

* **HIGH COURT OF DELHI: NEW DELHI**

+ **FAO (OS) No. 112/2005**

% Judgment reserved on: 8th April, 2010
Judgment delivered on: 26th April, 2010

M.L. MAHAJAN, CONTRACTOR Appellant
Through: Appellant in person.

Versus

**DELHI DEVELOPMENT AUTHORITY
& ANR.** Respondents

Through: Ms. Anusuya Salwan, Adv.
with Ms. Renuka Arora, Adv.

AND

FAO (OS) No. 419/2005

D.D.A. Appellant

Through: Ms. Anusuya Salwan, Adv.
with Ms. Renuka Arora, Adv.

Versus

M.L. MAHAJAN & ANR. Respondents

Through: Respondent in person.

Coram:

**HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MR. JUSTICE A.K. PATHAK**

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

A.K. PATHAK, J.

1. Both the above appeals are directed against the order dated 4th April, 2005, passed by the learned Single Judge, whereby objections under Section 30 of the Arbitration Act, 1940 filed by the Delhi Development Authority (hereinafter referred to as “DDA”) against the award dated 22nd May, 1992 published by Mr. M.S. Telang, sole Arbitrator, have been disposed of; claim Nos. 1 to 5, 7 and 8 and counter claims 1 to 4 have been made a Rule of the Court whereas claim No. 6 has been set aside.

2. In brief, relevant facts are that Mr. M.L. Mahajan (hereinafter referred to as the contractor) was awarded a work for the construction of 926 *janta* category flats at Ghazipur by the DDA. As per the contract, the construction work was to commence on 12th August, 1982 and was to be completed within a period of one year i.e. by 11th August, 1983. The work could not be completed in time by the contractor; accordingly, Superintending Engineer, DDA levied compensation on the contractor in terms of clause II of the contract alleging failure on the part of the contractor to complete the work. Consequently, disputes arose between the parties and were

referred to the Arbitrator, in terms of the arbitration clause as contained in the agreement.

3. Contractor raised eight claims besides the cost of arbitration. DDA also raised four counter claims. Claim No. 1 for Rs.2,85,792/- was towards the final bill which included payments under Clause 10 (c) of the contract, regarding statutory increase in the price of bricks and wages of labour. The Arbitrator awarded Rs.1,72,349.64 against this claim. Claim No. 2 in the sum of Rs.1,00,000/- was towards the refund of security deposit. Claim No. 3 for Rs. 5,635/- was regarding refund of rebate wrongly deducted by the DDA. Both these amounts were allowed by the Arbitrator in toto. Claim No. 4 in the sum of Rs.73,000/- was in respect of fixation of PVC pipes of a larger diameter than the one provided under the agreement. Against this claim, Arbitrator awarded a sum of Rs.66,815.89. Claim No. 6 for Rs.7,23,000/- was towards escalation of work done beyond the stipulated date of completion; Arbitrator had awarded Rs.2,89,586.79 against this claim. Claim No. 7 for Rs.2,85,000/- was towards overheads on account of site office and watch and ward during the prolonged period of the contract. The Arbitrator awarded Rs.1,96,200/- against this claim. Claim No. 8 was towards pendente lite interest which was allowed for the period as mentioned in the award @ 12 %

simple interest per annum. Counter claims of Rs.53,352/- and Rs.1,88,363/- towards levy of compensation and damages respectively on account of execution of balance work and rectification of defective works were negated. Counter claim No. 3 for Rs.1,69,769/- on account of reduction in items was allowed to the extent of Rs.72,979.32 but nil award was awarded as this amount was given an adjustment while determining claim No. 1. Similarly, counter claim No. 4 for Rs.1,62,791/- was allowed to the extent of Rs.12,124/- on account of recovery of materials issued but having remained unaccounted for, beyond the permissible limit, a nil award was awarded as this amount was also given an adjustment in claim No. 1.

