

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

+ **FAO(OS) NO.125/2000**

Date of Decision: 12th November 2009

BHAGAT CONSTRUCTION CO. P. LTD. Appellant
Through: Mr. Sandeep Sharma, Advocate

Versus

DELHI DEVELOPMENT AUTHORITY Respondents
Through: None.

CORAM:

HON'BLE MR. JUSTICE MUKUL MUDGAL
HON'BLE MS. JUSTICE REVA KHETRAPAL

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | No. |
| 2. | To be referred to the Reporter or not? | Yes. |
| 3. | Whether the judgment should be reported in the Digest? | Yes. |

% **J U D G M E N T**(Oral)

MUKUL MUDGAL,J.

1. The learned counsel for the appellant has been heard.
2. This appeal arises from the judgment of the learned Single Judge dated 19th November, 1999 in respect of the contract of construction of 400 houses under SFS at Rajouri Garden, part of Pocket-E, SH: Construction of 80 E-Bed room Type-III, 802-Bed Room, Type-II, and 120 Scooter garage under SFS including internal development of land Grade-I. The dispute in terms of Clause 25 of the Agreement was referred to the sole arbitrator Shri

S. Nagarajan, Additional Director General (Retd.) for adjudication and decision, and by the award dated 8th May 1992, claims No.1, 2, 3, 4, 5, 6 and 7 were allowed by the arbitrator. All the claims except claim No.3 were upheld by the learned Single Judge. The claim No.3 was set aside upon placing reliance on Clause 1 of specifications and Conditions and Clause 10 of the Contract. The said Clauses read as follows:

“Clause-1 – if part of site is not available for any reason or there is some unavoidable delay in supply of materials stipulated by the department, the programme of construction shall be modified accordingly and the contractor shall have no claim for any extra or compensation on this account.”

“Clause 10 – all materials so supplied to the contractor shall remain the absolute property of DDA and shall not be removed on any account from the site of the work provided that the contractor shall in no case be entitled to any delay in supply or on supply thereof all or any such materials and stores. Provided further that the contractor shall be bound to execute the entire work if the material supplied by the DDA within the schedule time for completion of the work plus 50% thereof For the completion of the rest of the work the contractor shall be entitled to such extension of time as may be determined by the engineer Incharge whose decision in this regard shall be final and binding.”

3. Accordingly, the learned Single Judge held that in case of delay in the completion of the work due to non-supply or short supply of the stipulated material the petitioner was entitled only to extension of time and for no compensation or damages. The learned counsel for the petitioner submitted that this very issue concerning the interpretation of the aforesaid

two clauses was the subject matter of the proceedings before the Division Bench of this Court, in the case *M. L. Mahajan v. DDA & anr.*, reported in 99 (2002) DLT 512. The relevant portion of the said judgment reads as follows:

“9. A perusal of the paragraph will show that Clause 10C is not an absolute bar on the claims put forward by the contractor. As this clause does not contain the peremptory prohibition expressed in Clause 3.3.15 or 2.16 and 2.4 of the contract in *Continental Construction's case (supra)*, interference by the learned Single Judge was not called for. In this analysis the decisions of the Court in afore-mentioned cases of M/s Metro Electric Co., Rawla Construction., etc. would support the impugned Award. A conjoint reading of these two Clause 10 and 10C is necessary in order to appreciate their true import and intent. Clause 10 deals only with ‘Stores supplied by Delhi Development Authority’ as is evident from the clause itself. It empowers the DDA to insist upon the use of a particular material to be supplied by it. The Clause then envisages that there are eventualities which may result from the delayed supply by the DDA of such material. Broadly stated what is laid down is that the material must be used as and when supplied. The contractor is not entitled to insist that the entire supply must be compelled by the DDA before commencing its obligations under the contract. It also clarifies that material supplied by the DDA will always remain its property. What is of great significance is the second proviso inasmuch as it states that the Contractor shall be bound to execute the entire work if the materials are supplied by the DDA within the scheduled time for completion of the work plus 50% thereof; but if a part only of the materials has been supplied within the aforesaid period, then the Contractor shall be bound to do so much of the work as may be possible. The understanding between the parties therefore was limited to the period indicated above, and where the maximum

