

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

+ **OMP 155/2006**

Reserved on : February 7, 2008.

Date of Decision : April 7, 2008

MUNICIPAL CORPORATION OF DELHI Petitioner

Through Ms. Smita Shankar, Ms. Gurupyari
Dwivedi, Advocates

versus

M/S. CONCRETE INDIA LTD. Respondent

Through Ms. Anusuya Salwan, Advocate

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

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| 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

1. In this petition, under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter called “the Act”), the Municipal Corporation of Delhi (hereafter referred to as “the MCD”) challenged an Award of the Arbitral Tribunal (hereafter called “the impugned Award”) dated 31.12.2005. The impugned Award allowed claims against the

MCD. The facts are brief and broadly undisputed. The MCD awarded a contract for construction of the school building at Sri Nagar near Rani Bagh, Keshav Puram through a work order dated 15.12.1995 to the respondent (hereafter variously referred to as "the claimant" and "the contractor"). According to the agreement, the work had to be completed within 18 months i.e. 24.6.1997. The work, however, was completed on 16.11.1998. The contractor claimed certain amounts and the dispute was referred in terms of the agreement to arbitration. The Arbitrator entered upon his reference on 21.11.2000. The impugned Award was made thereafter. The MCD objected to the Award on the ground that it is opposed to public policy and is patently illegal in so far as it accepts the contractor's claim quantified in Claim No.1 (Rs. 4,08,546/-), Claim No. 4 (Rs. 6,00,082), Claim No. 5 (Rs. 4,68,264/-) and Claim No. 10 (interest at 18% per annum) from the award till realization of the amount.

2. The MCD objects to the acceptance of Claim No. 1 i.e. payments of amounts on account of escalation clause during the extended period of contract. Clause 10 CC of the contract had enabled the contractor to claim escalation in certain costs during the subsistence of the contracts such as price of specified material, wages, fuel costs etc. It is claimed that the contractor was paid those escalation charges during the subsistence of the contract. The MCD alleges that such escalation can be paid beyond the contractual

period only if the extension of time is finally approved by the competent authority without claiming compensation. The MCD alleges that in this case no such approval was granted by the competent authority; the contractor was granted only provisional extension of the time. According to the MCD, compensation/penalty was levied—a fact brought to the notice of the Arbitrator. It is also contended that the contractor was bound to prove actual incurring of escalated expenses; these were incurred only during the agreed period of contract. The respondent failed to discharge this burden—it did not produce any document or material in support of the escalation claim for the extended period. Having accepted changes in the parameter of work such as alteration of architectural drawings etc., after finalization of the tender, but before entering into an agreement, unequivocally, the contractor could not complain of increase in work and was bound by the schedule of rates.

3. It is next contended that the Award discloses a patent illegality as it allows Claim No.4. In this claim, the contractor had alleged that its tools, machinery, workers and labour were kept idle for 1 year 4 four months and 22 days. It has alleged that site was unavailable due to the existence of a pre-fabricated structure which had to be dismantled. The contract to dismantle them had been awarded to someone else. According to the contractor, the clear site was handed over to it only after eight months from the due date

of commencing/start of work. The claimant had also alleged that there was shortage of cement. The Arbitrator awarded the sum of Rs. 6,00,082/- due to idle machinery and labour for that eight month period. While doing so, the Arbitrator relied upon entries in the Hindrance Register and held that the MCD itself admitted to obstructions in various forms for a period 379 days.

4. The findings on claim No. 4 are challenged on the ground that the Arbitrator committed an illegality in relying only on the Hindrance Register which at best is a pointer and cannot be understood to disclose conclusive proof of obstruction at the site. It is averred that the claimant did not produce any other material and on the contrary the MCD had attempted to rely on evidence which was examined by the Arbitrator but ignored. It is also alleged that the Hindrance Register shows a total hindrance of 349 days and not 379 days. Reliance is placed upon extracts of the Cement Register to show that materials were issued to the contractor on several dates.