4. Claims had arisen on account of delay alleged by the contractor on the part of the DDA, therefore, the Arbitrator had gone into this aspect and on the basis of the evidence adduced before him, he returned a categorical finding that the delay was attributable to the DDA. It was held that the site remained encumbered, as a consequence whereof, the contractor was prevented from completing the work within time. DDA had failed to remove obstructions from the site and had breached the obligations in this regard. It was also noted that a road was passing through the site which had to be removed and until it

was done, no work could proceed at the site; electric poles were obstructing the site where flats were proposed to be constructed and this also contributed to the delay, inasmuch as, the DDA caused delay in issuing some of the drawings which, in fact, were issued after the stipulated date of completion. Work was substantially completed by the contractor by February, 1986. However, on that date five minor works with regard to fixing of fittings pertaining to sanitary and water supply and final white wash remained to be completed. These works were kept pending, awaiting the allotment of flats, as there was a fear of the fittings being stolen, on there being a time gap between their fixation and the allotment of the flats. In spite of the works having been substantially completed, DDA did not issue the provisional completion certificate; it was made subject to contractor attending the minor works. Much after the defect liability period was over, compensation under Clause II was levied as late as on 15th December, 1988 by which time the maintenance period had expired i.e. in August, 1986. Since DDA failed to take the possession of the site, the contractor was justified in withdrawing the watch and ward from 12th September, 1986 after issuing a proper notice. Since delay was attributable to the DDA, the Arbitrator awarded different amounts, as aforesaid, under each claim.

5. Learned Single Judge on the basis of material placed before him found justification in the reasoning returned by the Arbitrator with regard to the claims/counter claims raised by the parties except with regard to claim No. 6. Consequently, the award was upheld and made a Rule of the Court with regard to all the claims/counter claims except claim No. 6 which was set aside.

6. Aggrieved by the dismissal of their objections with regard to claims No. 1 to 5, 7 and 8 and the counter claims, DDA has preferred FAO (OS) No. 419/2005, inter alia, on the ground that the claims under these heads were awarded by the learned Arbitrator without being supported by sufficient material, inasmuch as, the award was bereft of reasons. Contractor was also aggrieved by rejection of claim No. 6 by the learned Single Judge and has preferred FAO (OS) 112/2005.

7. We shall first deal with the appeal filed by the DDA. Learned Single Judge has held that the findings of fact returned by an Arbitrator can be challenged only on the ground that such a finding is perverse, in that, there is no evidence to sustain the same or no reasonable person would arrive at the finding on the given evidence or that a material document has been ignored. Save and except the three categories mentioned hereinabove,

findings of fact returned by the Arbitrator cannot be challenged by requiring this Court to sit as a Court of Appeal or to re-appreciate the evidence. Reasoning of the learned Arbitrator and the salient features noted on the issue of delay was well supported with evidence; to put it negatively, it cannot be said to be a finding which no reasonable person would arrive at or a finding which is based on no evidence. Learned Single Judge examined each claim independently on the basis of the arbitral proceedings and concluded that the Award under each of the claims except claim No. 6 was supported by material evidence and the findings arrived at were not perverse. We do not find any reason to take a different view than what has been taken by the learned Single Judge. We concur with the learned Single Judge that the findings of fact recorded by the Arbitrator cannot be challenged by the court as if it is hearing an appeal. Even before us the learned counsel for the DDA has failed to point out that the findings returned by the Arbitrator were based on no evidence or were perverse.

8. A Division Bench of this Court in ***M.L. Mahajan vs. Delhi Development Authority***, reported in ***2002(63) DRJ 57 (DB)***, had held that intervention in post award proceedings may be warranted if there is an error apparent on the face of the record either in law or in fact and has consequently resulted in a grave

miscarriage of justice. Court has not to substitute its own view with the view taken by the Arbitrator. If the view taken by the Arbitrator is a plausible one the Court would refrain from interfering. In this case it was inter alia held as under :-

“.....These are findings of fact which would normally not be interfered with by the Court. Objections covering such points are not justifiable. Intervention in post-Award proceedings may be warranted if the error of law or fact is perverse and apparent on the face of the Award, and results in a monumental miscarriage of justice. Having chosen their own forum of adjudication, the parties are left to reap the harvest of the seeds that they have sown. [Unless an error in the interpretation of a term in the contract between the parties is manifest merely by looking at that documents, jural interference is uncalled for. In no case is it permissible for the Court to substitute its own view, however compelling, for that preferred by the Arbitrator, even if it is only a plausible one. It is within this very restricted arena that the Court must consider and decide the Objections filed against an Award.]”

9. In ***Delhi Development Authority vs. Madhur Krishna*** reported in ***2009 VI AD (Delhi) 760***, a Division Bench of this Court had held that reasons given by the Arbitrator should reflect his thought process, whereby it can be ascertained as to how he has arrived at a particular conclusion. Thus, we are of the view that it is not mandatory for an Arbitrator to give a detailed judgment; he has to give reasons precisely so as to

indicate his thought process for arriving at a particular finding returned by him and the basis on which a particular sum has been awarded. If the Award is capable of indicating the mind of Arbitrator as to how he has arrived at a particular conclusion the requirement of stating the reasons is suitably met.

