

IN THE HIGH COURT OF DELHI AT NEW DELHI

+ FAO (O.S.) 731/2006

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Date of Decision: 16th May, 2008

R.S. BUILDERS

Petitioners

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Through: Mr. Jayant Bhushan, Sr. Advocate with
 Mr. Anil Dutt, Advocate.

Versus

\$ D.D.A. AND ANR.

Respondents

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Through: Ms. Anusuya Salwan, Advocate

CORAM:

***HON'BLE MR. JUSTICE T.S. THAKUR**

***HON'BLE MS. JUSTICE VEENA BIRBAL**

1. Whether the reporters of local papers may be allowed to see the judgment? yes
2. Whether the judgment be referred to the reporter or not?yes
3. Whether the judgment should be reported in the digest?yes

Veena Birbal, J.

1. Present appeal has been preferred under Section 37(1) of Arbitration Act, 1950 (hereinafter referred to as the Act) for setting aside the judgment of learned Single Judge of this court dated 5.7.2006 in C.S. (O.S.) 3458/2002 by which the arbitral award was modified and made rule of the court. The appellant

has also challenged order dated 1.9.2006 by which the review application of the appellant was dismissed.

2. The relevant facts giving rise to the filing of present appeal are that the appellant was awarded a contract for construction of 1323 SFS Houses at Sarita Vihar, Sector-1, New Delhi vide agreement no. 6/EE/SED-3/DDA/88-89 dated 22.9.1988 by DDA. Certain disputes arose between the parties and arbitration was initiated as per clause 25 of the agreement. The arbitrator published his award on 4.8.1992, awarding a sum of Rs. 12,99,750/- to the appellant along with simple interest @ 15% per annum from the date of publication of the award to the date of actual payment or decree of the court whichever is earlier.
3. Respondent DDA filed its objections under Section 30 & 33 of the Act. The objections were ultimately limited to claim No.2, Item no.1, relating to "preparation of sub-grade". The arbitrator awarded a sum of Rs.8,97,564/- towards this claim @ Rs.138.38 per sq. m. The objection raised by DDA was that the agreed

rates were derived from Delhi Schedule of Rates, 1985, (hereinafter referred to as "DSR") and the rate of Rs. 138.38 is payable @ 100 sq. mts. and not for one sq. mtr.

4. The learned Single Judge upheld the contentions of DDA and modified the award. It was held that the appellant cannot take advantage of typographical mistake in the agreement and the claim raised by it was clearly an afterthought. The learned Single Judge noted that agreement between the parties shows that the rate of Rs.138.38/- is applicable for per 100 sq. mts. because as per the agreement executed between the parties, the total area shown is 27361 sq. mts. @ Rs.138.38 amounting to Rs.37,862. The running bills for the quantity of work done under this item were prepared on the basis of 100 per sq. mtr. and the plaintiff (herein appellant) accepted the payment in past without raising any objection.

5. The counsel for the appellant argued before us that the Single Judge has erred in substituting the rates mentioned in the agreement with those in Delhi Schedule of Rates. Clause 12(iii)

of Contract specifically provides that “DSR” are to be referred only if no rate is specified in the agreement and the same cannot be derived from similar class of work in the contract. Clause 12(iii) is reproduced as under:

“If the altered, additional or substituted work includes any work for which no rate is specified in the contract for the work and cannot be derived from similar class of work in the contract then such work shall be carried out at the rates entered in (current CPWD schedule of rate for Delhi). Schedule of rates 1985 with upto date correction slips, minus/plus percentage which the total tendered amount bears to the estimated cost of the entire work put to tender.”

6. It is contended by counsel for appellant that in the present case, the agreement specifically provided the rate to be Rs. 138.38 per sq. m. and the Single Judge erred in relying upon Clause 12(iii) of agreement. In any event, it is contended that learned Single Judge failed to appreciate that when two views are possible and Arbitrator takes one, the Court cannot substitute its own view unless the decision of the arbitrator is totally perverse and based on wrong application of law. It is argued that the approach adopted by learned Single Judge is contrary to settled principle as laid down in **DDA vs. Bhagat Construction Co.**

Pvt. Ltd. , 2004 (3) ArbLR 548 (Del) and K.C. Sharma vs. DDA, 2006 (88) DRJ 525 (DB).

7. It is further contended that learned Single Judge had no occasion to modify the arbitral award as there was no error apparent on the face of the record. Reliance has been placed upon **M/s Sudersan Trading Co. vs. Govt. of Kerala and Others, AIR 1989 SC 890** and **Hindustan Tea Co. vs. M/s Shashikant and Co., AIR 1987 SC 81** wherein it has been held that if on a view taken in a contract, the decision of arbitrator on certain amounts is possible, though not possible, the award cannot be examined by the court.
8. Counsel for respondent on the other hand supported the judgment of learned Single Judge.
9. We have considered the submissions made and perused the record.
10. Schedule attached to the agreement and signed by the parties provides as under:

Description of item	Qty.	Unit	Rate	Amount
<u>Earth work:</u> Preparation of sub-grade by excavating earth to an average of 22.5 cm depth dressing to camber and consolidating with road roller including making good the undulation etc. and disposal of surplus earth lead upto 50m.	27361 m ²	5 cm.	138.38 (Rs. One hundred thirty eight & paise thirty eight only)	37862.00

This is a clear indication of the fact that the rate payable was @ Rs.138.38 per 100 sq. m. and not Rs.138.38/- per sq. m. Otherwise the total amount would have been much higher and not Rs.37862.00/- as is stated above.

11. Clause 17.1 of “DSR 1985” which was in existence on the date of agreement is as follows:

No.	Description	Unit	Rate (Rs.)
17.1	Preparation of sub-grade by excavating earth to an average of 22.5 cm depth, dressing to camber and consolidating with road roller including making good the undulations etc. and disposal of surplus earth lead upto 50 metres.	100 sq.m.	138.35

It may be noted that the work enumerated in the schedule of the agreement and the “DSR 1985” is precisely the same and so is the amount. Only there is a difference in unit which the learned Single Judge has found and, in our opinion, correctly to

be a typographical error. The relevant entry has to be read as a whole and in the context of the agreement which was estimated to be for Rs.2091516/- and tender amount is Rs.2509819/- only. There is palpably gross error in interpretation of terms of agreement by the Arbitrator which cannot be considered as merely error of fact or preference of one interpretation over the other possible one. It is a case where the Arbitrator has failed to consider the relevant clauses of the agreement as also relevant material placed before it. Such an award amounts to misdirection in law as is held in **Bharat Coking Coal Limited v. M/s. Annapurna Construction** AIR 2003 SC 3660.

12. The learned Single Judge has noted that the bills were prepared taking each unit as comprising of 100 sq. mt. which shows the understanding of the parties themselves. The appellant has tried to take the advantage of typographical omission in the agreement which has been allowed by the Arbitrator without application of mind ignoring the terms of agreement and conduct of parties. A cumulative reading of the agreement, DSR and the bills drawn clearly shows that the rates

in question was applicable for 100 sq. mt. In our opinion, the Arbitrator has mechanically construed the terms of the agreement without considering the typographical omission which if allowed would cause grave miscarriage of justice.

13. The award is based upon a proposition which is completely irrational and misdirected. The award stands vitiated on account of serious error apparent on the face of it. We are of the view that learned Single Judge has rightly modified the arbitral award in respect of claim No.2 and the decision calls for no interference.

14. The appeal is hereby dismissed with no order as to costs.

Veena Birbal, J.

T. S. Thakur, J.

May 16 , 2008
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