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IN THE HIGH COURT OF DELHI AT NEW DELHI

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O.M.P. No.254/2000

Reserved on: December 3, 2009.

Pronounced on: December 16, 2009.

M/S. DECONAR SERVICES PVT. LTD.

...Petitioner

Through: Mr. J.P.Gupta and Mr. Sohan Lal,
Advocates.

VERSUS

NATIONAL THERMAL POWER CORPORATION LIMITED

....Respondent

Through: Mr. R.K.Joshi and Mr. Jyotindra Kumar,
Advocates.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

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

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JUDGMENT

VALMIKI J. MEHTA, J

1. Though this petition was originally filed under Section 34 of the Arbitration and Conciliation Act, 1996 subsequently, as per the orders passed,
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these objections have to be dealt with and disposed of as having been filed under Sections 30 and 33 of the Arbitration Act, 1940. For this purpose, the petitioner has filed the objection petition afresh as an application dated 6.8.02 under Sections 30 and 33 of the Arbitration Act, 1940. This I.A., however, has not been numbered. Let the Registry number this I.A.

2. The objections pertain to the Award dated 7.7.2000 passed by the sole Arbitrator deciding the disputes arising out of the awarding of by the objector, to the non-objector, a contract of construction of 100 Nos. of A and B type quarters under contract dated 31.1.1989.

3. The counsel for the objector has pressed his objections to claim Nos. 1,2,8,10,12, 16 and counter claim Nos. 2 and 3 as decided by the Award. I shall take up each claim and objections thereto in seriatim.

4. Claim No. 1 which has been awarded is towards refund of the recoveries which were made by the objector from running bills of the contractor/non-objector @ 16% from each R/A Bill. This recovery of 16% from the bills was because according to the objector the contractor had given its letter dated 14.6.1988 before the awarding of the contract, whereby, it was stated that in case the contractor was awarded not only the subject contract but also another contract for the construction of 68 numbers of B,C and D type

quarters then in such case it would give a discount of 16% on the tendered amount for the contract for construction of 100 A&B type quarters.

5. A claim was made under this head for a sum of Rs.13,89,720/- on account of the fact that conditions to avail the discount were not fulfilled by NTPC. The Arbitrator has awarded a sum of Rs.12,01,140/- to the contractor under this claim. The non-objector argued, and which argument has been accepted, that the award of both the works was for the purpose that when the sites for execution of both the works are handed over together to the claimant/contractor, then both the works could be executed together, and in such a case, the contractor can save monies on account of deployment of men, machinery and supervision expenditure by carrying on work simultaneously at the two sites which were approximately at a distance of 1 km from each other. The claimant had also argued successfully that it was clearly mentioned in the work programme for the second contract that both the works were to be executed together. Award records that the admitted facts which have come on record are that the site for the second contract pertaining to 68 numbers B,C, and D type quarters was not handed over alongwith the site of the first contract of construction of 100 numbers A & B type quarters. The site for the second contract was only handed over progressively/ in parts. In view of the above facts, the Arbitrator has held as under:

“ From the facts of the case it is thus clear that the discount of 16% was conditional one and was given by the claimant with the intention and on consideration that he would derive commercial benefits by executing both the work simultaneously by optimising his resources. This fact has been accepted by the respondents in an unambiguous term while accepting the conditions & L-2 programme. It has also come up clearly during the proceedings that the respondents could not fulfil the intended and real spirit of the conditions of discount given by the claimant and thus in my view there is breach of contract on the part of the respondents. I have carefully gone through the arguments put forth by both the parties and adopting reasonable and fairness in approach I have no hesitation in saying that in my view there is no force in the arguments of respondents that mere issuance of award letter on the same date meets the condition of Appendix-E and their specific inclusion in the both the contracts read with L-2 programme of both the contracts do not support the contention of the respondent rather it strengthens the view of the claimant. If I apply the principles of natural justice and rely upon the tenor of letter dated 14/06/88 vide Appendix E of both the contracts. L-2 programme of both the contracts the claimant's claim cannot be ignored and hence it merits consideration and in my view therefore, the claimant is entitled to the refund of 16% discount recovered from the RA bills of the claimant.

6.5 As per MB No624 page 13 produced by Respondents along with their documents (Page 105 of the respondents documents) the value of civil work executed was to the tune of Rs.71,91,392.60. After 4% unconditional discount given while quoting the rates the value of civil works amounts to Rs.69,03,736.80. Further 16% discount on this amount of Rs.69,03,736.80 will work out to be Rs.11,04,598. As per record on page 95 of the respondents documents, the value of electrical work executed was Rs.6,28,527/-. After 4% unconditional discount given while quoting the rates, the value of electrical work amounts to Rs.6,03,385.92 and further 16% discount on this works out to Rs.96,542/-. Thus the total discount will work out to Rs.12,01,140/- (Rs.11,04,598+Rs.96,542).

