

IN THE HIGH COURT OF DELHI

FAO No.339/1997

Delhi Development Authority Appellants
! through: Ms.Amita Singh, Adv.

VERSUS

\$ Madan Construction Co. Respondent
^ through: Mr.Raman Kapur, Adv.

% DATE OF DECISION: 04.02.2008

CORAM:

* **Hon'ble Mr.Justice Pradeep Nandrajog**

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

: **PRADEEP NANDRAJOG, J.**(Oral)

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1. Heard learned counsel for the parties.
2. Learned counsel for the appellant has restricted challenge to the impugned award dated 7.6.1995 which has been upheld by the learned Trial Judge vide impugned order dated 7.7.1997 in so far it relates to claim No.1, 4, 12, 15, 23, 25.
3. At the outset I may note that the learned Additional District Judge who has dealt with the objections filed by the

appellant under Sections 30/33 of the Arbitration Act, 1940 has noted that findings of fact recorded by the learned Arbitrator would be immune for challenge.

4. I may only clarify that the law is not all that wide. If it can be shown that a material document or a clause of contract has been ignored by the learned Arbitrator, finding relatable thereto can be corrected.

5. Before dealing with the objections it may be noted that the contractor was awarded civil construction work for constructing MIG flats in Paschim Vihar. The contract could not be completed within the stipulated date. There was an over-run of the time.

6. Claim No.1 of the contractor in sum of Rs.4.5 lacs was on account of payment due under the final bill for work done. Learned Arbitrator has awarded Rs.83,272/-.

7. Challenging award pertaining to claim No.1 it is urged in the instant appeal and submissions in harmony with the same were made that learned Arbitrator has not computed how he determined Rs.83,272/- as the amount payable. According to the appellant the gross amount of work done by the contractor determined by the appellant was in sum of Rs.81,41,405/- and with respect to the previous bills no further amount was payable.

8. Learned Arbitrator has dealt with this issue at page No.2 and 3 of the award. The learned Arbitrator has noted that DDA had been measuring the quantities while certifying for payment the running bills but for unexplainable reasons in the last running bill had reduced the quantities of work. Learned Arbitrator has noted that DDA has not been able to explain as to under what circumstances measured works as reflected in the earlier bills got reduced.

9. Reasons given by the learned Arbitrator are sound and logical. As regards the challenge to the quantification of the claim suffice would it be to note that the learned Arbitrator was a retired Chief Engineer (CPWD). There is a presumption in law that when parties taken recourse to an arbitration proceeding with an expert arbitrator they accept to rely upon his knowledge in the field.

10. Objection to claim No.1 is accordingly repelled.

11. Claim No.4 of the contractor was in sum of Rs.50,000/- on account of the rebate which was deducted by the DDA from the running bills.

12. Learned Arbitrator has noted though claim was in sum of Rs.50,000/-, but record showed that only Rs.26,112/- was deducted as rebate under various running bills.

13. Learned Arbitrator has noted that the security

deposit was released on 10.12.1988. Learned Arbitrator has noted that DDA was not entitled to any rebate.

14. At the first blush it may appear to be a case where the learned Arbitrator, having not recorded the date when running of bills had to be paid and were paid, has misconducted himself. But it has been pointed out by learned counsel for the contractor that bills were not paid in time. The clause of the contract stipulated that if timely payment was released by DDA only in said eventuality would DDA be entitled to rebate.

15. I thus find no error in the award.

16. Claim No.12 in sum of Rs.2 lacs has been allowed in sum of Rs.71,000/-. The claim was on account of keeping watch and ward after work was completed on account of the fact that DDA delayed taking possession of the site.

17. The finding is on a fact. I find no infirmity therein.

18. Claim No.15 in sum of Rs.25,000/- related to recovery made by DDA alleging that there was an excess consumption of cement.

19. Under the contract cement which was consumed had to be determined as per a formula prescribed. Recovery rate was on double the issue price if excess cement was consumed. This was in terms of Clause-42 of the contract.

20. It may be noted that for the cement supplied recovery otherwise was made from the running bills. Thus, DDA was recompensed for the cement supplied by it and consumed by the contractor. The claim related to recovery at the penal rate. Learned counsel for the contractor has shown to me 2 decisions of this Court. The decisions are dated 24.12.1986 in Suit No.1092-A R.S.Builders Vs. Union of India and decision dated 23.3.1993 in Suit No.136/1991 A.K.Jain Vs. Union of India. Both decisions hold that DDA cannot recover at penal rate. The decisions hold that DDA has to prove the loss occasioned to it by cement being wasted.

21. Learned Arbitrator has noted that DDA has not proved any additional expenditure in procuring the cement.

22. The matter can be looked at a little differently. Since DDA supplied the cement it recovered the price thereof. In other words, full recovery was made at the issue price. Excess consumption was therefore to the detriment of the contractor. It was all the more necessary for DDA to have, under the circumstances, established that it procured the cement from the market at a rate more than what was specified in the contract for effecting recovery.

23. In view of the afore-noted 2 decisions of this court and my additional reasons as recorded hereinabove objection

to the award pertaining to claim No.15 is accordingly repelled.

24. Dealing with claim No. 23 it may be noted that conscious of the fact that material escalation had been recompensed under Clause 10 CC learned Arbitrator considered the claim which was in the nature of damages for prolongation of the contract. Damage was with reference to stationing graduate engineer at the site during period when contract got extended.

25. Learned counsel for the appellant states that in view of the decision of the Hon'ble Supreme Court reported as 1997 (1) Arbitration Law Report 292 The New India Civil Erectors Pvt. Ltd. Vs. ONGC, learned Arbitrator could not have allowed the claim in question.

26. Learned counsel draws attention of this court to para 10 of afore-noted decision.

27. A perusal of the decision shows that the Hon'ble Supreme Court was considering the claim for escalation in the cost of material and noted that the contract stipulated that price quoted was not subject to any escalation whatsoever till the contract was completed.

28. The decision is clearly distinguishable. The Hon'ble Supreme Court was dealing with a firm price contract and repelled the claim of the contractor for escalation.

29. The claim for escalation on account of increase in price of material is different than the claim for loss occasioned due to work being prolonged by stationing the qualified engineers and staff at the site.

30. I find no infirmity in the award.

31. It was lastly urged that the learned Arbitrator has awarded interest @ 18% p.a. Counsel urged that during relevant period interest was being restricted to 12% p.a.

32. I note that as per the award learned Arbitrator has directed interest to be paid @ 10% p.a. Granting 2 months time to DDA to make payment, interest has been enhanced to 18% p.a. if payment was not made within the time granted.

33. Learned counsel for the respondent states that the appeal was dismissed in default and before it could be restored the contractor has recovered full amount from DDA. Counsel states that this may be a factor taken into consideration by this court.

34. Judicial authorities are replete in this court repelling the challenge to an award by DDA in case after case and DDA keeps on filing objections.

35. The learned Arbitrator has granted 2 months time to DDA to make payment with interest @ 10% p.a.

36. I further note that the interest has been allowed

only on claim No.1 and on none else. I further note that the total sum as per the entire award is Rs.2,89,484/-. Claim No. is in sum of Rs.83,272/-.

37. The impact of interest would therefore be minimal. I accordingly do not tinker with the award pertaining to interest.

38. In a nutshell the appeal is dismissed.

39. No costs.

40. LCR be returned forthwith.

February 04, 2008
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PRADEEP NANDRAJOG, J.