10. We have perused the Award rendered by the learned Arbitrator and find that sufficient reasons have been given by him in arriving at a conclusion that delay was attributable to the DDA as also for determining the particular sums under each head. A perusal of the Award itself shows that it is not bereft of reasons, inasmuch as, the reasons in the same have been mentioned for arriving at the particular amount awarded under each count.

11. Accordingly, we are of the view that the appeal of the DDA is devoid of merits and the same is dismissed.

12. Now, we shall advert to the appeal of the contractor whereby it has been contended that learned Single Judge was not justified in setting aside the Award in respect of claim No. 6 of Rs.2,89,586.79 on the ground that the contractor was suitably compensated under Section 10(c) of the contract being a part of claim No. 1. As per the learned Single Judge, the statutory increase in the labour wages and material stood adequately

compensation under Clause 10(c), thus, the contractor was not entitled to any amount towards escalation of price for work done beyond the stipulated date of completion due to breaches committed by the DDA and non-fulfilment of its contractual obligations.

13. Arbitrator has dealt with claim No. 6 in the following manner :-

“Claim 6 - Claimants claim Rs.7,23,000/- towards escalation in prices for work done beyond stipulated date of completion due to breaches committed by department and non-fulfilling contractual obligations.

: As stated in the ‘Findings and Reasons’ above, the Respondents were in breach of the contractual obligations, as a result of which, there was delay in the completion of the work. The Claimants gave notice to the Respondents, at the relevant time about their intention to claim market rates for the work to be executed in the extended period. I hold that the Claimants are entitled to receive reasonable compensation towards the increase in the market prices of the materials of construction, and for the increased labour wages during that period. The claimants sought to justify their claim of 15% over the contract rates, for which they had given the Respondents notice at the relevant time, on the basis of the cost-indices published by the Central Public Works Department, from time-to-time, for works to be executed in Delhi. The cost indices are based on some of the important ingredients of the construction activities, such as prices of Bricks, Sand, Cement, Aggregate, Timber, Steel, and the wages of labour like Mason, Carpenter, and

un-skilled beldar, from time-to-time. In the instant case, I find that the Respondents have supplied to the Claimants construction materials like Cement, Steel, SCI pipes, Timber-shutters, PVC pipes, etc. at fixed rates, for the entire period of contract. The Claimants also stand reasonably compensated for the statutory increase in the labour wages (beyond initial 10%), as per their claim agitated in Claim No. 1 above. Thereby part of the increase in labour wages stands neutralised. In these Circumstances, the basis of computing the compensation on the cost-indices published from time-to-time, would lead to erroneous results. Therefore I hold that the Claim as made out is partly justified. I award Rs.2,89,586.79p, against this claim to be paid by the Respondents to the Claimants."

14. Admittedly the project was delayed. Arbitrator returned a categorical finding that the breach of the contractual obligations was on the part of the DDA. Delay was attributable to the DDA. In terms of the agreement, construction work was to be completed by 11th August, 1983. Work was substantially completed by the contractor by February, 1986. DDA vide its letter asked the contractor to attend certain works which were five in number. Two items related to the fixing of sanitary and water supply fittings; others included the final coat of white wash. This clearly shows that the work was almost complete except for the aforementioned minor items. The Arbitrator accepted the plea of the contractor that these items had been

kept pending due to fear of theft as the time gap in the completion of the construction and the allotment could be fairly long. The Arbitrator has further categorically held that the contractor was entitled to a “provisional completion certificate” in February, 1986 subject to his attending to these minor items of work. Be that as it may, it is evident that the work was almost complete by February, 1986 i.e. after a period of about two and a half years from the stipulated completion date. Work was however continued by the contractor even after the stipulated completion date i.e. till February, 1986 and during this period substantial construction work was done.

15. At this stage it would be relevant to extract clause 10 and Clause 10(c) which read as under :-

"Clause 10 - Stores supplied by Delhi Development Authority. If the specifications or schedule or items provided for the use of any special materials to be supplied from Engineer-in-Charge's stores or it is required that the contractor shall use certain stores to be provided by the Engineer-in-Charge as shown in the schedule of materials hereto annexed the contractor shall be bound to procure and shall be supplied such materials and stores as are from time to time required to be used by him for the purposes of the contractor only, and the value of the full quantity of material and stores so supplied at the rates specified in the said schedule of materials may be set off or deducted from any sums then due, or thereafter to become due to the contractor under the contract, or

