

+ FAO (OS) 322/2007

DELHI DEVELOPMENT AUTHORITY Appellant
Through : Mr. Bhupesh Narula, Advocate

ANAND AND ASSOCIATES Respondents
Through : Mr. Harish Malhotra, Sr. Advocate
with Ms. Namita Choudhary,

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

This appeal arises out of an order dated 18/4/07 passed by a Learned Single Judge of this Court whereby OMP No. 144/05 under Section 34 of the Arbitration and Conciliation Act 1996 filed by the appellant has been dismissed.

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appellant DDA had committed defaults in the discharge of its obligations under the agreement thereby rendering the termination of the contract illegal. On that finding, the Learned Arbitrator held the contractor entitled to the refund of a sum of Rs. 1 lac towards security deposit and a sum of Rs. 10,42,136/- representing the balance amount payable to the contractor for the work done by it but not paid. The arbitrator further held the respondent contractor entitled to a sum of Rs. 3,50,000/- towards increase in the price of materials and a sum of Rs. 1,91,659/- on account of increase in the labour charges. A further sum of Rs. 3,48,563/- was awarded by the arbitrator on account of loss of anticipated profit on the balance of the work which the contractor could not complete on account of termination. A total sum of Rs. 20,32,358/- was thus awarded by the arbitrator in favour of the respondent with interest @ 18% per annum from 25/4/87 till realisation with cost. The arbitrator directed that if the amount awarded by him was paid by the DDA within a period of two months from the date of this award, the rate of interest would stand reduced to 12% per annum for the entire period mentioned above.

3. Aggrieved by the award made by the arbitrator, the appellant DDA filed a petition under Section 34 of the Arbitration and Conciliation Act 1996 for setting aside the same on several grounds. These grounds were examined by Ms. Reva Khetrapal, J. and rejected in terms of an order dated 18/4/07. Relying upon the decisions of the Hon'ble Supreme Court in *Santa Sila Devi Vs. Dhirendra Nath Sen reported in AIR 1963 SC 1677; Hindustan Tea Co. V/s K. Sashikant and Anr. AIR 1987 SC 81; International Airports Authority V/s K.D. Bali AIR 1988 SC 1099, Gujrat Water Supply and Sewerage Board V/s Unique Erectors (Gujrat (P) Ltd. AIR 1989 SC 973; Bhagwati Oxygen Ltd. V/s. Hindustan Copper Ltd. AIR 2005 SC 2071* the Court held that while dealing with the objections to the arbitral award it was not sitting in appeal over the findings recorded by the arbitrator nor could the Court examine the correctness of the award on a reappraisal of the evidence adduced before the arbitrator. The

Court affirmed the finding of the arbitrator that time was not the essence of the contract and that the appellant Authority had committed a breach of its obligations under the contract thereby entitling the contractor to the refund of the amount of security lying in deposit with it. The Court also affirmed the finding of the learned arbitrator that the extra cost incurred by the contractor on account of the breach of its obligations by the appellant authority entitled the contractor to claim the reimbursement of the same from the authority. The forfeiture of the security amount could not, observed the Court, be justified in the light of that default.

So far as the claim of Rs. 10,42,136/- on account of the work done by the contractor and not paid for is concerned, the learned Single Judge held that the claim was rightly allowed by the arbitrator on the basis of joint measurement of the work recorded under the order of the High Court. Similarly, the award of a sum of Rs. 3,50,000/- on account of the increase in the price of material was also held to be justified as was the sum of Rs. 1,91,659/- on account of increase of labour charges. Relying upon the decision of the Hon'ble Supreme Court in ***Brij Paul Singh Vs. State of Gujrat AIR 1984 SC 1703*** the Court upheld the award made by the arbitrator even in regard to a sum of Rs. 3,48,563/- on account of loss of profit. The Court upheld even the award of interest by the arbitrator relying upon the decision of Hon'ble Supreme Court ***Santok Singh Arora Vs. Union of India and Ors. AIR 1992 SC 1809*** and dismissed the petition.

4. We have heard learned counsel for the parties and perused the record. The scope of the interference with an arbitral award has been settled by a long line of decisions rendered by the Hon'ble Supreme Court including those upon which reliance has been placed by the learned Single Judge. The decisions authoritatively declare that a Court hearing objections against an arbitral award does not sit in appeal over the same nor can it reappraise evidence adduced before the arbitrator to substitute the findings recorded by the arbitrator by those arrived at by the Court. The jurisdiction of a Court while dealing with an arbitral award was limited

to the grounds enumerated under Section 33 of the Arbitration Act 1940 which provision is now replaced by Section 34 of Arbitration and Conciliation Act 1996.

Section 34 of the Act reads as under:-

“34. Application for setting aside arbitral award.