6.6 In view of the facts and circumstances of the case I award Rs.12,01,140/- to the claimant against claim no.1” (Emphasis added)

6. The counsel for the objector has argued that once both the contracts were awarded to the contractor, automatically thereafter discount @ 16% became available to the objector. In my opinion, this objection /argument is not sustainable. I feel that two views were possible from the narration of facts which have been pencilled by the Arbitrator. One view is that the real spirit of the condition of discount was that the contractor would be saved considerable expense if both the contracts were executed together and only therefore on such basis it offered a discount of 16% under the first contract of 100 quarters. The Arbitrator while discussing this issue has adopted reasonableness and fairness in approach for arriving at this conclusion by reference to the work schedule/programme of both the contracts. The Arbitrator is clearly justified in holding one view that the intention for giving the discount of 16% was a conditional one for deriving commercial benefits by executing both the works simultaneously by optimising the use of the resources by the contractor. The jurisdiction of this Court while hearing objections under Sections 30 and 33 is a limited one and merely because another view is possible instead of the view taken by the Arbitrator, it is not permissible for this Court to take that another view. In the facts of the case, I find that the approach taken by the Arbitrator is

one permissible approach and therefore it cannot be said in any manner that the Arbitrator has misconducted himself or the proceedings in awarding this claim. Objections to this claim are therefore dismissed.

7. Claim No.2 is the consequential claim of interest with respect to Claim No.1. Once I have dismissed the objections against Claim No.1, the objections against this Claim No.2 will also stand dismissed. An issue, however, arose what should be the rate of interest, because, the Arbitrator has awarded interest @ 18% per annum. Ordinarily, this Court would have been inclined to reduce the rate of interest but the counsel for the contractor has rightly contended that in the present case there is a finding that the contractor borrowed funds from Commercial Banks at huge rate of interest and therefore the Arbitrator is justified in awarding interest @ 18% per annum. In this regard, some relevant observations of the Arbitrator are as under:

“7.1 The claimants have claimed 24% interest on the amount of 16% deducted and utilised by the respondents since they had borrowed funds from the bank at commercial rate of interest and the respondents had also agreed that claimants had borrowed funds from the bank.” (emphasis supplied)

In view of the aforesaid categorical admission of the objector as recorded in the Award, I do not think there is at all any unreasonableness in this finding of the Arbitrator of awarding pre-reference interest @ 18% per annum.

In the peculiar facts of the case, therefore, I am not inclined to interfere with the rate of interest as awarded qua claim No.2.

8. Claim No.12 was the claim of the contractor towards escalation in the price for the work executed beyond the original period of the contract. While dealing with this claim, the Arbitrator has arrived at a finding of fact that both the objector and the contractor were responsible for delays. After arriving at this finding, the Arbitrator has bifurcated the period of delay and computed the period which is solely on account of the delays caused by the objector. This has been quantified at a period of six months out of the total period of delay of about 32 months. For this period of 6 months, the Arbitrator by making a detailed reference to the different rates which were prevailing over different periods and the percentage of increases has arrived at a finding of fact by awarding escalation at 5% of the total executed value. I would do no better than reproduce the relevant findings in this regard and which are as stated below:

“The respondent had also advocated that if escalation is to be paid that should be restricted to the formula given in clause 53.4 of GCC. I have heard and gone through the arguments put forth by both the parties carefully and on the basis of my best judgments & assessment I am convinced that claimant cannot wholly be held responsible for the entire delay. It is on record that the work was awarded on 29th June 88. It is an established and known fact that the months of June, July & August fall in rainy season particularly in U.P. and site conditions as per record were not favourable for construction activities specially for foundation works. There were other factors like cement

shortage, delaying payment where the respondents have to be held responsible for the delay. The claimant has claimed escalation as a compensation towards the delays attributable to the respondent. Under the circumstances of the case, I am of the view that the claimant is entitled to:

17.5a) Time extension from 29.06.89 to 25.02.92.

17.5b) Compensation in lieu of abnormal increase in prices & financial disadvantages on account of various reasons for no fault of his.

