

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

+ **O.M.P. No.262/2000**

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?
3. Whether the judgment should be reported in the Digest?

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JUDGMENT

VALMIKI J. MEHTA, J

1. Though these objections were originally filed under Section 34 of the Arbitration and Conciliation Act, 1996 subsequently, as per the orders passed, 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 objections 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 award by the objector, to the non-objector, of a contract of construction of 68 Nos. of B, C and D type quarters under contract dated 29.6.1988.

3. The counsel for the objector has pressed his objections to claim Nos.2 and 15 as awarded by the Arbitrator.

4. Claim No.2 was the claim of the contractor towards escalation of cost during the extended period of the contract. Since the Arbitrator has extensively and exhaustively dealt with all the facts, contentions and has given detailed findings, it would be necessary to reproduce the entire discussion under this Claim no.2 which is as under:-

“Claim No.2:

7.0 Claimant claims Rs.66,98,773/- towards escalation for the works executed beyond the period of contract.

7.1 Both the parties made submission in favour and against the claim No.2. I have considered submission of both the parties. The date of start of work was 29/06/88. The date of completion as per award letter was 28.9.89. The actual date of completion was 31.5.93. It is an admitted fact that there was delay in the handing over the sites for 68 Nos. B,C & D quarters which were to be handed over for execution along with the site of 100 Nos A & B quarters in view of Appendix E of the contract read in conjunction with award letter dated 29.6.99 and L-2 programme submitted by the claimant and accepted by the respondents. As per claimant the respondent were not having the land for full 68 quarters and, therefore, the site for the 68 quarters was handed over progressively in parts against the spirit, terms and conditions of the contract. The work could not be completed in time due to various reasons pleaded by both the parties. Both blame each other for the delay. After carefully considering the arguments put forth by both the parties and the facts of the case I consider that the respondents were responsible for not handing over the site for 46 quarters as per the terms and conditions of contract and had breached the contract. There was a delay of more than 9 months in handing over of site as accepted by both the parties. The sites for 11 quarters were not at all handed over to the claimant for execution. Moreover there was shortage of cement for 40 days; the claimant was working at the foundation level during the monsoon in 1989 for no fault of his, the payment of most of the RA bills were not as per the terms of the contract. Moreover, the claimant had indicated to the respondent that because of the actions of respondents the claimant was forced to buy bricks at very high price and he would suspend the work till Nov 89 vide his letter dated 30/08/89 (DC-36 of Claimants documents) till the new stock of bricks arrive costing less. The respondents have acknowledged the above fact vide their letter dated 4/12/89 (DC-38 of claimants documents). Hence in my view the respondents were responsible for at least two years of delay and the situation was beyond the control of the claimant.

7.2 The respondent had opposed the payment of escalation based on clause 6 of the award letter, which is reproduced as under:

7.3 “The total contract value and the unit rates shall remain firm during the execution of contract and no variation on what-so-ever account shall be accepted by NTPC.”

7.4 The respondents contended that firm price contract was valid during the execution of contract, which includes the time till the work is completed. However the claimant contended that the term “during the execution of contract” in no case extend beyond the time of completion which was 15 months fixed at the time of award. There is no specific bar that escalation shall not be payable till the completion of works. The term “during the execution” always have to go along with the time fixed for execution and not till the completion.

7.5 The respondents were unable to show any other clause in the agreement barring payment of escalation to the contractor for the delay attributed to the respondents. In fact the respondents had accepted that the firm price contract was limited to the contract period only and they were refusing to pay escalation to the claimant since the delay was attributable to the claimant. In the letter dated 31/03/90 (page 28 of the respondent documents) the respondents had refused to pay escalation and the relevant sentence is reproduced as under:

7.6 “It is reiterated that no escalation can be paid to you as per the terms and conditions of contract since the work was awarded to you on firm price & the reasons for the delay it totally attributable to you”

7.7. From the above it is abundantly clear that the firm price contract was only for 15 months and respondents did not pay escalation because as per them the claimant was responsible for the delay.

7.8. Various authorities produced by the respondents had a specific bar for payment of escalation and this bar was till the completion of work. Hence the ratios could not be relied upon in this case.

7.9 The claimant produced authority to justify payment of escalation on fixed percentage if there is no formulas existed in the contract for payment of escalation.

