

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

+ **OMP NO. 337/2005**

Date of Decision: January 18, 2010

UNION OF INDIA

.....Petitioner

Through: Mr. Rao Vijay Pal,
Advocate.

VERSUS

M/S. GOEL CONSTRUCTION CO.& ANR. Respondents

Through: Mr. R.Rajappan,
Advocate.

% **CORAM:**
HON'BLE MS. JUSTICE ARUNA SURESH

- (1) Whether reporters of local paper 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

J U D G M E N T

ARUNA SURESH, J.

1. Parties to the petition executed a contract on 20th February, 1997, being Agreement No.01/EE/Pa.W.D.-IV/97-98 for construction of two MP flats at South Avenue, for a total cost of Rs.9,46,004/-. Respondent was to commence the work on 21st April, 1997 and the work was required to be completed by 20th October, 1997.

However, respondent actually completed the work on 6th January, 2000 and the department executed the completion certificate on 7th March, 2000. In the meantime, petitioner department issued eight running bills, which were accepted by respondent No.1. On 6th January, 2000, respondent was intimated about readiness of final bill, which was finalized on 5th July, 2000. The claimant/respondent did not accept the final bill.

2. A dispute arose between the parties regarding the amount raised in the final bill on 6th January, 2000. Respondent sent a letter dated 27th October, 2000, to the Chief Engineer for invocation of the arbitration clause to settle the disputes between the parties. Since the Chief Engineer declined to appoint an Arbitrator, respondent No.1 filed a petition under Section 11 of the Arbitration and Conciliation Act (hereinafter referred to as the 'Act'), bearing Petition No.240/2000 before this Court. The said petition was allowed by this Court vide its order dated 21st March, 2003 and Sh.R.J.Bakhru, (respondent No. 2) was appointed as the Sole Arbitrator, who published his

award on 8th February, 2005. Petitioner received a copy of the award on 14th February, 2005.

3. Petitioner department, being aggrieved by the award, filed the instant petition under Section 34 of the Act raising objections against the award dated 8th February, 2005, initially before the District Judge. The District Judge vide his order dated 9th August, 2005, was of the view that, the objection petition should have been filed before the court, which had appointed the Arbitrator and therefore, returned the petition to be filed before this Court. The petition was re-filed in this Court on 1st September, 2005. The grounds on which the impugned award has been challenged are:-

- (1) Arbitrator did not consider Clause 9 of the agreement while passing the impugned award as he failed to appreciate that claimant was required to submit the final bill within three months of physical completion of the work, or within one month of the date of final certificate of completion furnished by the Engineer-in-Charge.

The claimant did not submit the final bill, as stipulated.

- (2) Arbitrator misconducted himself when he entertained the time barred claim of the respondent as per Clause 25 of the agreement. The Arbitrator, while deciding this objection, took extraneous considerations for rejecting this objection by holding that the claim was within the period prescribed in Clause 25 of the agreement.
- (3) The Arbitrator failed to consider that it was after lapse of 2 ½ months from passing of the final bill, the claimant invoked the arbitration clause.
- (4) The Arbitrator exceeded his jurisdiction by awarding Claim No. 1 because, there was no digging work at the site, as the digging work was part of demolition of foundation wall and no separate or extra digging was done for the foundation wall and therefore, the question of removal of the earth from the digging work for

foundation wall did not arise. There was no proof of transportation, quantity or measurement before the Arbitrator, on the basis of which, he awarded Claim No. 1.

- (5) The Arbitrator exceeded his jurisdiction while awarding Claim No.3 for short payment for extra items, as he did not adopt the rate analysis by both the parties and did not give any reason for awarding this claim. The award, being non-speaking award, is in contravention of Section 31 of the Act.
- (6) The Arbitrator misconducted himself and travelled beyond the terms and conditions of the agreement by awarding Claim No.6 regarding escalation of labour and machinery charges, as he failed to consider and appreciate that Clause 10CC of the agreement was not applicable but Clause 10C was applicable, specially when the delay in completion of the work was entirely attributable to the claimant.

