

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

% **Judgment reserved on: 04.03.2009**
Judgment delivered on: 20.03.2009

+ **FAO(OS)No.389 OF 2008**

M/s. Sudhir Bros. Appellant
Through: Mr. Harish Malhotra, Senior
Advocate with Mr. Vipul Gupta,
Advocate

versus

Delhi Development Authority & Ors. Respondents
Through: Mr. S.M. Chopra, Advocate

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 Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

VIPIN SANGHI, J.

1. The appellant challenges the judgment of the learned Single Judge dated 16.07.2008 in C.S.(OS) No.2312/2006 and I.A. No.170/2008, whereby the learned Single Judge has decided the objections to the arbitral award dated 11.11.2006 made by Sh. V.D. Tiwari, sole arbitrator. The contract had been awarded to the appellant for construction of 234 LIG dwelling units at Pitam Pura Pocket-W Poorvi including internal services vide agreement No.23/EE/CDI/80-81. The stipulated date of start of the work was

16.01.1981 and the time of completion was 12 months. However, the work could not be completed by 15.01.1982 (the stipulated date of completion) and the contract spilled over into extra time. Disputes arose between the parties, which were referred to arbitration of the learned arbitrator Mr. V.D. Tiwari by this Court vide order dated 08.12.2005. The appellant was the claimant before the arbitrator. By the impugned judgment the learned Single Judge has set aside the award in respect of claim No.7, counter claim No.2 and varied the rate of interest awarded for a certain period, and deleted the interest awarded for certain other period. The appeal, as filed, impugns the findings of the learned Single Judge on claim No.7 and the denial of interest as aforesaid. At the time of argument learned counsel for the appellant has, however, restricted his submissions only to challenge the setting aside of the award on claim No.7.

2. Under claim No.7 the appellant/ claimant had claimed 35% over the quoted rates on the amount of work executed after the stipulated date of completion. One of the primary issues before the learned arbitrator was to determine as to which of the parties was responsible for the delay. The learned arbitrator came to a finding of fact that it was the respondent DDA who was wholly responsible for the prolongation of the contract. Founded upon the said delay, the appellant had raised various claims, including claim No.7 for Rs.21,36,403/-. The learned arbitrator arrived at a finding that the claim was admissible for an amount of Rs.3,54,396/-.

3. Before the learned Single Judge it was contended by the respondent DDA that the award on claim No.7 was not justified, as it was based on no evidence. It was contended that in the absence of proof of payment or loss, the arbitrator could not have calculated escalation or increased construction cost for the prolonged period on some arbitrary method. Reliance was placed on the decision of this Court in ***"Kochar Construction Co. v. Union of India & Anr."*** 1994(1) Arb. LR 269 as well as the decision of this Court in ***"Hindustan Construction Corporation v. Delhi Development Authority & Anr."*** 2002(3) Arb. LR 235 (Delhi).

4. On the other hand, the appellant while resisting the objection had contended that various documents on record of the learned arbitrator establish that at the relevant time the appellant had demanded escalation in cost of construction. The arbitrator had noticed that during the extended period the DDA itself was awarding contracts at rates which were 45% above the appellant's quoted rates. It was also contended that the arbitrator also took note of the continuous price rise and CPWD cost index while awarding the sum of Rs.3.54,396/-.

5. The learned Single Judge set aside the award on claim No.7 and the reasoning of the learned Single Judge is to be found in paragraphs 17 to 19 of the impugned judgment, which read as follows:

"17. So far as Claim No.7 is concerned, the contractor had demanded 35% of the total value of the original contract as escalated

construction costs over and above the cost of materials and labour admissible to it under clause 10-C. The Arbitrator relied upon a decision of this court reported as Metro Industries Electrical Vs. DDA AIR 1980 Delhi 266. The DDA's contentions, on the other hand, were that in the absence of any proper evidence of higher cost of construction, the Arbitrator could not have followed or adopted same cost analysis and awarded 25% escalation. It relies upon the Division Bench's judgment of this court in Kocher Construction and a subsequent decision in Hindustan Construction Corporation.