34. Application for setting aside arbitral award. (1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and subsection (3).

(2) An arbitral award may be set aside by the Court only if-

(a) the party making the application furnishes proof that-

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that-

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation.-Without prejudice to the generality of sub-

clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.”

5. A plain reading of the above would show that an arbitral award can be questioned only on one or more of the grounds enumerated under the above provision. It is not in dispute that the petition filed by the appellant under Section 34 did not make out a case for interference with the award on any one of the grounds enumerated in Section 34 (2) (a) (i) to (v) . Such being the position, the only provision to which the appellant could refer in support of its objections was Section 34 (2) (b) (i) and (ii). Even under that provision clause (i) had not been invoked by the appellant nor is it the case of the appellant that the subject matter of the dispute, was not capable of settlement by arbitration. The only ground to which the appellant could possibly refer in support of its challenge was Section 34 (2) (b) (ii) that the award is in conflict with the public policy of India. As to what is public policy of India has been explained by the Supreme Court in **2003(5) SCC 705 Oil & Natural Gas Corporation V/s Saw Pipes Ltd.** in the following words:-

*“From the judgments discussed above, it can be held that the terms “public policy of India” is required to be interpreted in the context of the jurisdiction of the court where the validity of award is challenged before it becomes final and executable. The concept of enforcement of the award after it becomes final is different and the jurisdiction of the court at that stage could be limited. Similar is the position with regard to the execution of a decree. It is settled law as well as it is provided under the Code of Civil Procedure that once the decree has attained finality, in an execution proceedings, it may be challenged only on limited grounds such as the decree being without jurisdiction or a nullity. But in a case where the judgment and decree is challenged before the appellate court or the court exercising revisional jurisdiction, the jurisdiction of such court would be wider. Therefore, in a case where the validity of award is challenged, there is no necessity of giving a narrower meaning to the term “public policy of India”. On the contrary, wider meaning is required to be given so that the “patently illegal award” passed by the Arbitral Tribunal could be set aside. If narrow meaning as contended by the learned Senior Counsel Mr. Dave is given, some of the provisions of the Arbitration Act would become nugatory. Take for illustration a case wherein there is a specific provision in the contract that for delayed payment of the amount due and payable, no interest would be payable, still however, if the arbitrator has passed an award granting interest, it would be against the terms of the contract and thereby against the provision of Section 28(3) of the Act which specifically provides that “Arbitral Tribunal shall decide in accordance with the terms of the contract”. Further, where there is a specific usage of the trade that if the payment is made beyond a period of one month, then the party would be required to pay the said amount with interest at the rate of 15 per cent. Despite the evidence being produced on record for such usage, if the arbitrator refuses to grant such interest on the ground of equity, such award would also be in violation of sub-sections (2) and (3) of Section 28. Section 28(2) specifically provides that the arbitrator shall decide **ex aequo et bono** (according to what is just and good) only if the parties have expressly authorised him to do so. Similarly, if the award is patently against the statutory provisions of substantive law which is in force in India or is passed without giving an opportunity of hearing to the parties as provided under Section 24 or without giving any reason in a case where parties have not agreed that no reasons are to be recorded, it would be against the statutory provisions. In all such cases, the award is required to be set aside on the ground of “patent illegality”.*

6. In the present case, appellant had not urged any ground or laid any foundation for the Court to declare that any part of the award or any one of the

principal claims was in conflict with the public policy of India. Whether or not the appellant had committed any default in handing over the work site or discharging other contractual obligations and whether or not the appellant had suffered any loss on that account, if so the extent of any such loss were all questions of fact on which the arbitrator was entitled to take a view as indeed he has done. Similarly, the question as to whether the respondent was entitled to any reimbursement on account of the cost of the material used during the extended period and if so what was the extent of reimbursement required on that account were matters that depended upon appreciation of evidence and the material placed on record. Suffice it to say that none of the principal claims made by the respondent could be described as barred by any law or tantamounting to undue enrichment of the respondent or granting an undue advantage to it so as to come in conflict with public policy of India. That is so especially, when the arbitrator, has while arriving at his conclusion in regard to the claims A to I given reasons and discussed the juristic basis on which the said claims were being allowed. It is true that while awarding a sum of Rs. 1,91,659/- towards increase in the labour charges and Rs. 3,50,000/- on account of the increase in the price of materials, the arbitrator has observed that no books of accounts had been produced before him and that he has determined the amount from whatever is available on record yet interference with that part of the award would also not be justified in view of the settled legal positions that the court would not set aside an award simply because it was to an extent based upon some guesswork. Reference may in this regard be made to ***Mohd. Salamatullah and Ors. Vs. Government of Andhra Pradesh*** 1977 SC 1481 where the court has observed :-

“We are not able to discern any tangible material on the strength of which the High Court reduced the damages from 15% of the contract price to 10% of the contract price. If the first was a guess, it was at least a better guess than the second one. We see no justification for the appellate court to interfere with a finding of fact given by the trial Court unless some reason, based on

some fact, is traceable on the record. There being none we are constrained to set aside the judgment of the High Court in regard to the assessment of damages for breach of contract.”

