

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

+ **OMP No. 127/2002**

**19<sup>th</sup> January, 2010**

SHRI DHEERAJ SINGH

...Petitioner

Through: Mr. Rajiv Kapoor, Advocate

VERSUS

GOVT. OF NCT OF DELHI

....Respondent

Through: Mr. V.K.Tandon, Advocate

**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 (ORAL)**

**VALMIKI J.MEHTA, J**

1. By this petition the petitioner is challenging the impugned Award dated 16.01.2002 passed by the sole Arbitrator.
2. In my opinion the Award is liable to be set aside inter alia, for the following reasons:-
  - (i) There are contradictory findings and conclusions in the Award.

(ii) The Award fails to give germane reasons, which reasons in law, are a *sine qua non*, under Section 31 of the Arbitration and Conciliation Act 1996 for a valid Award. (See *Jai Singh Vs. DDA, 2008(9) AD(Delhi 453)*).

(iii) The Award is illegal.

(iv) The perversity in the Award is such that the judicial conscience of this court requires the setting aside of the Award.

3. The Award was passed on account of disputes which arose between the parties whereby the petitioner was awarded the work of construction of bridge across N.G.Drain from crossing water mains at RD-79600 m & RD-20673 respectively. There were delays in the performance of the contract and ultimately the contract was rescinded by the respondent. Claims and Counter-Claims, were filed by the parties before the Arbitrator. The claims of the petitioner pertained to the work done, escalation, refund of the security deposit and illegality of rescission of the contract etc. The counter-claims of the respondent pertained to, inter alia, cost of awarding of risk purchase tender, forfeiture of the security deposit and levy of compensation.

4. The counsel for the petitioner has pressed his objections with regard to setting aside of the entire Award and all the claims/counter-claims decided.

5. So far as Claim No.1 is concerned, since the Award shows the admitted position that an amount of Rs. 47,216/- is payable, the objections in this regard are not sustainable and thus this part of the Award is not liable to be set aside.

6. Claim No.2 was the claim for refund of the security deposit. This claim can be dealt with along with the Counter-Claim no.1 which is with respect to forfeiture of the same security deposit. The Arbitrator has allowed the respondent to forfeit the security deposit on account of the counter-claim of the respondent on the same subject matter, by holding that the respondent was justified in rescinding the contract.

Since the decision on the issue of forfeiture of the security deposit is also related to Claim no.5 with regard to the entitlement to rescission of the contract by the respondent, I am also taking up the said claim along with this claim/counter-claim of forfeiture of the security deposit.

7. On the aspect whether the respondent was entitled to rescind the contract, I note that this was a case where time of performance was not the essence of the contract and nor was it so treated in view of the extensions granted by the respondents. In terms of the decision of the Supreme Court reported as *Hind Construction Contractors Vs. State of Maharashtra AIR 1979 SC 720*, once the time of performance is not the essence, it was necessary for the respondent first to make time, the essence of the contract before rescinding the contract. There is no discussion on this aspect, in this part of the Award. The issue with regard to the rescission of contract and the related issue of forfeiture of the security deposit therefore is remanded back to the Arbitrator for a fresh decision to be made after considering all the relevant aspects.

8. Claim No.3 was with regard to the entitlement of the contractor for escalation under Clause 10CC. I find that the Arbitrator has awarded a sum of Rs.5173/-, but, I find that this is only a conclusion and how is this figure arrived at instead of the figure as claimed by the petitioner are not very clear. It is therefore, desirable that this claim be also remanded back to the Arbitrator to give appropriate reasons and findings for arriving at the figure of Rs.5173/- which has been awarded and whether this figure ought to be awarded or any other figure on a fresh consideration of the matter by the Arbitrator.

9. So far as challenge to Claim No.4 is concerned, I do not find any substance in the challenge because the Arbitrator has examined the factual position with respect to the making of the 'bandi' and has held that the amount already paid to the petitioner of Rs.42,000/- will serve the purpose. Before giving this conclusion, the Arbitrator has given the following findings and which cannot be faulted with:-

"I have carefully gone through the submission of both parties & documents submitted and find that the respondents reasoning is correct. There is not much change in slope or depth of drain from RD 30673 to RD 30775 and such extra bundi construction, its restoration and pumping of water was not required. As there is not much flow, normally water is diverted to other side by digging a drain, no pumping is required and cofferdam is made by earthwork. The calculation submitted by claimants are contradictory to size, length and also pumping out water from pound size 95 mx75mx17m, restoration of 192 m length and new cofferdam construction of 74 m only. Contractor himself has agreed in letter dated 21.10.1993 exhibit C-4 of original claims that rains has damaged bundi and as per special condition 12 of agreement at page 121 of agreement, nothing extra is payable for damage/extra work because of rain."

