

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

+ O.M.P. 273/2005

Dated: 05.08.2008

PT.MUNSHI RAM AND ASSOCIATES Petitioner
Through Mr. D. Moitra, Advocate

versus

DDA Respondent
Through Mr. D.S. Mahendroo, Ms. Ruchira Kumaramanglam,
Advocates

% 05.08.2008

CORAM:

Mr. Justice S. Ravindra Bhat

- | | | |
|----|---|-----|
| 1. | Whether reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to the Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

Mr. Justice S. Ravindra Bhat (OPEN COURT)

1. In these proceedings under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter "The Act"), the Award dated 5th January, 2005 of a Sole Arbitrator Justice P.K. Bahri (Retd.) has been challenged. The Arbitrator was appointed by orders of this Court.

2. The brief facts necessary for deciding this case which involves a narrow question are outlined hereafter.

3. The petitioner was awarded a work for construction of 288 Janata houses for landless persons and Harijans at Basant Village, the work included internal development. According to the tender conditions and the agreement arrived at, the work commenced on 26.01.1990 and had to be completed on 25.04.1991. The stipulated value of the work was Rs. 96,94,048/-. The work prolonged and was ultimately completed, according to the record on 29.05.1992. The respondent granted extension of time for completion of work without levying any penalty.

4. The petitioner made certain demands alleging withholding of payments by and claiming amounts from the respondent DDA. The matter was referred to arbitration and Justice P.K. Bahri(Retd.) was appointed as sole Arbitrator by an order dated 01.06.20901. The claimant made as many as 16 claims; the Arbitrator after considering the entire documentary oral evidence as well as the pleadings of the parties, awarded sum of Rs. 3,05,714/-. The petitioner has preferred objections and contended that the award is unsustainable on various grounds.

5. During the course of hearing, Mr. D. Moitra, learned counsel confined the challenge to the Award on the issue of findings by the Arbitrator in respect of the claim Nos. 8,9,10 and 11 which concerned damages for holding staff and machinery and loss of profit, escalation in

market rates, under utilization of man, materials, tools and plants.

6. The relevant part of the discussion and the findings of the Arbitrator on this head are contained in paras 8.9.10,11,14 and 58. They are extracted below:

"8. However, the claimant on expiry of the stipulated period for completion of the work sent a letter-dated 12.5.1991 (C-36). In this letter the claimant made out following points:-

1. Despite various hindrances not attributable to it, the work approximately of the value of the contract, stood completed within stipulated period of completion.

2. The claimant expressed its intention to continue to do the work so as to complete the work but it wanted decisions on the following points:-

a. Extension of time without levy of compensation be given in accordance with the balance quantum of work.

b. As there had been escalation rates of material & labour and clause 10.cc was not enough to compensate for the same, 40% enhancement in the rates be given for the balance work.

c. All the amounts withheld or less paid in the running bills be released.

d. Various items, which were payable extra and not yet paid, be paid in the next running bill.

9. The respondent had in its letter dated 25.4.1990 (R-7) refused that the claimant had suffered any loss of rs.2,000/- per day as some labour engaged by the claimant was not kept idle as they were shifted to the work of construction of the boundary wall. In regard to some restrictions placed on traffic by the police, the claimant was asked to co-ordinate with the police as such problems were already known to the claimant who inspected the site before giving its tender. The respondent also informed that decisions regarding plinth beams for all blocks as per already supplied drawings stood communicated. It is to be emphasized that the respondent granted extension of the period for completion of the work without levy of any compensation.

10. Therefore the respondent did not agree to the conditions mentioned by the claimant in its letter seeking extension. In such a fact situation the claimant had two options. Either the claimant ought to have rescinded the contract there and then as the respondent did not agree to grant any

enhancement in the rates or the claimant could continue the work under the rates already stipulated in the contract.

11. The claimant made a choice of continuing the work on the agreed terms of the contract as the claimant did not rescind or abandon the remaining work of the contract. It is also significant to note that the claimant did not thereafter put the respondent to notice that it was executing the remaining work and would claim higher rates or claim any losses suffered by it due to prolongation of the contract. Thereafter the claimant sent letters (C-37 dated 15.7.1991, C-38 dated 10.8.1991, C-39 & C-40 dated 11.10.1991, pointing out non-supply of material causing delay and requested that such hindrances be recorded in the register of hindrances.

14. At any rate the work stood completed on 29.5.1992. The claimant, while executing the work beyond the stipulated period, did not put the respondent to notice that it would be executing the remaining work and charge any higher rates or would claim any compensation for any loss to be incurred by the claimant. Section 55 of the Contract Act clearly lays down that in case a party delays the performance of the contract, the aggrieved party while accepting late performance has to give notice of its intention to claim damages or compensation for loss which may be caused to it by such late performance. In absence of such notice the aggrieved party is not entitled to have any such extra payment in shape of higher rates, overheads, loss of profits etc.