(7) The Arbitrator acted beyond jurisdiction while awarding Claim No. 7 without any material on record to show that the establishment was engaged and lying idle at site during the alleged period. There was no requirement of keeping the alleged machinery and workers at the site, as the respondent knew that during the piling work, he was not required to keep anything at the site. There was no evidence before the Arbitrator to award Claim No. 7.

(8) The interest awarded by the Arbitrator is much higher than the prevailing rates and is, therefore, liable to be rejected.

Respondent has controverted the abovesaid challenges to the award made by the petitioner in his reply to the petition.

4. Before I deal with the objections raised by the petitioner, I feel the necessity of reproducing Section 34 of the Act, so far as is relevant to the present petition. The same reads as follows:-

“34. Application for setting aside arbitral award

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the court only if,-

(a) the party making the application furnishes proof that,-

(i) a party was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the court finds that-

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation: Without prejudice to the generality of sub-clause (ii) of clause (b), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.

(3)

(4):"

5. A bare reading of this Section makes it clear that provisions contained in Section 34 of the Act are mandatory in nature and none of the parties can derogate from the same. The scheme of the provision is to limit the judicial intervention in the arbitration proceedings and therefore, these provisions have to be

read with basic provisions contained in Section 5 of the Act restricting the area of judicial intervention and confining the intervention only to those, which are specifically provided in part I. Sub-section (2) of Section 34 of the Act lists various grounds on which an arbitral award may be set aside. Sub-clause (a) of sub-section (2) gives list of five grounds and sub-clause (b) lists two additional grounds upon which an award may be set aside.

6. Thus, it is clear that by way of this new Act, the supervisory role of the courts in arbitration has been minimized and vast powers have been given to the parties and Arbitrators without much intervention by the court. Arbitrators are chosen by the parties and decisions made by them are binding on the parties.

7. From perusal of the Statement of Objects and Reasons contained in the Arbitration and Conciliation Bill, 1995, it is clear that the emphasis was on the objective of minimization of the interference of the courts in arbitration process besides for making comprehensive procedure for arbitral process; to provide that the Arbitral

Tribunal gives reasons for its award to ensure that the Arbitral Tribunal remains within its limits of jurisdiction, to permit an Arbitral Tribunal to use every method of alternative dispute resolution mechanism during the course of arbitral proceedings for settlement of disputes and to make the provision that the arbitral award is to be enforced as a court decree and to give similar status to the settlement arrived at, during the course of arbitral proceedings.

8. Section 5 of the Act makes it explicitly clear that notwithstanding anything contained in any other law for the time being in force, in the matters governed by part I of the Act, no judicial authority can intervene except where so provided in this part. The provisions contained in this Section are mandatory in nature.

9. It is no longer *res integra* that, where parties have chosen a Forum to refer their disputes to be adjudicated upon under the Act by appointing their Arbitrator, may be through the process of law, the Court, while exercising its powers cannot substitute its opinion with that of the Arbitrator. If the clauses in the

agreement/contract are open to two plausible interpretations, it is legitimate for the Arbitrator to accept one or the other available interpretation and even if the Court may think that the other view is preferable, the Court cannot and should not interfere with the interpretation of the Arbitrator (reliance is placed on ***Food Corporation of India Vs. Joginderpal Mohinderpal & Anr., MANU/SC/0427/1989***).

10. In ***Delhi Development Authority Vs. Anand & Associates, 2008 (1) ARLB 490 (Delhi)***, this Court observed that a Court hearing the objections against an arbitral award, does not sit in appeal over the same nor it can reappraise the evidence adduced before the Arbitrator to substitute the findings recorded by the Arbitrator by those arrived at by the Court.

11. Keeping in mind the above said proposition of law, this Court, while dealing with the objections raised by the objector in this petition, would not interfere in the fact findings of the Arbitrator regarding claims made by the respondent in his petition filed before the Arbitrator and would restrict itself only to the objections, which fell

within the ambit of Section 34 sub-section (2) of the Act. It is made clear that petitioner/objector has not challenged the impugned award on any of the additional grounds incorporated in sub-section (3) of the Act.

