

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

+ **FAO(OS) NO.312/2001**

Date of Decision : March 26, 2009

ENKAY CONSTRUCTION CO. Appellant
Through : NEMO

versus

DELHI DEVELOPMENT AUTHORITY & ANR. Respondents
Through : NEMO

CORAM:

HON'BLE MR. JUSTICE MUKUL MUDGAL

HON'BLE MR. JUSTICE VIPIN SANGHI

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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? | No |
| 3. Whether the judgment should be reported in the Digest? | No |

% **JUDGMENT (Oral)**

MUKUL MUDGAL, J.

1. This is an appeal against the judgment dated 16.03.2001 of the learned Single Judge making the award dated 23.03.1996 as a Rule of the Court except in respect of Claim Nos.5B & 5D. These two claims were for Rs. 31000/- on account of reimbursement of increase in the price of glass due to the delay in supplying window shutters and for Rs. 3,300/- on account of amount payable due to the increase of cartage from bricks and tiles respectively. The learned Arbitrator awarded Rs. 16,387/- and Rs. 19,779/- respectively on these two claims. The discussion of these claims by the learned Arbitrator reads as follows:

“It is clear in R-8 that respondent has written that supply of shutters for doors and windows shall be issued at the appropriate time as the same are not required at the moment.

I have read 10(C) of agreement also. It is needed that the respondent takes all materials to be issued on correct time as per contract.

As per date of start 22-3- and date of completion 21-3-82, the shutters will have to be fixed at least by 70% of 12 months, say 8.5 months from 22-3-81, say by 12/81. The contractor should have been asked to take all doors and windows and then he could have also purchased glass. This is not so as per R-1.

In 1/82 10th bill date is : Rs. 26,51,426/-

In 5/82 14th bill date is : Rs. 47,42,658/-

In 4/83 25th bill date is : Rs. 96,40,910/-

In 4/84 36th bill date is : Rs. 1,23,72,044/-

In 10/84 47th bill date is : Rs. 1,43,25,975/-

1/82 - 18.51%

5/82 - 33%

4/83 - 67.3%

4/84 - 86.4%

Which means sometime in 5/83 onwards the claimant could get doors and windows and in 4/83 onwards he could have started glass work. Increase in rate from 19-3-82 at Rs. 12/- per sq. m. and 4-7-85 it is given at Rs. 26.06 per sq. m.

Therefore rate will be $\frac{26.06-12}{2} = 7.03$ above Rs. 12%

i.e. 19.03 % above

As claimant has given claim of Rs. 31000/- only, the rate allowed will be

$$\frac{19.03}{36} \times 31,000 = 16387$$

Therefore I award that for claim No. 5 (B) the respondent will pay Rs. 16387/- to Claimant.

The brick tiles are required later and even earlier

bricks more in number has to be taken by claimant.

Therefore 75% of 3086125 of bricks and 100 % of 151573 of tiles. However, tiles can be 1000 nos.

Therefore the award is as below:

Bricks $\frac{75}{100} \times 3086125 \times 8.10 = 18748$ (approx)

151573 X 6.80 = 1031 (approx)

19779

Respondent will pay Rs. 19,779/- to claimant for claim 5(D)."

"CLAIM NO. 5-B

The sole objection as to this award is that the Arbitrator has given his finding as to the claim of the petitioner without any evidence and merely on the surmise and conjecture of the claim that due to the delay in supply of the doors and windows by the respondent he has suffered losses on account of increase in the price of the glass panes.

However the perusal of the award shows that the Arbitrator has relied upon the date of start of the work which was 22nd march, 1981 and the date of completion which was 21st March, 1982 whereby the shutters were to be fixed by 70% of 12 months say 8.5 months from 22nd March, 1981 say by December, 1981 and the contractor should have been asked to take all the doors and windows so that he could have also purchased glass but this is not so. Even if it is assumed that the respondent had given the final bill and had caused delay but it was again incumbent upon the petitioner to

show as to the amount of losses he suffered for the delay in supplying the doors and windows on the part of the respondent. It was also required by the Arbitrator to call upon the petitioner to produce the evidence. Award in this regard seems to have been made on surmises and conjectures. Since this award is based upon non-evidence the same cannot be upheld and is set aside.

CLAIM NO. 5(D):

Same is the position with regard to this Claim as the learned Arbitrator allowed this claim without production of any of the receipts vide which the extra or increased cartage for bricks and tiles was paid. Even otherwise no reasons have been furnished by the Arbitrator while granting this award. Rather the reasons for this award are that brick tiles were required later and even earlier bricks which were more in number had to be taken by the claimant. Therefore 75% of the total bricks and the 100% of the total tiles were there. This observation of the learned Arbitrator is highly unintelligible and does not lead anywhere. The award with respect to this claim is without any basis and is accordingly set aside.”

2. The learned Single Judge has concluded that Award on Claim No. 5 (B) was made without any evidence and merely on surmises. In our view, the learned Single Judge is absolutely justified in arriving at a finding that there was no evidence led by the appellant in respect of claim No. 5 (B). Merely due to non-supply of the doors and windows, he has assumed that the appellant suffered losses on account of increase in the prices of glass pains. On that ground Claim No. 5 (B) was allowed. Thus Claim No. 5 (B) was rightly disallowed by the learned Single Judge.

3. So far as Claim No. 5 (D) is concerned, in our view, the learned Single Judge has wrongly construed the Award. The learned Arbitrator relied upon the rates notified by Delhi Administration towards cartage of tiles and bricks. The rates notified towards cartage by Delhi Administration Notification

per thousand bricks and tiles as on 05.01.1981 and 12.05.1982 were noted by the Arbitrator as follows:

Rates on	Bricks	Tiles
5-1-81	33.90	21.20
12-5-82	88.00	28.00
payable	8.10	6.10

3. The total number of bricks after the increase in the rate used in the works was 3086125. The total tiles used after the increase in the cartridge rates was 151573. The learned Arbitrator, taking into consideration the fact that bricks were used in the earlier part of the work as well whereas tiles were used only in the later part of the work, has proceeded by considering 75 per cent of the bricks used and 100 per cent of the tiles used for purposes of grant of enhanced cartage. On that basis he has arrived at his award on Claim no. 5 (D) at Rs. 19,779/-. In our view, therefore, the learned Single Judge was not correct in observing that the claimant / appellant had not produced receipts pertaining to extra or increased cartage for bricks and tiles. One cannot lose site of the fact that the Arbitrator was a technical person and was aware of the nature of work involved in the contract. By his experience if he has arrived at a finding of fact that 75 per cent of the bricks and 100 per cent of the tiles were used after the initial period of contract, no error can be found in the said estimation of the learned Arbitrator which warrants interference by the learned Single Judge. Consequently, we set aside the judgment of the learned Single

Judge in so far as it sets aside the award on Claim No. 5 (D). Accordingly, we restore the award in respect of Claim No. 5 (D) in favour of the appellant.

4. We may note that even though the award on Claim No. 5 (B) was set aside by the learned Single Judge, in the operative part of the impugned judgment it is only Claim No. 5 (D) which finds a mention. For this reason the appeal has been restricted to the setting aside of Claim No. 5 (D) alone. The appeal stands allowed accordingly.

MUKUL MUDGAL, J.

VIPIN SANGHI, J.

MARCH 26, 2009
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