7. Coming then to the question whether the arbitrator was legally right in awarding interest @ 18% per annum for a period of 17 years or so, the arbitrator has justified the same on the authority of ***Santok Singh Arora Vs. Union of India and Ors. AIR 1992 SC 1809.*** There can be no quarrel with the proposition stated in the said decision which recognises the right of a claimant to be compensated for denial of its legitimate dues during the period the claim remained under adjudication. Having said that, we are of the opinion that the rate of interest awarded by the arbitrator appears to be excessive. As noticed earlier, the arbitrator has directed payment of interest @ 18% per annum from 25/4/87 subject to the condition that in case the award amount is paid with interest and cost within a period of two months from the date of award, the DDA would pay interest @ 12% per annum only for the entire period. Higher rate of interest thus awarded by the arbitrator appears to us to be in terrorem only to ensure that DDA pays as quickly as possible the amount held payable. The alternative rate at which the arbitrator stipulated in the event of payment is indeed more realistic though still on the higher side. In the circumstances, therefore, we are inclined to interfere with the award made by the arbitrator but only to that limited extent. While the power of the arbitrator to award interest is not under challenge before us the said power has to be exercised in a reasonable manner keeping in view the rate of interest that was prevailing during the period for which the same is being awarded. It is common knowledge that the rate of interest on term deposits has for the last decade fluctuated between 6 to 8 per cent. It is true that for the period of a decade after April, 1987 the rate of such deposit ranged up to 10% or so, yet keeping the totality of the facts and circumstances of the case in view and especially the long period for which the interest is being awarded, we are of the opinion that interest @ 9% per

annum in stead of 18% per annum from 25/4/87 till date of deposit of the amount in this Court on the principal amount of Rs. 20,32,358/- would meet the ends of justice. We may in this regard draw support from the decision of the Hon'ble Supreme Court in ***State of Rajasthan and Anr. Vs. Nav Bharat Construction Co. AIR 2002 SC 258***, where the Hon'ble Supreme Court had, in similar circumstances, reduced the rate of interest from 18% per annum to 6% per annum. The Court observed:

“8.However considering the dispute involved and overall circumstances of the case we modify the award qua the rate of interest and reduce the same at the rate of 6% per annum. The arbitrator in paragraph 21.8.1 of the award has granted interest on the principal amount of claims no. 1 to 8 from 01/7/1990 to 30/4/1998 and 10 to 18 from 29/4/1991 to 30/4/1998 at the rate of 18% and the District Court has awarded interest at the rate of 15% from the date of decree. The part of the award and decree is modified and it is held that respondent-claimant is entitled to recover the said amount with interest at the rate of 6% only. The appeal is disposed of accordingly. Parties to bear their own costs of litigation all throughout.”

8. We may also refer to recent decision of the Hon'ble Supreme Court in ***Krishna Bhagya Jala Nigam Ltd. Vs. G. Harischandra Reddy and Anr., (2007) 2 SCC 720***, where too the Court reduced the rate of interest from 18% per annum to 9% per annum pendente lite and future taking more economic reforms of the country and the change in interest regime. The Court observed:-

“11. On the merits of the claims made by the contractor we find from the impugned Award dated 25/6/2000 that it contains several Heads. The Arbitrator has meticulously examined the claims of the contractor under each page 0711 separate Heads. We do not see any reason to interfere except on the rates of interest and on the quantum awarded for letting machines of the contractor remaining idle for the periods mentioned in the Award. Here also we may add that we don not wish to interfere with the Award except to say that after economic reforms in our country the interest regime has changed and the rates have substantially reduced and, therefore, we are of the view that the interest awarded by the Arbitrator at 18% for the pre-arbitration period, for the pendente lite period and future interest be reduced to 9%.”

9. In the result, we allow this appeal and modify the award as also the order passed by the learned Single Judge to the extent that interest amount awarded on the principal sum of Rs. 20,32,358/- shall be payable to the appellant @ 9% per annum w.e.f. 25/4/87 onwards only in substitution of @18% per annum awarded by the arbitrator. Since the appellant has already deposited the decretal amount in this Court, we direct that after release of the amount payable under the award as modified by us, the entire balance amount shall together with interest accrued on the same be refunded to the appellant.

T.S. THAKUR,J

VEENA BIRBAL, J

FEBRUARY 08, 2008
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