12. Counsel for the petitioner Mr. Rao Vijay Pal has submitted that the intimation of the final bill being ready for payment was given to the respondent on 6th January, 2000. However, respondent invoked the arbitration vide letter dated 27th October, 2000. Therefore, the claims of the respondent are barred under Clause 25 of the agreement, as respondent failed to invoke the arbitration within 120 days of receiving the intimation that final bill was readied for payment and therefore, by implication of the said clause, the claims of the respondent were deemed to have been waived after expiry of 120 days and the petitioner was discharged and released of all the liabilities under the agreement. The Arbitrator failed to appreciate that the respondent was not entitled to invoke Clause 25 of the contract for appointment of an Arbitrator. In support of his submissions he has relied

upon ***Wild Life Institute of India, Dehradun Vs. Vijay Kumar Garg, (1997) 10 SCC 528.***

13. Counsel for the respondent Mr.R.Rajappan has submitted that the Arbitrator has given his findings on this objection, as it was also raised by the petitioner before him in its reply, that there is no concept of misconduct of Arbitrator under Section 34 of the Act and the terms and conditions of Clause 25 of the agreement were duly complied with by the respondent and observed by the Arbitrator in the award. According to him, the bill was finalized on 5th July, 2000 and the arbitration clause was invoked on 27th October, 2000. He further submitted that by virtue of Sections 55 and 73 of the Indian Contract Act, limiting the legal right of speculation of contract is void *ab initio*. As admitted by the petitioner, actual date of completion of work was 7th March, 2000, because the date of intimation of the final bill to be 6th January, 2000, was not possible as final bill could not have been readied before the date of the completion of work.

14. Clause 25 of the agreement reads as under:-

“CLAUSE 25

Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, design drawings and instructions here-in before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever, in any way arising out of or relating to the contract, designs drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter:-

i) If the contractor considers any work demanded of him to be outside the requirements of the contract, or disputes any drawings, record or decision given in writing by the Engineer-in-Charge on any matter in connection with or arising out of the contract or carrying out of the work, to be unacceptable, he shall promptly within 15 days request the Superintending Engineer in writing for written instruction or decision. Thereupon, the Superintending Engineer shall give his written instructions or decision within a period of one month from the receipt of the contractor's letter.

If the Superintending Engineer fails to give his instructions or decision in writing within the aforesaid period or if the contractor is dissatisfied with the

instructions or decision of the Superintending Engineer, the contractor may, within 15 days of the receipt of Superintending Engineer's decision, appeal to the Chief Engineer who shall afford an opportunity to the contractor to be heard, if the latter so desires, and to offer evidence in support of his appeal. The Chief Engineer shall give his decision within 30 days of receipt of contractor's appeal. If the contractor is dissatisfied with this decision, the contractor shall within a period of 30 days from receipt of the decision, give notice to the Chief Engineer for appointment of arbitrator failing which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator.

ii) Except where the decision has become final, binding and conclusive in terms of Sub Para(i) above disputes or difference shall be referred for adjudication through arbitration by a sole arbitrator appointed by the Chief Engineer, CPWD, in charge of the work or if there be no Chief Engineer, the administrative head of the said CPWD. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

It is a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such dispute alongwith

the notice for appointment of arbitrator and giving reference to the rejection by the Chief Engineer of the appeal.

It is also a term of this contract that no person other than a person appointed by such Chief Engineer CPWD or the administrative head of the CPWD, as aforesaid should act as arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitration at all.

It is also a term of the contract that if the contractor does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the intimation from the Engineer-in-charge that the final bill is ready for payment, the claim of the contractor shall be deemed to have been waived and absolutely barred and the Government shall be discharged and released of all liabilities under the contract in respect of these claims.

The arbitration shall be concluded in accordance with the provisions of the Indian Arbitration Act, 1940, or any statutory modifications or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause.

The arbitrator may from time to time with the consent of the parties enlarge the time for making and publishing the award.

It is also a term of this contract that the arbitrator shall adjudicate on only such disputes as are referred to him by the

appointing authority and give separate award against each dispute and claim referred to him and in all cases where the total amount of the claims by any party exceeds Rs.1,00,000/- the arbitrator shall give reasons for the award.

It is also a term of the contract that if any fees are payable to the arbitrator these shall be paid equally by both the parties.