otherwise or against or from the security deposit or the proceeds or sale thereof if the same is held in Government securities. the same or a sufficient portion thereof being in this case sold for the purpose. All materials so supplied to the contractor shall remain the absolute property of Delhi Development Authority and shall not be removed on any account from site of the work, all shall be at all times open to inspection by the Engineer-in-Charge. Any such materials remaining unshed and in perfectly good condition at the time of the completion or termination of the contract as shall be returned to the Engineer-in-Charge at a place directed by him, by a notice in writing under his hand, if he shall so require but the contractor shall not be entitled to return any such materials unless with such consent, and shall have no claim for compensation on account of any such materials so supplied to him as aforesaid not being used by him or for any wastage in or damage to any such materials. Provided that the contractor shall in no case be entitled to any compensation or damages on account of any delay in supply or non supply thereof all or any such materials and stores. Provided further that the contractor shall be bound to execute the entire work if the materials are supplied by the Delhi Development Authority within the scheduled time for completion of the work plus 50 percent thereof (scheduled time plus 6 months if the time of completion of the work exceeds 12 months) but if a part only of the materials has been supplied within the aforesaid period then the contractor shall be bound to do so much of the work as may be possible with the materials and stores supplied in the aforesaid period. For the completion of the rest of the work the contractor shall be entitled to such extension of time as may be determined by the Engineer-in-Charge whose decision in this regard shall be final."

Clause 10C - If during the progress of the works, the price of any material incorporated in the works, (not being a material supplied from the Engineer-in-Charge's stores in accordance with Clause 10 hereof) and/or wages of labour increases as direct result of the coming into force of any fresh law, or statutory rule or order (but not due to any changes in sales tax) and such increase exceed ten per cent of the price and/or wages prevailing at the time of receipt of the tender for the work, and contractor thereupon necessarily and properly pays in respect of the material (incorporated in the work) such increased price and/or in respect of labour engaged on the execution of the work such increased wages, then the amount of the contract shall accordingly be varied provided always that any increase so payable is not, in the opinion of the Superintending Engineer (whose decision shall be final and binding) attributable to delay in the execution of the contract within the control of the contractor. Provided, however, no reimbursements shall be made if the increase is not more than 10% of the said prices/wages and if so the reimbursements shall be made only on the excess over 10% and provided further that any such increase shall not be payable if such increase has become operative after the contract or extended date of completion of the work in question.

If during the progress of the works, the price of any material incorporated in the works (not being a material supplied from the Engineer-in-Charge's stores in accordance with Clause 10 hereof) and/or wages of labour is decreased as a direct result of the coming into force of any fresh law or statutory rule or order (but not due to any changes in sales tax) and such decrease exceeds ten per cent of the prices and/or wages prevailing at the time of receipt of the tender for the work, Delhi Development Authority shall in respect of materials incorporated in the work (not

being materials supplied from the Engineer-in-Charge's stores in accordance with Clause 10 hereof) and/or labour engaged on the execution of the work after the date of coming into force of such law statutory rule or order be entitled to deduct from the dues of the contractor such amount as shall be equivalent of difference between the prices of materials and/or wages as they prevailed at the time of receipt of tender for the work minus ten per cent thereof and the prices of materials and/or wages of labour on the coming into force of such law, statutory rule or order. The contractor shall for the purpose of this condition keep such books of account and other documents as are necessary to show the amount of any increase claimed or reduction available and shall allow inspection of the same by a duly authorised representative of Delhi Development Authority and further shall, at the request of the Engineer-in-Charge furnish, verified in such a manner as the Engineer-in-Charge may require. Any document, so kept and such other information as the Engineer-in-Charge may require.

The contractor shall, within a reasonable time of his becoming aware of any alteration in the prices of any such materials and/or wages of labour give notice thereof to the Engineer-in-Charge stating that the same is given in pursuance to the condition together with all information relating thereto which he may be in a position to supply.