17.6 In view of the above I consider that the claimant is entitled to time execution from 29.06.89 to 25.02.92, because of the basic reason that the works were taken over on 25.2.92 by the respondent without demur and even without imposing any compensation for delay. The claimants have claimed Rs.42,20,261/- towards escalation for the works executed only beyond the stipulated period of contract. This can reasonably be considered seeing the facts of the case for the period of Six months from 29.6.89. However compensation towards the escalation shall be payable only for the period of six months from 29.6.89 as the delays were wholly attributable to the respondent. Moreover clause No.53 had been deleted for this contract and hence cannot be applied.

17.7 As per the details of annexure J of the statement of facts of the claimant, the value of work executed during 89-90 was Rs.26,16,129/- during 90-91 was Rs.28,67,116/- and during 91-92 was Rs.5,85,141/-. The total value of works executed in three years works out to Rs.60,68,386/-. The work was awarded to the claimant on 23% above DSR 85 as per the claimant and whereas it was 40.2% as per the respondents. The prevailing rate above DSR 85 during 89-90, 90-91 & 91-92 has been shown as 75%, 100% and 130% respectively by the claimant. The respondents have not contested the figures of claimant as far the amount of works executed in three years is concerned but have given the figures above DSR 85 during this period as 49% in 1989, 81% in 1990 & 106% in 1991-92 in their written arguments. Thus the claimant is entitled to relief for escalation for six months on the amount of the work executed after 28.06.89, since the delay of Six months was attributable to the respondents. The prevailing

percentage as per respondents in 89 was 49%. Even though the percentage of escalation above the quoted rate of 40.2% above DSR 85 is 8.8% I find justified to restrict the award to 5% on the total executed value of Rs.60,68,386 as relief for the escalation to be paid to the claimant which works out to Rs.3,03,419/- as against Rs.42,20,261/- claimed by the claimant.

17.8 Hence I award Rs.3,03,419 in favour of the claimant against claim No.12.” (Emphasis added)

9. The counsel for the objector has argued, what was also argued before the Arbitrator, that the contract was a fixed price contract and the Arbitrator cannot re-write the terms of the contract and award escalation when barred by the terms of the contract in view of the fixed price of the same. He has also canvassed that the finding of the Arbitrator is inconsistent because there did not arise any question of awarding escalation once both the parties were held responsible for the delays. The counsel for the objector has relied upon *State of Orissa Vs. Sudhakar Dass 2000(3)SCC 27*, *State of Orissa Vs. S.C. Roel 2002(1)RA786* and *New India Civil Erectors Private Limited Vs. Oil and Natural Gas Corporation AIR 1997SC 980*. These judgments are relied upon for the purpose that when there is no provision for escalation in the contract, the Arbitrator cannot award escalation. I am afraid that the arguments and contentions of the objector and reliance on the aforementioned authorities is wholly misconceived. This is because of the reason that the admitted facts are that the stipulated date of completion was 28.6.1989 but the contract was completed only on 25.2.1992. A fixed price contract would be a fixed price

contract only during the original period and surely it is an absurdity to suggest that irrespective of the extension of the contract well beyond the original stipulated date of completion and more so when the same is on account of breaches/delays by the objector, yet in such case that it can be contended that still no escalation would be paid. The contractor, in my opinion, is justified in its contention that the expression “during the execution” irrespective of any time limit would lead to an absurdity if escalation is not granted for a period which is much longer than the originally contracted period. I may note that there is no clause in the contract where escalation has been expressly debarred , showing the intention of the parties that the contract was of a fixed price only for the original term and not for a continuous indefinite period for all times in the future till the work goes on although the work is delayed due to the breaches/delays of the owner/objector. I am supported for the view taken by me by the Division Bench judgment of this Court reported as ***M.L.Mahajan Vs. DDA 2002(99)DLT 512*** where it has been held that for the prolonged period of the contract, where the contractor is not at fault, the Arbitrator can give escalation beyond what is provided in the contract. Once escalation beyond the formula provided in the contract is restricted to the original period of the contract, and does not prevent the contractor from claiming market rates, then similarly the fixed price remains fixed only for the original period of the

contract and for the prolonged period escalation at actual can be awarded to the contractor.

Accordingly, the objection in this regard is wholly misconceived and unsustainable. The objection with respect to this claim No.12 is accordingly dismissed.