It is also a term of the contract that the arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties calling them to submit their statement of claims and counter statement of claims. The venue of the arbitration shall be such place as may be fixed by the arbitrator in his sole discretion. The fees, if any, of the arbitrator shall, if required to be paid before the award is made and published, be paid half and half by each of the parties. The cost of the reference and of the award (including the fees, if any, of the arbitrator) shall be in the discretion of the arbitrator who may direct to any by whom and in what manner, such costs or any part thereof shall be paid and fix or settle the amount of costs to be so paid."

15. It is a common case of the parties that though the work was required to be completed by 20th October, 1997, but, it was physically completed on 6th January, 2000. However, petitioner finally inspected the premises and issued the completion certificate on 7th March, 2000.

The final bill though stated to have been readied and intimated to the respondent on 6th January, 2000, was in fact finalized on 5th July, 2000. While following the procedure laid down in Clause 25 of the agreement, petitioner intimated to the Executive Engineer his claims vide letter dated 15th July, 2000 with a copy to the Superintending Engineer and the Chief Engineer. He sought an amicable settlement of the disputes or its reference to the Arbitrator. This was pursued by the respondent vide letter dated 27th October, 2000, addressed to the Chief Engineer with a copy to the Executive Engineer. However, the claims of the respondent were rejected by the Executive Engineer on 26th March, 2001 and the same were referred to the Superintending Engineer on 3rd April, 2001. On persuasion of the respondent to expedite the settlement of his claims, Executive Engineer rejected his claims vide letter dated 26th June, 2001. It was thereafter that respondent filed a petition bearing AA No.240/2000, and the Arbitrator was accordingly appointed. Arbitrator was within his rights to interpret Clause 25 of the agreement.

It was on analysis of the documentary and other evidence available with him on record, the Arbitrator concluded that respondent/claimant had intimated its claims, after final bill, for an amicable settlement within time of 120 days stipulated under Clause 25 of the agreement and rejected the objections of the petitioner.

16. In Clause 25 of the agreement, the words 'arising out of' or 'in relation to' have to be interpreted as sufficiently wide to comprehend the matters in respect whereof the decision of the Engineer-in-Charge of the petitioner has been agreed to be final and binding on the parties.

17. In the facts and circumstances of the present case, it is obvious that reference to arbitration in pursuance to the said clause between the parties was in connection with or relating to all the claims of the respondent against the petitioner. The question of interpretation of terms of the contract is a question of law and reference in respect thereof having been made to the Arbitrator, even if the Arbitrator allegedly mis-conducted or mis-interpreted the terms of the contract, it

cannot be considered as an error of law on the face of the award and the award cannot be set aside on this ground. It was for the Arbitrator to interpret the provisions of the contract including Clause 25. Since he had the jurisdiction to do so and specially on an objection thereof being raised by the petitioner, the Arbitrator had interpreted the clause of the agreement in a particular manner and had taken a decision on such interpretation, based on appreciation of evidence and application of law, his conclusions cannot be termed to be 'erroneous legal proposition' or based on erroneous application of law. Hence, none of the objections raised by the petitioner regarding interpretation of Clause 25 of the agreement and its invocation by the respondent can be sustained by this Court. Findings of the Arbitrator cannot be faulted on the grounds raised by the petitioner. The view taken by the Arbitrator is plausible and a possible view. Hence, no different view can be taken. Therefore, observations of the court in **Wild Life Institute of India's** case (*supra*) were *per curiam* and have no bearing on the facts and circumstances of this case. In this case, the contractor

did not receive any amount under the final bill but on coming to know of the bill having been finalized by the department, he immediately lodged his dispute with the Engineer-in-Charge of the petitioner.

18. The second limb of arguments of learned counsel for the petitioner is that as per clause 9 of the agreement, respondent/claimant failed to submit his final bill within three months of physical completion of the work or within one month of the date of the final certificate of completion issued by the Engineer-in-Charge and therefore, the Arbitrator acted beyond the jurisdiction in ignoring Clause 9 of the agreement while publishing the award and accepting the claims of the respondent.

19. While refuting the submissions of learned counsel for the petitioner, it is argued by counsel for the respondent that Clause 9 of the agreement is not attracted in this case, as the final bill was not prepared by the claimants.