16. Aforesaid clauses were expounded and scrutinized in the M.L. Mahajan's case (supra) and it was observed as under :-

"A conjoint reading of these two Clauses 10 and 10C is necessary in order to appreciate their true import and intent. Clause 10 deals only with 'Stores supplied by Delhi Development Authority' as is evident from the caption itself. It empowers the DDA to insist

upon the use of a particular material to be supplied by it. The Clause then envisages that there are eventualities which may result from the delayed supply by the DDA of such material. Broadly stated what is laid down is that the material must be used as and when supplied. The Contractor is not entitled to insist that the entire supply must be completed by the DDA before commencing its obligations under the Contract. It also clarifies that material supplied by the DDA will always remain its property. What is of great significance is the second proviso inasmuch as it states that the Contractor shall be bound to execute the entire work if the materials are supplied by the DDA within the scheduled time for completion of the work plus 50% thereof; but if a part only of the materials has been supplied within the aforesaid period, then the contractor shall be bound to do so much of the work as may be possible. The understanding between the parties therefore was limited to the period indicated above, and where the maximum period has elapsed, the obligations under this Clause would not remain operative. This factor is of obvious relevance while construing Clause 10C, and in particular the opening phrase "If during the progress of the works....." Thereafter, Clause 10C clarifies that it shall have no applicability on any increase in the price of materials to be supplied by the DDA, which clearly stands to reason. It further stipulates that increases in the price of any material, sourced and paid for by the Contractor, and increases in wages of labour as a direct result coming into force of fresh law which have been actually borne by the Contractor, would be reimbursed. Of course, the increase must be in excess of 10%. The Clause does not exclude or prohibit claims for increase in prices of material and wages of labour after the stipulated period within which the work is to be completed. If this is not to be so, the opening words would be rendered wholly otiose. It is, therefore,

plainly obvious that where a contract stretches beyond the stipulated period i.e. the schedule time plus 50% thereof, the claim for escalation in prices is not excluded or barred under Clause 10C. We make this observation not so as to lay down the only interpretation that can be given to these Clauses, but rather to outline these possible understanding by the Arbitrator."

17. In the back drop of above settled legal position it is clear that clause 10(c) of the contract takes within its sweep the statutory increase in the wages of labour and/or material within the maximum stipulated period of completion of work. This clause, in our view, does not in any manner exclude or prohibit the claim for increase in market prices of material or wages of labour after the stipulated period of completion of the work. Clause 10(c) encompasses the statutory increase but does not take into account the rise in market prices as per the price index beyond the 'stipulated period'. Thus clause 10(c) is not a bar on the claims set up by the contractor towards market increase in the prices of material and the wages of labour during the delayed period of completion. In M.L. Mahajan's case (supra) it was held that contractor would be entitled to be compensated for his claim towards a rise in the market price of material and increase in the wages of labour beyond the stipulated date of completion notwithstanding clause 10(c).

18. Similarly, in ***Delhi Development Authority vs. S.S. Jetley*** reported in ***2001(1) Arb. LR 289***, a Division Bench of this Court held that the claim of damages on account of prolongation of contract, inasmuch as, the respondent was made to incur unnecessary expenditure due to the fault of the DDA in prolonging the contract, was a claim maintainable even as per Sections 73 and 74 of the Contract Act, 1872. It had been held as under :-

“In fact as noticed above, Claim No. 17 is not based on Clause 10(c) of the agreement. The respondent had preferred separate claim namely, Claim No. 19 under Clause 10CC of the agreement and there is no dispute that the said claim was entertained and adjudicated upon, keeping in view the provisions of Clause 10CC of the agreement between the parties. The Claim No. 17 is in fact founded on different premise altogether. It was the case of the respondent that because of prolongation of the Contract due to the fault on the part of the appellant, the respondent was made to incur the expenditure on idle labour, staff, machinery centering, shuttering and other ancillary requirements like electricity, water, petroleum, etc. It was the case of the respondent that it was necessary for the respondent to keep regular establishment including graduate engineer at site till the work is completed as required under Clause 36 of the agreement. The Arbitrator found that the respondent had in fact incurred expenditure on the aforesaid grounds and awarded the claim @ 5,000 per month for the period of delay which was 44 months and on this basis a sum of Rs.2,20,000 was awarded. It was clear, therefore, that Claim No. 17 was

for damages on account of prolongation of Contract inasmuch as respondent was made to incur unnecessary expenditure due to the fault of the appellant in prolonging the Contract. This claim is, therefore, maintainable as per Sections 73 and 74 of the Contract Act which gave entitlement to the respondent to claim damages/loss suffered due to breach of contract by the appellant. The award of Claim No. 17 was, therefore, justified and we see no merit in the aforesaid contention raised by the appellant. “

19. In view of afore-stated legal position, we are of the view that the learned Single Judge was not right in rejecting claim No. 6. Appeal of the contractor M.L. Mahajan is accordingly allowed and claim No. 6 is also made a Rule of the Court. Interest as awarded by the learned Single Judge shall be payable on claim No. 6 as well.

A.K. PATHAK, J.

VIKRAMAJIT SEN, J.

April 26, 2010
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