5. The MCD attacks the findings on Claim No. 5 as completely opposed to law and disclosing a patent illegality. It is averred that the contractor completed his work after provisional extension of time. The MCD did not terminate the contract and no part of the work was left un-executed. It is alleged that in such cases, the contractor should establish that had he received the amount due, he could have utilized it for some other business for

which he would have earned profit. Unless such plea is established, the claim of loss of profit should not be granted.

6. The contractor in its reply refutes the attacks to the award as unfounded. It alleges that the Award is a well reasoned one and based on the materials on record. The Clause 10-CC is a part of the contract and the Arbitrator was not justified in segregating the two periods i.e. contractual period and the extended period in its application. The contractor denies the contention about its dis-entitlement to the payment under that condition or that it was levied compensation at 1%. It alleges that the condition was correctly applied after due interpretation.

7. The contractor relies upon the Award to say that the findings on Claim No. 4 were perfectly justified and reliance placed on the Hindrance Register was sound. It is generally contended that the other findings on damages, on loss of profitability and on the interest, are sound and cannot be characterized as patent illegalities, or containing factors that can persuade the Court to interfere with the Award under Section 34 of the Act.

8. Ms. Smita Shankar, learned counsel relied upon the text of clause 10-CC and contended that the said condition applies in the first instance only during the contract period; the MCD had undoubtedly made the payment for such period. It was contended that escalation charges were payable for the extended period only upon approval by the

competent authority. In this case, only provisional extension was granted to the contractor. She relied upon the letter dated 10.3.1998 in support of the contention. Counsel submitted that this being provisional, and the contractor having accepted it, he could not claim any amount towards escalation in the absence of un-conditional acceptance. Learned counsel also relied upon the noting dated 18.10.2005, approved by the competent authority subsequently that the extension of time was granted upto 16.11.1998 with levy of 1% compensation.

9. As regards the Award in respect of Claim No.4, counsel contended that the disproportionate weight attached to the Hindrance Register in the Award was not justified. It was contended that even the finding that the site could not be utilized for the work for 379 days is factually incorrect as a bare reading of the register would show that actually the delay which could be attributed was 349 days. Counsel contended that no evidence was produced by the contractor in support of the contention that the work had halted completely. No details were produced nor was any evidence led about when tools and machineries and staff were kept idle. It is contended that entries occurring in Items 3 to 5 of the extract of the Hindrance Register, which is a part of the record show that the work could not have come to halt. In support this, counsel relied upon entries in the Cement Register and the Measurement Book (MB) to say that the work had been carried out

when earth work such as digging etc. took place. Learned counsel placed considerable reliance on the fact on three separate dates cement was issued to the contractor which itself evidences that work was possible.

10. Learned counsel attacked the Award on as Claim No. 5 i.e. loss of profitability. It was contended that loss of profit is normally allowed only in cases where the contract is rescinded or where work is less than what is contracted for is accepted. Here, there was un-executed portion of the work justifying the contractor to claim amounts for the extended period. Learned counsel relied upon the decision of this Court in *Delhi Jal Board vs. Subhash Pipes Ltd.*, 2005(2) Arb. L.R. 213 (Delhi); *M/s. A.T. Brij Paul Singh & Bros. v. State of Gujarat*, AIR 1984 SC 1703; *Dwarka Das vs. State of Madhya Pradesh*, AIR 1999 SC 1031 and the decision of the Supreme Court in *Bharat Coking Coal Ltd. vs. L.K. Ahuja*, 2004 (5) SCC 209.

11. Ms. Anusuya Salwan, learned counsel for the contractor submitted that the finding of the Arbitrator was well reasoned and should not be interfered with. It was submitted that after accepting the work in November 1998, it is not open to the MCD to allege that extension of time was not granted in terms of contract to dis-entitle the respondent from the benefit of Clause 10-CC. She relied on the text of the said condition and submitted that the interpretation sought to be placed by the MCD is unsupportable in law. Learned

counsel also contended the question of competent authority levying any compensation for the extended period thereby depriving the benefit of escalation and wages and costs, cannot be now raised as no such material was placed on the record in arbitration proceedings; in any event the noting sought to be relied is of the year 2005.

