8. Insofar as ward and watch expenses are concerned, Ld. Counsel fairly submits that the only evidence is that the contractor had to employ ward and watch by deploying six guards at the building for 8 months after the completion. In respect of interest, Ld. Counsel submits that even in the agreement itself, at that time when the tender was awarded, the contractor had made it clear that the MCD ought to make monthly payments, failing which, 24% interest would be charged. This was accepted by the MCD O.M.P. 709/2011 Page 4 of 9 being a condition imposed by the contractor, without any demure. Thus, the Arbitrator has in fact reduced the rate of interest to 18% which is reasonable. It is further submitted that the judgment relied upon by the Ld. counsel for the

... Petitioner

applies under Section 34 of the CPC and not arbitral proceedings.

9. This Court has heard the submissions of the parties and has also gone through the written submissions filed by them. The first and the foremost fact that needs to be noted is that the contractor at the time when he submitted his bid in response to the tender, had done so on the following condition: Condition:

1. Our Rates are hold good for Monthly Payment if the monthly Payment not be done then 24% interest will be Charged. 10. The fact that the above condition was written in hand by the contractor at the time of submitting the bid itself shows that:

- i) Timely monthly payments were essential for the contractor, especially owing to the past history wherein the earlier contractor had exited the contract due to non-payment by MCD; ii) The contractor also agreed to carry out the work only if monthly payment was made; iii) For any delay 24% interest would have to be paid by the MCD.

11. This condition shows that that the contractor was apprehensive about the fact that the payments may not be made in a timely manner by the MCD, which apprehension in fact turned out to be true. The contractor took over the project on 22nd September, 2004, but due to the nature of the property and the condition in which it was left by the earlier contractor, certain O.M.P. 709/2011 Page 5 of 9 clarifications were sought. On 28th December, 2004, since no decision was taken by the MCD, that the work had to be stopped by the contractor. Repeated communications have also been relied upon to support the contention that timely payments were also not made. The Commissioner, MCD thereafter agreed to process the contractors payment on priority and it was only thereafter the work could be re-commenced.

12. Under these circumstances, though the payment was made in March 2006, the formal sanction for payment of Rs.20 lakhs per month was given only on 28th November, 2006 which was beyond the date of completion as per the contract. Thus, it was only when the contractor started receiving some monthly payments that he could re-commenced the work which was then completed by 3rd September, 2007.

13. The MCD does not dispute that the work has in fact been completed by the contractor and it has taken over the completed building from the contractor. Since, the first payment was made only on 31st March, 2006, for which formal sanction was given on 28th November, 2006, which was after the stipulated completion date, it cannot be stated that the contract was not extended. The MCD was conscious of the fact that even on 28th November, 2006, the contractor was continuing to perform the contract. Further the MCD admitted that provisional extension was given to the contractor. This is evident from the evidence by way of affidavit filed on behalf of the MCD which reads as under: 3. I state that the Claimant did neither seek any extension of time at any stage for completion of work nor there was any written approval from the Respondent for completion of work beyond contractual date of completion. However, in the interest of work, provisional extension of time was granted by the Respondent. Hence, O.M.P. 709/2011 Page 6 of 9 the delay is justified and unreasonable. 14. The stand that extension of time was not granted is not correct. Thus as per Clause 10CC,

escalation is liable to be granted in any contract even during the extended period and the contractor is entitled to escalation. Coming to the question as to whether any evidence was lead on payments made under Clause 10CC - it is the settled position that 10CC prescribes a formula for calculation of escalation. It stipulates the manner in which escalation is calculated. Once the escalation is awarded, the manner of calculation is done as per the said Clause itself. In any case, during the period during which escalation was claimed, the work was under progress. The fact that the work was continuing and was also completed itself is proof of material, labour etc., being employed. Thus, the award of escalation under Clause 10CC is not liable to be interfered with.

15. Para 20 and 21 of Municipal Corporation of Delhi v. Rakesh Brothers 2005(2) Arb. LR257(Delhi) are apt and are set out herein below: learned arbitrator was 20. Claim No.5 in sum of Rs.1.35 lacs was based on Clause 10(CC) of the contract provided for escalation as per formula provided therein. Clause 10(CC) has been incorporated in the contract at Serial No.26 of the general conditions of the contract. Submission of the MCD before that compensation under Clause 10(CC) had to be paid on the basis of actual occurrence of the escalation with return proof. Learned arbitrator has rejected the same by holding that this would defeat the mandatory provision of the agreement. Two Division Benches of this Court in the 21. decisions (Delhi) 300=1999(1) Arb. LR88Del.) (DB) - DDA vs. U. Kashyap and 2001 (II) AD (Delhi) 116 - DDA vs. K.C. Goyal, have held that where a clause in a contract reported as 1998 the (VII) AD O.M.P. 709/2011 Page 7 of 9 formula provides a to give escalation, award of escalation on the basis of actual increase in price of material would be impermissible. Opposition before the learned arbitrator to Claim No.5 is based on a wrong notion of law and the learned arbitrator has rightly held that escalation has to be as per statutory formula. Decision of the learned arbitrator is in complete harmony with decisions of this Court. Learned arbitrator has awarded a lessor sum on the basis of the final calculations as per formula provided. I accordingly uphold the award pertaining to Claim No.5. Thus, the award of escalation under Clause 10CC is based on the formula and not on the basis of any other evidence, which is not liable to be interefered with.

16. Coming to the next claim relating to watch and ward charges, the claim petition merely pleads as under: CLAIM No.2. Reimbursement of amount spent in keeping watch and ward after the completion of the work till taken over Rs.2,40,000/- for the building which otherwise was The claimant submits that the work was completed on 03.09.07 but the respondents failed to take over the flats due which the claimants had to keep his watch and ward the responsibility of the respondents after the completion. The claimants employed 24 hours watch and ward by deploying 6 guards and guarded the building for 8 months after the completion. The total amount thus works out to:-

"6X5000X8 = Rs.2,40,000/- In this regard the respondents were vide letter dated C-14 dated 17.04.08 requested the respondents to reimburse the salary of guards but nothing was done. Also refer our letter C-15, 16 and C-17. It is therefore prayed that the amount may please be awarded in favour of the claimants. 17. The counsel for the Respondent/contractor is unable to show any O.M.P. 709/2011 Page 8 of 9 evidence which has been placed on record that guards were actually employed and any payments were made to them. In the absence of actual evidence, no watch and ward expenses are liable to be allowed.

18. The contractor had demanded interest @ 24% as a condition in the tender. The Arbitrator has awarded interest @ 18% for the entire period from 8th March 2004 viz., the date of cause of action i.e. 08.03.2004 till the date of filing suit, date of degree and date of payment holds goods as per law. The notice of arbitration was given on 6th July, 2008 i.e. within a period of 10 months after the actual date of completion. However, in view of the fact that the work involved was in respect of the zonal office building of the MCD at Narela, which is a public amenity, the simple interest @ 18% p.a. shall be payable from date of invocation of arbitration i.e., 6th July 2008 till date of award. However, during the period when the objection petition remained pending before this Court, the interest is modified to simple interest on awarded amount @12% p.a. till today.

19. If the entire payment is made within 8 weeks, no further interest would be charged and if the payment is not made within 8 weeks, then simple interest @ 18% p.a. would be liable to be paid on the entire amount.

20. OMP is disposed of. Decree sheet be drawn, accordingly. PRATHIBA M. SINGH JUDGE DECEMBER12 2018 Rahul O.M.P. 709/2011 Page 9 of 9

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