18. In Kocher Construction, the question was whether a claim for escalation of costs allowed by the Arbitrator was justified. The Arbitrator had accepted a cost analysis submitted to him by the claimant. The Court held that mere reliance on a cost analysis would be insufficient to establish that such cost had in fact been incurred. The decision in Hindustan Construction, on the other hand, turned upon on the tenability of the contractor's claim for escalation of costs under clause 10-C.

19. In the present case, no doubt the Contractor/claimant wrote certain letters which have been adverted to in the previous part of this judgment. Yet, this court is of the opinion that the findings of the arbitrator on this head cannot be sustained. What the Contractor really claiming is a head of compensation or damages even though styling it as escalation. One cannot be unmindful of the fact that the contract negotiated between the parties factored the eventually of extension of contract and the consideration payable. If the contractor had intended that extension was acceptable only on the condition of payment of stipulated additional compensation, he should have made such reservation in terms of Section 55 of the Contract Act. The second and more substantial aspect here is that the contractor - claimant made no attempt to prove such damages and merely relied upon letters addressed to the DDA. A mere demand cannot be justified for grant of escalation

particularly when the claim for such additional consideration is disputed. If the Contractor wanted to establish its entitlement to such additional amounts, the mode of proving it could not have been any different than in respect of other claims. Therefore, the methodology and approach adopted by the arbitrator in awarding such 25% amount working to Rs.3,54,396/- is unsustainable; it is also contrary to the Division Bench ruling in Kochar Construction. This part of the award, therefore, cannot be sustained."

6. The submission of learned counsel for the appellant is that the learned Single Judge had failed to appreciate that the arbitrator had categorically recorded a finding that the work had been delayed for a period of more than 40 months, as the same could not be completed till it was ultimately terminated on 25.07.1984 and that the delay was attributable to the respondent alone. He submits that the appellant had sent various communications demanding escalation and referred to Exs.P-1, P-8, C-25, C-30 and C-46 in this regard, which had also been referred to in the award. He submits that the finding of learned Single Judge that the appellant had not made any reservations in terms of Section 55 of the Contract Act is, therefore, incorrect. He further submits that the claimant-appellant had placed the CPWD cost index as well as evidence of tenders accepted by DDA according to which there was escalation in rates by 55% and 45%, respectively. He submits that the claimant, as is evident from the award, had claimed escalation ranging from 25% to 42% and the learned arbitrator had made a conservative award by restricting the increase to 25%, even though there was sufficient evidence on record that the increase had

been at least 45% to 55%, even as per undeniable documentary evidence. Learned counsel for the respondent, on the other hand, has sought to support the judgment of the learned Single Judge.

7. Before we proceed to consider the submissions of learned counsels for the parties, it would be appropriate to set out in extenso the award made by the learned arbitrator on claim No.7. The same reads as follows:

“11.0 CLAIM NO.7: CLAIMANTS CLAIM 35% OVER
THE QUOTED RATES ON THE
AMOUNT OF WORK EXECUTED
AFTER THE STIPULATED DATE
OF COMPLETION

11.1 The claimants submitted that the tenders for the work were invited by the respondents giving twelve months as the time of completion and they had quoted their rates keeping in view that the time was of essence of the contract as mentioned by the respondents in clause 2 of the contract. They also stated that the quoted contract rates were applicable for this stipulated period only. They then submitted that there had been a continuous rise in the prices with the passage of time and because of the contract spilling into extra time due to defaults of the respondents only, they had to suffer heavy losses. They further submitted that there were two aspects to reach the conclusion on this issue. First of this was the C.P.W.D. Cost Index which is sanctioned by the department every year keeping in view the market prices of the key building materials prevailing at the time of sanction. The data concerning variation in the C.P.W.D. Cost Index for the related period had already been placed by them on record and that this data clearly showed that there had been an increase of over 50% in costs since the time their tender was accepted. The second aspect was the