10. Claim Nos. 8,10 and 16 are dealt with together because they pertain to the issue of rate of interest. In view of the recent catena of the Supreme Court judgments reported as *Rajendra Construction Co. Vs. Maharashtra Housing & Area Development Authority & ors.*2005 (6) 678, *McDermott International Inc. Vs. Burn Standard Co. Ltd.& ors* 2006 (11) SCC 181, *Rajasthan State Road Transport Corpn. Vs. Indag Rubber Ltd.* (2006) 7 SCC 700 and *Krishna Bhagya Jala Nigam Ltd. Vs. G.Harischandra*, 2007 (2) SCC 720 and *State of Rajasthan Vs. Ferro Concrete Construction* (2009) 3 Arb.LR. 140 (SC) and in accordance with the mandate thereof I feel that in the facts and circumstances of the case with respect to these claims, interest instead of being awarded @ 18% per annum should be reduced to 9% per annum simple. Accordingly, wherever in these claims interest is awarded @ 18% per annum, the same shall stand substituted by the figure of interest @ 9% per annum simple. I am, however, not interfering with the period for which interest has been granted.

11. Counter claim no.2 is indeed a very minor one. The objector had issued cement to the contractor and had claimed cost of cement bags which were not returned at Rs.10/- per bag as per the contract. The Arbitrator has however awarded only Rs.2/- per bag holding that the owner has not proved any losses to show that the cost of bag was Rs.10/- per bag. Therefore, only a sum of Rs.15,782/- was awarded to the objector instead of the claim for higher amount @ Rs.10 per bag. Once, a loss is caused to a person, then, in terms of Section 74 of the Contract Act,1872 even if there is a liquidated figure of damages, yet, if the loss can be proved the same will have to be proved in accordance with law. The price of cement bags was something which the objector could well have proved before the Arbitrator. The clause for charging Rs.10/- per bag being a provision for pre-fixed damages would be a claim under Section 74 of the Contract Act. Accordingly, the Arbitrator in my opinion was justified in awarding Rs.2/- per bag instead of Rs.10/- per bag because the objector failed to prove that the cost of a cement bag was Rs.10/-. In any case even if two views are possible, while hearing objections to an Award, I do not find so much unreasonableness with respect to this finding of the Arbitrator and I would therefore choose not to interfere with the same while hearing objections under Sections 30 and 33.

12. Counter claim No.3 was for an amount of Rs.4,81,275/- and was a claim by the objector towards liquidated damages. The Arbitrator in this regard has held as under:

“26.1 I have perused the submissions made by both the parties. I have already held that the respondents are responsible for the delay of at least six months and, therefore, the claimant cannot be blamed for the delay in the execution of work. Moreover, time was not the essence of the contract as held by the Honourable Supreme Court in AIR 1979 SC 720. There was condition for extension of time and there was also a clause for levy of compensation. The claimant contended that no notice was given for levying liquidated damages and the respondents have accepted the work after stipulated period of agreement without making further time as the essence of contract. Since the respondents had accepted the work on 25/02/92 and prepared the final bill without levying compensation for delay the respondents by their own actions de-facto extended the time of completion up to 25.02.92 for all intents and purposes. Hence there cannot be any compensation for delay after having de-facto extended the time of completion.” (Emphasis supplied)

I find that the Arbitrator has rightly relied upon the judgment of the Supreme Court reported as ***Hind Construction Contractors Vs. State of Maharashtra AIR 1979 SC 720*** because as per the facts in the present case, once there is a provision for liquidated damages, time of performance ceases to be essence of the contract because there are liquidated damages provided for each fixed period of delay. Admittedly, no notice has been given by the objector after entering into the contract to make the time as essence of the contract as per the ratio in the aforesaid case of ***Hind Construction Contractors***

case (supra). The Arbitrator has also noted that the final bill has been prepared without levying any compensation for delay and therefore time can be said to have been extended. If that be so, that there is no breach of performance within the contractual period of time because time was not the essence of the contract. The Arbitrator was wholly justified in giving the finding disentitling the claim towards liquidated damages. In my opinion, the Arbitrator has not misconducted himself or the proceedings while disallowing this counter claim of the objector.

13. The last objection which has been urged by the counsel for the objector pertains to the claims being barred in view of clause 52 of the contract. Relying upon clause 52, the counsel for the objector contended that all the claims became barred because the claims having not been raised within a particular period after preparation of the final bill and therefore the same cannot thereafter be raised. The counsel, in this regard, has sought to place reliance upon the decisions of the Supreme Court reported as *Wild Life Institute of India Vs. Vijay Kumar Garg 1997(10)SCC 528* and the *General Manager Northern Railway Vs. Sarvesh Chopra 2002(4)SCC 45*. I feel that it is indeed very unfortunate and most appalling, that such frivolous objections are being taken by public sector undertakings in this Court. In this regard, I may note that the disputes in this case were referred to the Arbitrator not through any petition