period has elapsed, the obligations under this clause would not remain operative. This factor is of obvious relevance while construing Clause 10C, and in particular the opening phrase – “if during the progress of the works.....” Thereafter, Clause 10C clarifies that it shall have no applicability on any increase in the price of materials to be supplied by the DDA, which clearly stands to reason. It further stipulates that increases in the price of any material, sourced and paid for by the Contractor, and increases in wages of labour as a direct result coming into force of fresh law which have been actually borne by the Contractor, would be reimbursed. Of course, the increase must be in excess of 10%. The clause does not exclude or prohibit claims for increase in prices of material and wages of labour after the stipulated period within which the work is to be completed. If this is not to do so, the opening words would be rendered wholly otiose. It is, therefore, plainly obvious that where a contract stretches beyond the stipulated period, i.e., the schedule time plus 50% thereof, the claim for escalation in prices is not excluded or barred under clause 10C. We make this observation not so as to lay down the only interpretation that can be given to these clauses, but rather to outline these possible understanding by the Arbitrator. In consonance with the ratio of *Sudersan Trading Co. and Associated Engineering (supra)* if any other plausible meaning is preferred by the Arbitrator, he would be free to implement it. In no way, therefore, can it be predicated that the Award is legally flawed on the contention that the Arbitrator has misconstrued Clause 10C. The judgments of this Court in which Clause 10B was directly in consideration ought to have been followed by the learned Single Judge. In the *Continental Construction’s case (supra)* the relevant clauses had a totally distinct intent.”

(emphasis supplied)

4. In particular, reliance was placed on the portion of the judgment (emphasized) which states that if the stipulated period stretches beyond, i.e.,

the scheduled time plus 50% thereof, the claim for escalation in prices is not excluded or barred under Clause 10C. It is not in dispute in the present case that the contract was required to be completed within 12 months from 3rd March 1981 and, in fact, there was a delay of 31 months in the contract. There is a further finding that the delay was on account of the handling over the site by the respondent DDA. There was also delay in furnishing designs and drawings ...foundation drawings were issued in May 1981; details for lintels in August 1981; terrace floor RCC details in January 1982; and details for int. development in September, 1982; while date of start of contract was 3rd March 1981 and scheduled date of completion was 2nd March 1982. There was thus undue delays in the issue of stipulated materials, i.e., cement, steel, SCI pipes and wooden door shutters (practically in all materials stipulated for issue by the Respondents). Wooden shutters for toilet and kitchen doors could not be fully supplied even till November 1983.

5. The respondent only furnished some explanations for the supply of cement only but could not explain the delays in other stipulated materials nor in supply of designs and drawings etc. Thus, the sole arbitrator had rightly concluded the reason for the delay in the following terms:

“In view of the protracted and long delays by the respondents the work got delayed considerably and the Claimants would naturally have been put to loss and damages due to continuous rise in prices of materials and labour. Law is well settled that in such cases, the injured party is entitled to compensation/damages suffered. The claim is thus

admissible.”

6. Since the delay is more than 200% of the stipulated time of one year, the above judgment in the case of *M. L. Mahajan* (supra) clearly becomes applicable. Another judgment of the Division Bench of this Court in FAO(OS) No.298/1998 had also occasion to deal with the aforesaid judgment of *M. L. Mahajan*, 99 (2002) DLT 512, in the following terms:

“6. We were also informed that the aforesaid judgment of the Division Bench in FAO(OS) NO. 179/1990 was challenged before the Hon’ble Supreme Court by way of Special Leave Petition (Civil) NO. 16468/2002 and the said Special Leave Petition was dismissed by the order dated 16th September, 2002. The Division Bench in the aforesaid paragraph 9 in FAO(OS) No. 179/1990 has clearly taken a view that the bar on compensation claimed under clause 10 should be restricted to the period indicated in the second proviso, as the Contractor was bound to execute the entire work if the material or stores was supplied by the DDA in the scheduled time. Since there was inordinate delay beyond the said period inclusive of 50% more period than stipulated, the Division Bench chose not to interfere with the Award of the Arbitrator in granting compensation.”

7. The judgment of the Hon’ble Supreme Court was also relied upon by the respondent’s counsel in the aforesaid case which was delivered in case of *Rajasthan State Mines and Minerals Ltd. v. Eastern Engineering Enterprises and anr.*, 1999(3) Arb. LR 350(SC), which was dealt with by the Division Bench of this Court in the following terms:

“7. The learned counsel for the respondent, Ms. Anusuya Salwan, relied upon a judgment of the Supreme Court in the case of **Rajasthan State Mines and Minerals Ltd. vs. Eastern Engineering Enterprises and another** 1999(3) Arb. LR 350 (S.C.). The relevant conclusions in the above judgment read as under: -

“From the resume of the aforesaid decisions, it can be stated that:

.....(f) To find out whether the arbitrator has travelled beyond his jurisdiction, it would be necessary to consider the agreement between the parties containing the arbitration clause. Arbitrator acting beyond his jurisdiction--Is a different ground from the error apparent on the face of the award.

(g) In order to determine whether arbitrator has acted in excess of his jurisdiction what has to be seen is whether the claimant could raise a particular claim before the arbitrator. If there is a specific term in the contract or the law which does not permit or give the arbitrator the power to decide the dispute raised by the claimant or there is a specific bar in the contract to the raising of the particular claim then the award passed by the arbitrator in respect thereof would be in excess of jurisdiction.