58. All these claims for Rs. 24,000/-, Rs. 1,13,39,928/-, Rs. 11,16,383/-, Rs. 4,93,855/- as damages for idling of staff and machinery, loss of profit, escalation in market rates and under utilization of men, material, tools and plant are based on the plea that prolongation of the contract was due to ground imputable to the respondent. I have already given a finding that no proper notice at the relevant time was given under Section 55 of the contract for claiming all such alleged losses. The claimant is, thus, not entitled to have any of such claims. These claims are rejected."

7. Learned counsel urged that a textual reading of the Award discloses that the Arbitrator mis-construed the materials on record in declining to render any findings on the question of appropriate damages and compensation. Counsel urged that C-36, a letter dated 12.5.1991

had categorically demanded a 40% enhancement in the rate as a condition of extension of the time beyond the stipulated date. The respondent DDA in answer to it had relied on Ex. R-7, a letter dated 25.4.1990. Counsel contended that a glance at the Award and the relevant documents would disclose that the letter seeking extension dated 12.5.1991 could not have been replied or dealt with by Ex. R-7 a letter written much earlier.

8. For a better appreciation of the controversy, it would be necessary to extract Ex. C-36 which reads as follows:

*"To
The Executive Engineer
S.W.D.-7, D.D.A.
Vasant Kunj, New Delhi.*

*Subject:- Const. of 288 Janta Houses for Landless and Harijans
at Basant Village including internal development.*

Dear Sir,

The above work was awarded to us with date of start as 26.1.1990 stipulated to be completed on 25.4.1991. As per the award letter the scope of work was construction of 288 Janta House at the estimated cost of Rs. 96,94,047/-.

Even after various hindrance, not attributable to us, we have completed approximately same amount of work allotted to us within the stipulated period. However, it is pointed out here that lot of further work is to be carried out at site to complete the allotted 288 houses.

As our stipulated time for completing the project is over and as we have completed the same quantum of work allotted to us on time therefore our responsibility as per the contract stand discharged.

However, we being a prudent contractor are interested to complete all the 288 Janta Houses allotted to us but on following conditions:-

- 1. Extension of time without levy of compensation be given to us in accordance with the balance quantum of work.*
- 2. You also know that in law few months rates of building materials and labour have risen sharply and the escalation under clause 10 CC is not enough to compensate for this rise in the market. Therefore we will be charging 40% above our quoted rates for the balance work to be done.*
- 3. All the withheld amount and less paid amount in our various R/A Bills will be released immediately.*
- 4. Various Items, which are payable extra, however not paid by you, will be paid in our next R/A Bill.*

These are our genuine demands seeing the present market condition.

Thanking you,

Yours faithfully,

(L.C. SHARMA) M.D.

For Pt. Munshi Ram & Associates (P) Ltd."

9. As evident from the above, the petitioner agreed to extension of time without levy of compensation but sought for enhancement of 40% above the quoted rates for the balance work to be done alleging that there was steep enhancement of the rate for various rates and costs which were not compensated under Clause 10(cc). The respondent, however, placed reliance upon Ex. R-7, a letter which was almost a year earlier. The Award discloses that the

work was to commence on 26.1.1990 and was to be completed on 25.4.1991; Ex. C-36 is dated 12.5.1991. In the circumstances, the objection of the petitioner as to the relevance of Ex. R-7 which is dated 25.4.1990 is justified and substantial.

10. In the course of the submission, Mr. Mahendru stated that para 18 of the award somewhat deals with the relevant claim Nos. 8,9,10 and 11 and has discussed the impact of Ex. C-36. Counsel for the petitioner submitted on the other hand that consideration of the subsequent running bills is not relevant in such cases because in such circumstances payment is made on ad hoc basis and final bills are drawn after the work is completed.

11. The foundation of the Arbitrator's reasoning is contained in the previous discussion which deals with the claim for damages on the basis of letter dated 12.5.1991 has having been answered by the earlier letter of 25.4.1990. Further, in the absence of any other circumstances, the Arbitrator's reasoning that such demands were impliedly declined, cannot be supported.

12. Although, the jurisdiction of this Court is circumscribed after enactment of the Act yet the Court can intervene with Awards where it discloses patent errors of law or findings which would include findings inconsistent with the materials on the record. In this case, the Court is persuaded that the Award to the extent it had declined damages for the reasoning indicated in it cannot be sustained. As a result, the parties would have to approach the Arbitrator afresh or seek recourse to arbitration in accordance with the agreed procedure, anew, so far as the

Claim Nos. 8,9,10 and 11 are concerned.

13. For the above reasons, the petition is partly allowed. The award to the extent it declines compensation or damages under Claim Nos. 8,9,10 and 11 is hereby set aside. It is open to the parties to seek recourse to arbitration in accordance with law.

14. The petition is allowed in the above terms.

S. RAVINDRA BHAT,J

AUGUST 05, 2008

dkg