20. Clause 9 of the agreement reads as under:-

“CLAUSE 9

The final bill shall be submitted by the contractor in the same manner as specified in interim bills within three months of physical completion of the work or within one month of the date of the final certificate of completion furnished by the Engineer-in-Charge whichever is earlier. No further claims shall be made by the contractor after submission of the final bill and these shall be deemed to have been waived and extinguished. Payments of those items of the bill in respect of which there is no dispute and or items in dispute, for quantities and rates as approved by Engineer-in-charge, will, as far as possible be made within the period specified hereinunder, the period being reckoned from the date of receipt of the bill by the Engineer-in-Charge or his authorised Asstt. Engineer, complete with account of materials, issued by the Department and dismantled materials.

- i) If the Tendered value of work is upto Rs.5 lakhs : 3 months
- ii) If the Tendered value of work exceeds Rs.5 lakhs : 6 months”

21. As per Clause 9 of the agreement, if the contractor failed to submit his final bill within three months of physical completion of the work or within one month of the date of final certificate of completion furnished by the Engineer-in-Charge, he would not be entitled to make any further claims thereafter and all

such claims would be deemed to have been waived and extinguished. The Arbitrator dealt with this objection in the award in the following manner:-

“The final bill was prepared by Respondents after recording detailed measurements of work in their measurement books, completion of Accounts relating to advances, materials etc. in prescribed format in similar manner as interim bills as per general practice. I find that claims are extinguished ONLY in case final bill is prepared by Claimants. Claimants have right to raise the claims after final bill is prepared by Respondents. The claims were intimated to Respondents within a stipulated period of 120 days as per Clause 25 from date of finalization of final bill. Accordingly objection is not tenable and is rejected.”

22. This clause in no manner debarred the Contractor/claimant from invoking Clause 25 of the agreement, which he did in the instant case. On receipt of information that final bill was finalized on 5th July, 2000, he immediately wrote to the Chief Engineer on 11th August, 1998 for redressal of the disputes amicably or for appointment of an Arbitrator for settlement of the disputes. Therefore, it is clear that he raised the dispute against the final bill prepared by the department within

the period stipulated in Clause 9 of the agreement. He did not submit his bill but he did raise a claim/dispute on the final bill readied by the petitioner. The Arbitrator, therefore, did not mis-interpret Clause 9 of the agreement when he observed that claimant did not raise the claim after final bill was prepared by the respondent but claims were intimated to the respondent within the stipulated period of 120 days, as per Clause 25 of the agreement.

23. Under these circumstances, objections raised by the petitioner to the findings of the Arbitrator in the impugned award, pertaining to Clause 9 of the agreement are unsustainable.

24. Another limb of argument of counsel for the objector/petitioner is that Arbitrator misconducted himself in invoking Clause 10 CC of the contract and thereby awarding escalation for work executed beyond the stipulated period due to prolongation of contract amounting to Rs.1,10,728/-. Counsel of the claimant/respondent has submitted that Arbitrator had invoked Clause 10C of the contract and not Clause 10CC

and therefore, the Arbitrator rightly awarded him the compensation amount of Rs.1,10,728/- for the work carried beyond stipulated period due to prolongation of the work against his claim of Rs.3,58,785/-. The work was started by the respondent on 21st April, 1997 and stipulated date of completion was 20th October, 1997.

25. As stated, the completion was delayed mainly on account of petitioner's delays in disconnection of electrical connection by NDMC, change in foundation designs, giving decisions and drawings, releasing part of work executed by other agencies, pile foundation work by other agency was completed on 14th October, 1998 and the last item of polishing of floors was completed on 25th December, 1999. The work was completed only on 6th January, 2000. The formal completion was initially recorded by the petitioner on 6th January, 2000 and revised on 7th March, 2000 after inspection of the site. The claimant calculated the delay of 848 days upto 6th January, 2000. The Arbitrator calculated the compensation amount due to increase in cost of materials and labour as per the CPWD cost index, which

was approximately 10% for materials and 17.50% for labour (Minimum Wages) during the extended period, after calculating prolongation of work for 27.33 months (i.e. 20.10.1997 to 31.12.1999) as under:-

“(i) Materials (excluding : $0.85 \times 0.70 \times 9,64,015 \times 0.10$ = Rs.57,358.89
cost of cement & steel)

(ii) Labour : $0.85 \times 0.30 \times 11,95,950 \times 0.1750$ = Rs.53,369.27

(i) + (ii) = Rs.1,10,728.16”

26. From the above it is clear that the Arbitrator’s findings that the delay was due to the default of the petitioner are reasonable. These are findings of fact which would normally not be interfered with by the Court and objections covering such points are not justiciable. The Court may intervene in post award proceedings, if it is of the view that there is an error of law or fact which is perverse and apparent on the face of the award and results into miscarriage of justice. Once the parties have chosen their own Forum to adjudicate upon their disputes, they 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 the documents, jural interference is uncalled for.