10. Counter-Claim Nos .2,5 and one counter claim titled as “another counter-claim” (last page of the Award) can all be dealt with together. These counter-claims have been dismissed by the Arbitrator by holding that the same are not arbitrable and also holding that no actual expenditure and loss has been proved by the respondent.

I note from the dealing of these counter-claims, that what is the reason , why the claims have been held to be non arbitrable, is not clear. The Award must contain not only the conclusion but also the findings and reasons, on the basis of which the conclusion is arrived at. While dealing with Counter-Claim no.2, the Arbitrator records that the new bridge which has to be constructed is on a different alignment at a different site, however, what would be the consequential effect thereof, has not been discussed. What is most perplexing in the Award is the dealing in the Award with respect to the counter-claim titled as “another counter claim”. This part of the Award, in my opinion, is totally bereft of any logic. To understand this complete lack of logic, it would be necessary for me to reproduce how this counter-claim has been dealt with. This relevant portion of the Award reads as under:-

|                           |                                                                                                                                                                                                                                                                                                                                                                                                                                                |
|---------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| “Another<br>counter claim | It arises during proceeding was that the respondents should be permitted to adjust the recoveries dues on accounts of compensation levied under clause-2 of agreement and recoveries of risk & cost of Rs.1108846/26 (Which was non-arbitrable) against the amount of award if any due to contractor. Respondents submitted that as per normal practice in the ordinary dealing, they will adjust the recoveries & release the balance amount. |
|---------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

Award

Claimants submitted that the no recoveries can be adjusted against the awarded amount. That is needed to be released in full. If any claims are recoverable from claimants, respondents need to file a separate suit for that under law of land. No recoveries should be adjusted against the amount of award.

Our careful consideration of submission of both sides during hearing and reading of clause-29 (1) & 29 (A) of contract, undersigned finds that this point also needed to be settled by Arbitrator.

Hence, I award, that the claims for recoveries of Rs.209580/- (Towards compensation levied under clause-2 of contractor) and Rs.1108846/26 including Rs.1 lacs security deposit forfeited by the respondents is (Towards recoveries for balance work done under clause-3 of contract) may be adjusted from the award so given.”

From the aforesaid discussion in the Award, certain things which become clear are that, after dismissal of the counter-claims of the risk purchase cost and other related claims, still the Arbitrator has, without any reasoning, awarded a sum of Rs.11,08,846.26p. to the respondent. The effect of this is that after dismissing effectively the counter-claims, the same is in fact surprisingly allowed for this amount of Rs.11,08,846.26 and the awarding of such counter-claim is without any discussion whatsoever of the entitlement, basis and reasons which justify the grant of an Award for the said sum. What is further inexplicable is that how has the Arbitrator arrived at a figure of Rs.2,09,580/- which has been finally awarded to the present petitioner. Still further, it is totally inexplicable as to how the Arbitrator has finally awarded the respondent a sum of Rs.52,389/-, I am totally confused in fact as to how at all these separate figures namely Rs.11,08,846.26/-, Rs. 2,09,580/- and Rs.52,389/-

can be reconciled. It is therefore best that this Award is remanded back to the Arbitrator to again pass a fresh Award by giving proper findings and appropriate reasons to support the conclusions as regards Counter-Claim Nos. 2 & 5, as also the Counter-Claim titled as “another counter-claim”.

11. So far as the rate of interest is concerned, I find that the Arbitrator has awarded the same at 12% per annum while dealing with Claim No.6. In my opinion even the rate of interest awarded is higher than what ought to have been at 9% per annum simple. In view of the recent pronouncements of the Supreme Court in the 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 Pvt. Ltd* (2009) 3 Arb. LR 140(SC). The award of interest @ 12% is set aside. I am not directing the Arbitrator to award a particular interest but, I am setting aside this claim and directing the Arbitrator to award interest lesser than 12% and in accordance with the aforesaid judgments of the Supreme Court. Accordingly, except so far as Claim Nos. 1 and 4 which are sustained, the rest of the Award is set aside and is remanded back to the Arbitrator for reconsideration of the other claims and counter-claims and passing a fresh Award in accordance with law with regard thereto.

12. I may note that in view of the apparent shortcomings and illegalities in the Award, its lack of reasons and findings, the counsel for the respondent after making the endeavour to argue realised the futility, and in all fairness thereafter, has not very vehemently objected to the issue of remission.

13. The Award is therefore sustained so far as Claim Nos.1 and 4 are concerned. The Award is set aside qua the Claim Nos.2,3, issue of rescission, counter-claim Nos.2,4 and 5 and the one titled as “another counter claim” and the matter is remitted back to the Arbitrator qua these claims and counter-claims. The Arbitration record in this court be returned back to the counsel for the respondent for being returned to the Arbitrator so that a fresh Award, in accordance with law, can be passed in terms of the present judgment. Parties are left to bear their own costs.

**VALMIKI J.MEHTA, J**

**January 19, 2010**

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