7.10 From the facts of the case I hold that the respondents were responsible for the delays and hence in my view the claim of the claimant merits due consideration. I hold in the given facts and circumstances of the case that the delay of 2 years is attributed to the respondents and they are liable to pay compensation towards escalation for such delay of two years. The claimant has completed the work and the respondents had accepted the work on 31/05/1993 and prepared the final bill without imposing compensation for delay. Hence the respondents by virtue of their own actions de-facto extended time up to 31.05.93 for all intents & purposes. Hence claimant is entitled to extension of time up to 31.05.93. There was steep rise in prices during this period and claimed by the claimant and not refuted by the respondents and in my view the claimant is entitled to compensation towards escalation. As per annexure B of the statement of facts of the claimant, the value of work executed after the stipulated date of completion is as follows:

In 89-90	Rs.2,57,052.00
In 90-91	Rs. 21,35,539.00
In 91-92	Rs.6,66,496.00
In 92-93	Rs.20,82,435.00
In 93-94	Rs.8,12,848.00
Total value of works executed	Rs.59,54,370.00

7.11 From the above it is clear that most of the work was executed after Sep 89.

7.12 Clause No.53 had been deleted in this contract and hence cannot be applied. The premium on DSR 85 for the work in question of the contract amount was 20.4%. The prevailing premium above DSR as per the claimant in 89-90, 90-91, 92-93, 93-94 was 75%, 100%, 130%, 155% & 185% respectively. However the respondents had not contested the value of work executed but they had indicated the premium prevailing on 89,90,91,92 was 49%, 81%, 106% & 106% respectively. Considering the premium percentage above DSR 85 of the respondents for 90&91 and taking an average of the two the prevailing percentage during the execution works out to 93.5 $(81+106/2)$. The escalation from 1989 to 1991 has been 57% $(106-49)$. Considering 57% escalation on the entire work executed beyond contractual period, the escalation works out to Rs.33,93,990/-. After considering all aspects of the case however I restrict the compensation towards escalation @ 15% per year of delay on the value of the work executed which shall work out of Rs. 8,93,156/- x 2 years totaling to Rs.17,86,212/-

7.13 Hence I award Rs. 17,86,212/- to the claimant against claim no.2.”
(Emphasis added)

5. I have deliberately reproduced the entire discussion with respect to this claim because there are various facts and aspects which have been noted in this part of the Award. To briefly state, these aspects are that the contractual date of completion was 28.9.1989 but the actual date of completion was 31.5.1993. There was also an admitted delay in handing over all the sites for the construction of the 68 quarters as the respondent was not having the land for the entire 68 quarters. Further, the sites for 11 quarters were not at all handed over, out of the sites of 68 number quarters. Details of the delays caused by the

objector have also been stated with precision under different aspects. The Arbitrator has thereafter referred to the fact that it is the respondent who was responsible for the delay which was of two years (out of the total delay of 2yrs and 8 months) and consequently, the objector was liable to pay compensation towards escalation for such delay of two years. The Arbitrator has also referred to the value of the work as also the official DSR for the increase in the rates. Ultimately, on a conspectus of the aforesaid facts, the Arbitrator has awarded the claim towards escalation of Rs.17,86,212 out of the amount claimed of Rs.66,98,773/-.

6. There is absolutely no perversity whatsoever in the detailed discussion and findings as arrived at by the Arbitrator. The counsel for the objector has sought to canvass and contend that there is perversity in the findings. However, perversity is not a 'mantra' and perversity has to be ex facie apparent. If detailed evidence is required to be reappraised and on the basis of which evidence two views are possible, it cannot be said that there is any perversity. Merely because some documents which the objector sought to refer would go in favour of the objector cannot derogate from the fact that there are other facts and documents which have been in detail referred to by the Arbitrator for arriving at the findings of fact and which is that it is the owner/objector who is responsible for the delays as per para 7.1 of the Award

reproduced above. The contention of the objector is misconceived because the arbitrator clearly has considered the documents which are now sought to be relied upon by the objector because the arbitrator has apportioned the extended period in two parts and has awarded escalation only for that period for which the objector has been held responsible and not for the period for which the contractor was responsible. This rational honest guesswork of apportioning of the period is a pure finding of fact which cannot be interfered under Sections 30 and 33. Such reasons and heads of delays could not in any manner be effectively countered and in the scope of hearing objections under Sections 30 and 33 and the objector cannot be allowed to convert this court hearing objections to an Award into a Court of first appeal to re-appraise the entire evidence.

7. The counsel for the objector has also argued, and 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, New India Civil Erectors Private Limited Vs. Oil and Natural Gas Corporation AIR 1997SC 980 and State of Maharashtra Vs. Digambar Balwant Kulkarni 1979(2)SCC217. These judgments are relied upon for the purpose that when there is no provision for escalation in the contract, the Arbitrator cannot award escalation and that the Arbitrator cannot act against the terms of the contract. 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 28.9.1989 but the contract was completed only on 31.5.1993. 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. 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 for 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 is accordingly dismissed.

8. 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.

9. Claim No. 15 pertains 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 *State of Rajasthan Vs. Ferro Concrete Construction Pvt. Ltd* (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 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.

10. 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.

11. 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 which were filed nine years back 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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