27. As already discussed above, in no case it is 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. The Court has to consider and decide the objections filed against the award within this very restricted arena.

28. To appreciate the objections raised by the petitioner, it becomes imperative to reproduce Clauses 10C and 10CC of the contract, which read as under:-

“CLAUSE 10C

If after submission of the tender 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 thereof) 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 of the last stipulated date for receipt of the tenders including extensions if any for

the work, and the 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 any delay in the execution of the contract within the control of the contractor.

Provided, however, no reimbursement shall be made if the increase is not more than 10% of the said prices/wages and if so the reimbursement 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.

CLAUSE 10 CC

"If the prices of materials (not being materials supplied or services rendered at fixed prices by the department in accordance with clause 10 & 34 thereof) and/or wages of labour required for execution of the work increase, the contractor shall be compensated for such increase as per provisions detailed below and the amount of the contract shall accordingly be varied, subject to the condition that such compensation for escalation in prices shall be available

only for the work done during the stipulated period of the contract including such period for which the contract is validly extended under the provisions of Clause 5 of the contract without any action under the clause 2 and also subject to the condition that no such compensation shall be payable for a work for which the stipulated period of completion is 6 months or less. Such compensation for escalation in the prices of materials and labour, when due, shall be worked out based on the following provisions:-

(i) The base date for working out such escalation shall be the last stipulated date of receipt of tender including extension, if any.

(ii) The cost of work on which escalation will be payable shall be reckoned as 85% of the cost of work as per the bills, running or final, excluding any work for which payment is made at prevailing market rates. From this amount the value of materials supplied under Clause 10 of this contract or services rendered at fixed charges as per Clause 34 of this contract, and proposed to be recovered in the particular bill, shall be deducted before the amount of compensation for escalation is worked out. In the case of materials brought to site for which any secured advance is included in the bill the full value of such materials as assessed by

the Engineer-in-Charge (and not the reduced amount for which secured advance has been paid) shall be added to the cost of work shown in the bill for operation of this clause. Similarly, when such materials are incorporated in the work and the secured advance is deducted from the bill, the full assessed value of the materials originally considered for operation of this clause should be deducted from the cost of the work shown in the bill, running or final."

29. From reading of the said two clauses, it is clear that Clause 10C of the contract speaks of payment on account of increase in prices/wages due to statutory orders. Whereas Clause 10CC of the contract can be invoked by the claimant where payment due to increase/decrease in prices/wages after receipt of tender for works, for which the stipulated period of completion was more than six months. Therefore, the Arbitrator invoked Clause 10C of the contract and not Clause 10CC of the same, as alleged by the petitioner.

30. Perusal of Clause 10C of the contract makes it clear that it is not an absolute bar on the claims put forward by the department and obviously so, if this

relates to the 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 or compensated. This increase is regulated by this clause itself. The increase must be in excess of 10% of the said price/wages and the reimbursement has to be made only on the excess over 10% and further any such increase would not be payable, if such increase had become operative after the contract or extended date of completion of the work in question. This clause does not prohibit the Constructor to claim any increase in prices of material and wages of labour after the stipulated period within which the work is to be completed. Therefore, it is obvious that where a contract stretches beyond the stipulated period, the claim for escalation in prices is not excluded or barred under Clause 10C of the contract.