rates at which the respondents themselves were accepting tenders from time to time and in this regard also they had filed clear evidence that the respondents in the year 1982 were accepting tenders at rates which were nearly 45% above their quoted rates. In this connection, they referred to their Annexure F at pages 220 to 230 of their Book B. The claimants further submitted that notices were served on the respondents seeking enhancement of their contract rates vide their Exhibits P-1, P-8, C-25, C-35 and C-46. The details of the claim were furnished by them in their Statement of Facts and Annexure F. The claimants then pleaded that the entire delays in the execution of the work were on the part of the respondents by way of non supply of stipulated materials in time, delayed supply of drawings, delayed availability of part site and delayed monthly payments and that it was the respondents only who had pushed them in the grip of the rising market. They also stressed that though the stipulated date of completion expired on 15.1.1982, they were making the claim only from March 1982 as per details of the calculations filed by them. The claimants referred to citation AIR 1980 Delhi 266 of Delhi High Court (Metro Electrical Vs. D.D.A.) and provided a copy of the same for record. They also laid reliance on exhibits C-72 and C-74.

11.2 The respondents denied the claim emphasizing that the rates once quoted by the claimants were applicable throughout the contract period and also thereafter. They also stressed that the claimants were accepting the running payments made to them without any fuss. Moreover, the delays in the execution of the work were also on account of the defaults of the claimants and for this reason also they were not entitled for any rate revision. The respondents then referred to clause 10(c) of the contract and stated that any escalation that could be admissible to the claimants had to be related to this clause of the contract and nothing more could be allowed. They further pleaded that since the S.E. had granted extension of time with levy of full compensation, escalation under clause 10(c) also was not payable to the claimants beyond the stipulated contract period. The respondents also argued that the claimants

had collected most of the materials required for the work in the stipulated period of contract over which secured advance was paid to them and hence the question of paying higher rate on the cost of materials did not arise.

11.3 AWARD

11.3.1. I have heard both the parties at length on this issue and have carefully considered the arguments put up by them in the matter and have also studied the evidence filed and cited by the parties. It has already been observed earlier that the delays due to which the contract period spilled into extra time were solely attributable to the respondents. The claimants had thus been put in the grip of the rising prices in the market due to defaults on the part of the respondents. There is no provision in the contract that the claimants will have to carry out the work at their quoted rates beyond the stipulated contract period even if the defaults lay with the respondents. The claimants had sought extra rates varying from 25% to 42% above their quoted rates for the work done beyond the stipulated contract period in various letters filed by them. The revision of rates sought by the claimant appears to be justified when compared to the upward change seen in the C.P.W.D Cost Index in the same period as also on the basis of the tenders that had been accepted by the respondents in that period. I do not find the applicability of clause 10 (c) beyond the stipulated contract period. This point was considered and decided by the Delhi high Court in its judgment in the case of Metro Electrical Vs. DDA. Hence the respondents cannot take recourse to this clause to deny the claim as has been done by them. Moreover, clause 10 (c) relates to statutory increase in wages of labour and cost of material and does not bring into its ambit the escalation in construction costs in the prolonged period of the contract on account of the delays attributable to the other party. The acceptance of running payments does not debar the claimants from getting the revised rates, specially when they were projecting their claim for revision in rates through their letters in the extended period.