12. Learned counsel relied upon the findings of the Arbitrator to say that the Award on claim No. 4 was based on the materials available in the proceedings. It was contended that the Hindrance Register was as good as a piece of evidence as any, since it contained signatures of the nominated representatives of MCD on a daily basis. In preferring to given importance to this document, the Arbitrator did not fall into any error warranting interference with his Award. Learned counsel contended that issue of material or entries in the Measurement Book could not be construed as prejudicial to the claim for cost of idle equipment, machinery and labour. It was contended that in this case a clear site was to be given for construction. Such a clear site was not available for a long period as pre-fabricated materials were lying there. Merely because cement was issued from time to time to enable the contractor to stack it and commence operation upon the availability of site could not foreclose his claim No. 4.

13. Learned counsel contended that the Arbitrator did not commit any error in law in awarding damages for lost of profitability. This was based on standard practices of the

trade. Learned counsel relied on the decision reported as *P.C. Sharma & Anr. v. Delhi Development Authority*, 2006 III AD (Delhi) 357 and *Narayan Das R. Israni vs. Delhi Development Authority*, 2005 VIII AD (Delhi) 556 to say that his loss of profit is a perfectly justifiable in an Award adjudicating claims on construction contracts even where the period for performance is extended. Learned counsel relied upon judgment reported as *Mcdermott International Inc. vs. Burn Standard Co. Ltd. & Ors.*, 2003 (5) SCC 505 to say that if the Arbitrator, takes a plausible view even if not completely sound in law, the Court should not interfere with unless patent illegality appears on the fact of the record. It was contended that with the decision in *Subhash Pipe (supra)*, the scope for interference under Section 34 has been limited.

14. Clause 10-CC of the contract reads as follows:

"Clause 10 CC : If the prices of materials used and the material supplied or services rendered at fixed priced by the department in accordance with clause 10 and from 27 and clause 28 of General condition before and/or wages of labour required for execution of the work increase, the contractors all be compensated for such increase as per provisions detailed below and the amount of contractor shall accordingly be valid, subject to the condition that such compensation for escalation in prices shall be available only for the work done during the stipulated period of the contract, including such period for which the contractor validity is extended under the provisions of clause 5, of the contract without any action under clause-2, and also subject to the condition that no such compensation shall be payable for the work for which the stipulated period of completion of 6 months or less."

15. A reading of the above clause shows that it applies not only during the contract period, but also the extended period; the conditions being that extension is

“without any action under clause-2, and also subject to the condition that no such compensation shall be payable for the work for which the stipulated period of completion of 6 months or less.”

An attempt was made on behalf of the MCD to say that the extension in this case was not given by the competent authority, or that the order granting it was provisional. Here, the materials show that the letter categorically stated that extension was being given; though it used the word provisionally, MCD did not show that the letter was ever withdrawn, or the decision disapproved; the attempt made now, in 2005 was to show existence of some office notings to say that compensation to the extent of 1% was proposed, and approved. However, it is not even the petitioner (MCD's) case that such a decision was communicated to the contractor or implemented.

16. In view of the wording of the clause and the fairly straightforward interpretation placed on it by the arbitrator, this court is unable to accept the contention that such determination and acceptance of the first claim is a patent illegality, or such as to attract the odium of being contrary to public policy. The interpretation placed on the clause is certainly plausible; even reasonable. The MCD was beneficiary to the completion of

work during the extended period; it did not object to the extension, or make any contemporaneous reservation under Section 55 of the Contract Act. The MCD's contention about segregating the two periods – one, contractual when the claimant would be entitled to escalated costs, and the other, extended period, where he would get such costs only if higher costs are proved, strains logic; it introduces different burdens of proof for interpreting the same condition. The objective of the condition is compensatory, i.e to ensure that the rise in costs of certain inputs is neutralized by an agreed formula. The interpretation suggested by the MCD nowhere achieves that objective; it creates an artificial distinction between two situations, despite the underlying fact situation being the same. In the circumstances, the award, as far as it allowed Claim No. 1 cannot be called patently illegal.