(h) The award made by the Arbitrator disregarding the terms of the reference or the arbitration agreement or the terms of the contract would be a jurisdictional error which requires ultimately to be decided by the Court. He cannot award an amount which is ruled out

or prohibited by the terms of the agreement. Because of specific bar stipulated by the parties in the agreement, that claim could not be raised. Even if it is raised and referred to arbitration because of wider arbitration clause such claim amount cannot be awarded as agreement is binding between the parties and the arbitrator has to adjudicate as per the agreement. This aspect is absolutely made clear in Continental Construction Co. Ltd. (supra) by relying upon the following passage from M/s. Alop Parshad v. Union of India [1960] 2 SCR 703 which is to the following effect:

There it was observed that a contract is not frustrated merely because the circumstances in which the contract was made, altered. The Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity. The parties to an executory contract are often faced, in the course of carrying it out, with a turn of event which they did not at all anticipate, a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. There is no general liberty reserved to the courts to absolve a party from liability to perform his part of the contract merely because on account of an un contemplated turn of events, the performance of the contract may become onerous.

(i) The arbitrator could not act arbitrarily, irrationally, capriciously or independently of the contract. A deliberate departure or conscious disregard of the contract not only manifests the disregard of his authority or misconduct on his part but it may tantamount to mala fide action.”

8. No doubt a court is entitled to interfere if the contractual clause is not followed by the arbitrator, but where the clause is such that two interpretations are possible then the arbitrator is entitled to adopt one of the possible interpretations and this is what the arbitrator did in the facts of this case by interpreting a clause and holding that where there is inordinate prolongation of a contract then for all times and for even inordinate delays the increase of compensation cannot be restricted only to clause 10 and which interpretation was a possible interpretation, which interpretation the learned Single Judge ought not have substituted with his own interpretation of the clause. In our view, while we are fully bound by the law laid down by the Hon'ble Supreme Court, this judgment did not deal with a clause similar to clause 10C in the present case and is thus inapplicable. In the absence of such a clause dealt with in the above referred judgment, the judgment of the Division Bench of this Court in FAO(OS) No. 179/1990, which precisely deals with Clause 10C in respect of a prolonged contract is binding upon us. The learned counsel for the respondent-DDA was unable to show us why the above judgment is not binding on us particularly when it was challenged unsuccessfully upto the Hon'ble Supreme Court. We are, therefore, fully bound by the Division Bench judgment of this Court, which has specifically dealt with the clause 10(C) of the Contract and accordingly we are satisfied that the learned Single Judge's judgment could not be sustained as the Division Bench of this Court has held contrary thereto. In light of this, the judgment of the learned Single Judge qua claim no.4 is set

aside and the appellant is held entitled to the said amount ordered in the claim no.4. Appeal is allowed to this extent and stands disposed of accordingly.”

8. The above judgment in FAO(OS) No.298/1998 was followed by another Division Bench of this Court in the case of *Delhi Development Authority v. M/s Chugh Kathuria Engineers Pvt. Ltd.*, FAO(OS) No.444/1996, decided on 12th October, 2009.

9. We are bound by the judgments of the three Division Benches of this Court, particularly when the judgment of the Supreme Court in *Rajasthan State Mines* case (supra) which was relied upon by the respondent in one of the aforesaid judgments was not found inapplicable. Therefore, we are satisfied that the Claim No.3 was wrongly disallowed by the learned Single Judge. Accordingly, the impugned order 19th November, 1999 in so far as relates to the Claim No.3 is set aside and the award of the arbitrator is made Rule of the Court. However, it is made clear that the interest payable is reduced from 12% to 9% per annum in light of the judgment delivered by this Court in the case of *M/s India Furnishers v. Punjab National Bank*, FAO(OS) No.261/2001, decided on 22nd April 2009 in accordance with the following judgments of the Hon’ble Supreme Court in the cases of *Rajendra Construction Co. v. Maharashtra Housing & Area Development Authority and Ors.*, 2005 (6) SCC 678, *Mc Dermott International Inc. v. Burn Standard Co. Ltd. and Ors.*, 2006 (11) SCC 181, *Rajasthan State Road Transport Corpn. V. Indag Rubber Ltd.*,

(2006) 7 SCC 700 & *Krishna Bhagya Jala Nigam Ltd. v. G. Harischandra Reddy*, 2007 (2) SCC 720.

10. With the above observations the appeal is allowed to the extent indicated above and stands disposed of along with pending applications.

MUKUL MUDGAL
(Judge)

REVA KHETRAPAL
(Judge)

November 12, 2009
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