11.3.2. The calculations submitted by the claimants in support of their claimed amount show that the claim is for work done by them after they were paid the running bill in the month of March 1982. The net amount on which the rate revision has been sought by the claimants has been worked out by them to be RS.21,36,403/=. This figure had been arrived at by the claimants taking into account the secured advance paid by the respondents on the material that had been collected by the claimants prior to seeking revision of the rates. The respondents have not contested these calculations while denying the claim. This amount however will undergo a change due to certain items of work claimed by the claimants as work done in claim no. 1 but disallowed in the award for that claim. This disallowed amount works out to RS 1,18,819/= and this has to be retrenched from the total amount of work done as projected by the claimants. The claimants have also erred in not allowing for the cost of materials issued by the respondents at fixed cost which is also required to be adjusted from the work done figure; this amount has been assessed to be RS 6,00,000/= on proportionate basis. The claimants are therefore entitled to receive rate revision on a sum of RS 14,17,584/= only and not on the sum of RS 21,36,403/= as claimed by them. The claimants had projected a price rise of 25% in the initial stages and then had raised this figure to 35% to 42% over rates quoted by them. I therefore grant them enhanced rates only at 25% above instead of 35% above their quoted rates claimed by them later and on which basis the claim has been made now. The amount admissible to claimants works out to RS 3,54,396/= only and I award this sum to the claimants."

8. In the light of the aforesaid award, in our view, it cannot be said that the appellant had not put the respondent to notice with regard to the preservation of its right to claim escalation/compensation in terms of Section 55 of the Contract Act. The learned arbitrator has

recorded that notices had been served on the respondent seeking enhancement in their contract rates vide Exs.P-1, P-8, C-25, C-35 and C-46. He further recorded that the appellant-claimant had sought extra rates varying from 25% to 42% above their quoted rates for the work done beyond the stipulated contract period in various letters filed by them. It was not the respondents' case in their objections, that these findings of fact were contrary to the record. Consequently, we are of the view that the finding of the learned Single Judge that reservation in terms of Section 55 of the Contract Act was not made by the appellant for claiming escalation or compensation (whatever may it be called) for executing the work during the extended period of contract, is not correct.

9. We are also of the view that the learned Single Judge has erred in concluding that the claimant had made no attempt to prove the damages claimed to have been suffered, and that the claimant had merely relied upon letters addressed to DDA raising a demand for extra rates. It is not as if the claimant had merely relied upon its own communications to claim escalation/damages. It is evident that the claimant had placed on record, by way of evidence, the CPWD cost index, which showed escalation to the extent of 55% in the cost. The claimant also placed on record before the learned Arbitrator other contracts awarded by the DDA during the relevant period, which showed increase in rates by 45%. It cannot be said that there was no evidence before the learned arbitrator in support of claim No.7. The sufficiency of evidence before the arbitrator is not for the Court to

judge. The arbitrator is not bound by strict rules of evidence. So long as there is cogent evidence presented before the arbitrator, it is not for the Court to judge its sufficiency. Of course, if relevant evidence is altogether ignored or wholly irrelevant evidence is considered, it would be a case of misconduct on the part of the arbitrator.

10. In the light of the aforesaid evidence in the form of CPWD cost index and other contracts entered into by the DDA during the extended period, it cannot be said that there was no cogent material or evidence before the arbitrator to support the claim of the appellant. The learned arbitrator had restricted the award to grant of escalation to the extent of 25% only, which was the lowest escalation demanded by the appellant in the various communications above referred to.

11. The decision ***Kochar Construction Co.*** (supra) is clearly distinguishable and has no application in the facts of this case. As noted by the learned Single Judge, ***Kochar Construction Co.*** (supra) was a case where a claim of escalation of cost was allowed by the arbitrator merely by accepting the cost analysis submitted by the claimant. That is not the position in the present case. As aforesaid, cogent evidence had been led before the arbitrator to justify the claim for escalation/compensation during the extended period of contract, which has been considered by the learned arbitrator.

12. Consequently, in our view, the judgment of the learned Single Judge on claim No.7 cannot be sustained. Accordingly, we allow the present appeal. The award of the sole arbitrator on claim No.7 is

restored. The rest of the judgment of the learned Single Judge is affirmed, leaving the parties to bear their respective costs.

(VIPIN SANGHI)
JUDGE

(MUKUL MUDGAL)
JUDGE

March 20, 2009
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