31. In ***M.L.Mahajan Vs. Delhi Development Authority & Anr., 99(2002) DLT 512***, when invocation of Clause 10C of the contract, entered into between the

parties, almost of similar in nature, by the Arbitrator, while passing the award, came under challenge, this Court observed:-

“9. This factor is of obvious relevance while construing Clause 10C, and in particular the opening c- "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 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. In consonance with the ratio of Sudersan Trading Co. And Associated Engineering (supra) if any other plausible meaning is preferred by the Arbitrator, he would be free to implement it. In no way therefore, can it be predicated that the Award is legally flawed on the contention that the Arbitrator has misconstrued Clause 10C. The judgments of this Court in which Clause 10C was directly in consideration ought to have been followed by the learned Single Judge. In the Continental Construction's case (supra) the relevant Clauses had a totally distinct intent."

32. Thus, it is clear that question of interpretation of the terms of the contract is a question of law and reference in respect thereof having been made to the Arbitrator, even if there is misconstruction or misinterpretation of a term or terms of the contract by the Arbitrator, it cannot be considered as an error of law on the face of the award and the award cannot be set aside on that ground. It was for the Arbitrator to interpret the contract including Clauses 10C and 10CC of the contract.

33. In the instant case when petitioner failed to appoint an Arbitrator to enter into reference and

adjudicate upon the disputes *inter se* the parties, respondent had to have recourse to law and the Arbitrator was appointed by this Court to enter into reference to which the objector neither raised any objection before the Arbitrator nor challenged his jurisdiction to enter into reference and decide the claims referred to him by the claimants.

34. Since the Arbitrator interpreted the provisions of the contract and applied the terms contained in Clause 10C of the contract while awarding Claim No.6 in favour of the claimant/respondent, he interpreted the said Clause in the right perspective to the facts and circumstances and evidence placed before him by the parties. Therefore, it cannot be said that the Arbitrator misconstrued or misinterpreted Clause 10C of the contract, as pointed out above, the Arbitrator did not exercise his jurisdiction in awarding Claim No.6 by invoking Clause 10CC.

35. The Court could have interfered if the Arbitrator's erroneous conclusion was manifestly incorrect by merely looking at the Contract. In other

words, his conclusion was impossible in contra-distinction to implausible. The Arbitrator in this case has not travelled beyond his jurisdiction and therefore, the award cannot be assailed by the petitioner on the ground that the Arbitrator misconducted himself and acted against the public policy. Therefore, the objection, as raised by the petitioner, that the Arbitrator misconducted himself and acted against the public policy, must fall as under the circumstances the Court cannot interfere with the findings of the Arbitrator and substitute its own decision.

36. Objections against awarding Claim Nos. 1, 3 and 7 in favour of claimant cannot be interfered with by the Court for the simple reason that these awards are based on findings of fact based on evidence produced before the Arbitrator. Non-speaking award cannot be interfered with by the Court to look into the mind of the Arbitrator in awarding the said claims. Therefore, objections as against these claims are not sustainable.

37. Arbitrator has awarded interest at the rate of 12% per annum on a sum of Rs.5,99,634/- with effect from 8th July, 2000 till date of payment or decree,

whichever is earlier. The petitioner has challenged the rate of interest awarded by the Arbitrator alleging that it is much higher than prevailing rates for commercial transactions and therefore, is liable to be rejected. This award was published on 8th February, 2005. At the relevant time, prevailing market rate and banking rate of interest was around 9%. The higher rate of interest as awarded by the Arbitrator, therefore, seems to have been awarded with a view to terrorize the petitioner to ensure that the payment, as awarded, was made to the claimant as early as possible.

38. Under these circumstances, I am inclined to interfere with the rate of interest awarded by the Arbitrator but to a limited extent. Hence, considering the disputes involved and overall circumstances of the case, the award is hereby modified qua rate of interest and the same is hereby reduced to 9% per annum. Reference is made to ***Delhi Development Authority Vs. Anand & Associates, 151(2008)DLT 18*** and ***Krishna Bhagya Jala Nigam Ltd. v. G. Harischandra Reddy and Anr. AIR 2007 SC 817.***

39. Consequently, the objection petition is partly allowed and the impugned award dated 8th February, 2005 is modified to the extent that interest amount awarded on the principal sum of Rs.5,99,634/- shall be payable to the claimant at the rate of 9% per annum w.e.f. 8th July, 2000 till date of payment or decree, whichever is earlier.

**ARUNA SURESH
(JUDGE)**

**JANUARY 18, 2009
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