17. As far as Claim No. 4 is concerned, the impugned award went by the Hindrance Register which was undeniably signed by the MCD's representatives, on a daily basis. The object of that document is to record, on a daily basis, whether the progress of the work on site was hampered (or "hindered") for any reason. The MCD admits that 349 days have been shown as idle, on account of hinderance of some kind; yet it denies the claim. The basis of this denial is that the petitioner got cement issued on certain dates, which had been recorded in the hindrance register; it is claimed that this shows that work

was done, and therefore, capable of being done.

18. The approach of the arbitrator on this head, in this court's opinion, cannot be faulted as unreasonable. The hindrance register was an agreed document, specifically meant to show if, and what kind of hindrances existed to hamper the work. The arbitrator allowed 379 days as admissible to calculate the cost of idle labour, machinery and equipment. The MCD states that it has issued cement to the contractor on some dates. There might have been some entries in the cement register; yet those cannot be conclusive to displace the existence of some obstruction to the work, at site. The work required handing over of the site, without any obstruction. The site actually had some prefabricated materials. In these circumstances, unless the entire clear site had been handed over, the claimant could not have started its work. The issuance of cement, on certain dates, does not prove that work was being done on those dates; it is evidence to the fact that cement was issued, perhaps in preparation of the impending work; conceivably to stock it so as to avoid loss of time later. The arbitrator's determination in this regard is hardly illegal; certainly it is not a patent illegality warranting interference with the award.

19. As far as the claim for loss of profit was concerned, the contractor had demanded it, on account of the probable profit he would have made, if the contract had been

completed and he had been paid in time. The arbitrator had awarded escalated costs for the various items such as labour cost, increased fuel and other expenses. Therefore, prima facie the contractor had not been put to loss. The claim for compensation due to idle labour and equipment cost/ rent too was accepted. If the claimant wanted amounts towards loss of profit, it had to prove such loss. Unlike most cases, where damages or compensation is claimed for breach of contract here the contractor is seeking damages for extension of contract and the loss of opportunity to put the money, if it were received on time. Apart from imponderable factors which control such anticipated profits, the claim would be tenuous and vague unless the claimant actually proves its losses.

20. In *Bharat Coking Coal Ltd. v. L.K. Ahuja*, (2004) 5 SCC 10 the Supreme Court held that :

*“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.*⁵ 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.”*

Now, in this case, there is no question of damages or compensation in the normal sense as understood, having occurred. The contract was performed; extension was granted and the contractor accepted the extension, when granted. At that stage, the contractor did not exercise its right to say that the extension was being accepted subject to its right to claim damages, under Section 55 proviso of the Contract Act. Undeniably the parties agreed to extend the time. The contractor also did not issue notice demanding such compensation at any stage after performance. The contractor also did not adduce evidence to show that the said amounts would have been invested, and might have fetched a particular amount as returns. It is only in the latter event, i.e proof of such denial of reasonable return on the consideration being paid in time, the arbitrator or court would be within its right to award loss of profit compensation. The Petition is allowed partly, to that extent.

21. Having considered the materials, this court is of the opinion that the contractor cannot claim amounts towards loss of profit. The award no doubt is based on a formula, to calculate probable loss of profit. Yet, in the absence of some material justifying application of that formula, this court is of opinion that the impugned award is unsustainable on that score. The finding, bereft of evidence and containing award in Claim No. 5 for loss of profits, therefore, is plainly and patently illegal. It requires to be set aside to that extent.

22. The court does not see any reason to make a departure as regards the rate of interest granted. Being a commercial transaction, the higher rate of interest is neither opposed to public policy, nor patently illegal.

23. In view of the above discussion, the present petition succeeds in part. The award, to the extent it directs payment of Rs. 4,68,264/- to the contractor, on account of loss of profit, cannot be sustained; it is therefore, set aside. Subject to the above, the petition has to fail. It is accordingly, directed that the award to the extent it allows Rs. 4, 68, 264/- is hereby set aside. The petition is allowed partly, to that extent.

S. RAVINDRA BHAT,J

April 7, 2008

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