filed in the Court but through the order of the competent authority of the objector itself. If the claims were excepted matters in terms of clause 52, I do not understand at all as to how the claims in the first place would have been referred to the Arbitrator at all. On a further query by the Court to the counsel for the objector as to whether this objection was taken in the pleadings before the Arbitrator, the counsel for the objector had to concede that no such pleading was at all taken during the arbitration proceedings. The counsel for the objector tried to contend that such a plea was raised in the written arguments. However, I note that the Award does not deal with this argument of excepted matters or matters not referable to the arbitration in the sense of their having been extinguished or been incapable of being referred to arbitration. It is, therefore, obvious that this objection would not have been pressed before the Arbitrator because the Award does not deal with it. If indeed this objection was pressed before the Arbitrator and this objection was so vital that it would have demolished all the claims, then in such circumstances, the objector would surely have raised this issue by moving of an application for correction/modification/recall of the Award before the Arbitrator because a major objection was not considered by the Arbitrator. Admittedly, this has not been done and no such application was at all filed before the Arbitrator. The narration of the facts show that this frivolous objection is indeed an unfortunate

state of affairs because the objection is an effort to nullify arbitration proceedings which began way back in 1994 i.e. more than 15 years back. Both the parties have been put to huge amount of expenses and loss of man hours for conducting and pursuing the arbitration proceedings over different years whether before the Arbitrator or in this Court. I may further note that clause 52 of the contract requires proof of various factual issues which have to be asserted firstly by a pleading before any argument on the basis of the same can succeed. Obviously, therefore, such contention had to form part of the pleadings so that the contractor was given due opportunity to meet such claim factually not only in the pleadings but if so required by filing and relying upon necessary documents. Mr. Gupta, on behalf of the contractor, has sought to urge that in fact, factually also, the necessary requirements of clause 52 were complied with. However, I need not at all to go into the merits of this issue because it was incumbent on the objector to have raised this factual issue in the very first instance before the Arbitrator in its pleadings and which clearly was not done and hence now cannot be raised by way of this objection petition. The reliance by the counsel for the objector on the judgments of *Wild Life Institute of India* and *Sarvesh Chopra* (supra) is clearly misconceived in the facts and circumstances of the present case. I may note that the judgment in *Wild Life Institute of India case* has come before the amendment to the Section 28 of the

Contract Act, 1872 in the year 1997 and by which amendment, the Legislature has legislated against any attempt to cut down on the period of limitation and mandated that such action would be void. Section 28 (b) clearly bars this argument of the objector and as per which provision any contractual clause which extinguishes a claim by shortening the period of limitation is void. I am supported in the view I am taking by a judgment of a learned Single Judge of this Court in ***Pandit Construction Co. Vs. DDA 2007 (143) DLT 270*** in which while interpreting a similar clause 25 in the General Conditions of Contract it has been held that such clauses are void in view of Section 28 of the Contract Act. In any case, even independent of reference to Section 28 of the Contract Act, I feel that in the facts and circumstances of the present case, the judgment which would in fact be applicable is the recent judgment of Supreme Court reported as ***Inder Sain Mittal Vs. Housing Board, Haryana 2002(3)SCC 175***. In this judgment, the Supreme Court has laid down that a person is estopped from challenging the jurisdiction of the Arbitrator if he with open eyes participates in the proceedings and takes the chance of the Award going in its favour, then, in such a case, such a party cannot turn around and is estopped from challenging the jurisdiction of the Arbitrator if the Award ultimately goes against him. The observations of the Supreme Court in ***Inder Sain Mittal's case(supra)*** are wholly apposite in the facts of the present case.

In my opinion therefore any argument based in terms of clause 52 is most unfortunate, misconceived and a gross abuse of the process of law. This objection is accordingly dismissed.

14. In terms of Section 29 of the Arbitration Act, 1940 interest @ 9% on the decretal amount as per this judgment shall be payable in case the payment is made within 90 days of the date of this judgment. If the decretal amount is not paid within 90 days then interest on the amount payable under the present judgment and decree shall be @ 12% per annum simple till payment.

15. Accordingly, except to the extent of reduction in the rate of interest, the present objections are dismissed with costs quantified at Rs.50,000/-. While awarding costs I have taken into account the fact that the objector has got the benefit of delay in disposal of the objections by reduction in the rate of interest on account of the recent judgments of the Supreme Court in the cases already referred to. The objection petition is therefore disposed of accordingly and Award dated 7.7.2000 is made a rule of the Court subject to the modification of the rate of interest as per this judgment.

VALMIKI J.MEHTA, J

December 16, 2009
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