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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved On : 30.04.2010
Pronounced on: 31.01.2011

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CS (OS) 1347/1998

J.S. CHAUDHARY

..... Plaintiff

Through: Mr.Sudhanshu Batra, Advocate

versus

THE VICE CHAIRMAN, DDA & ANR.

..... Defendants

Through: Mr. Ajay Verma, Advocate for Defendants

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

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

MR. JUSTICE S.RAVINDRA BHAT

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1. The plaintiff claims a money decree, based on the sum of ₹ 81,54,667/-towards various heads, on account of amounts due from the Defendant (hereafter called “DDA”) in a works contract; additionally, the plaintiff claims interest, at a quantified rate, as well as *pendent lite* and future interest. The claim is premised on the performance of a works contract, entered into by the parties, for construction of 448 flats at Jhilmil Colony.

2. The facts, to the extent they are uncontroverted, are that the plaintiff, who describes himself as sole proprietor of a firm, successfully bid, and was awarded the contract, by the DDA. The bid was accepted on 09.9.1991; the written contract (Ex-PW-1/2) was entered into on 16.09.1991. The time for performance, agreed upon by the parties, was 15 months, from the date

of signing the agreement. It was however, extended. The plaintiff says that this was due to various defaults by DDA; the latter however denies that position. Eventually, the construction was completed on 12.12.1994. The completion certificate was issued on 6th July, 1995. The plaintiff relies on a document (Ex.PW-1/3) issued on 12.12.1994, evidencing the date of completion of construction.

3. The plaintiff contends that in terms of the Agreement, Ex. PW-1/2, the Final Bill had to be settled by DDA, within six months of completion. The suit claims the sum of ₹ 81,54,667/50 from the DDA towards various heads, which are described briefly hereafter. Claim (i) pertains to balance of final bill amount, i.e. ₹ 5,23,195/-. According to the plaintiff, the final bill was payable within six months from completion, i.e. 11.6.1995; DDA is alleged to have failed to pay this. The bill was submitted on 16.06.1996. The plaintiff admits to some part payment on 11.09.1996, after which it submitted a fresh bill on 10.09.1997. The sum of ₹ 5,23,195/- is claimed on this score.

4. Claim (ii) is for the release of bank guarantee to the extent of ₹ 3,00,000/-, which the plaintiff furnished in favour of DDA, for the due performance of the contract. It is alleged that in terms of the contract, the guarantee had to be released within six months after completion, yet the DDA has not done so. The plaintiff claims the sum of ₹ 3,00,000/- on this account. Claim (iii) relates to incidental expenses towards revalidation of bank guarantee for the period beyond the contract, after its completion; the plaintiff says that a sum of ₹ 50,000/- is to be paid by DDA.

5. According to the suit, the cost of work done beyond the stipulated date of competition @30% extra amounts to ₹ 34,43,818.00/-; the plaintiff claims this. It is contended that the work could not be completed within the stipulated period on account of the following defaults of DDA:

- a) delay in handing over of site for work;
- b) delay in issue of stipulated material;
- c) delay in release of payments for work done,
- d) delay in laying of electrical conduits by the agency appointed by the defendant.

e) delay in conveying of decisions to the plaintiff from time to time during/relating to the execution of work.

6. The suit says that due to the aforesaid defaults of DDA, the work could be completed only on 12.12.1994, i.e. in a period of 39 months, as against the stipulated period of 15 months contained in the agreement between the parties. During the delayed period, the price of material and labour increased in the market. It became impractical and un-economical for the plaintiff to execute the work within the accepted/ quoted rates. The plaintiff says that the rates quoted by him were in the month of May 1991; he however, was made to complete the work at the same rates even in the 1994. DDA is therefore, liable to make good the loss incurred (by the plaintiff) on this account before the completion of the work and after the originally stipulated date of completion. The plaintiff submits having indicated to the defendant, by a notice duly served upon it, that he would continue the work provided he is paid 30% over and above the contractual rates despite the escalation clause provided in the agreement. The DDA duly accepted the said condition (of the plaintiff) as no objection was raised by it and continued to get the work executed from him. The plaintiff claims the following payments, as due and payable to him by DDA on account of labor and materials due to the delay in execution of work:

Cost of work done as per final bill	₹ 1,98,58,848.00
Less: Cost of work done upto 18.12.1992, which is the original stipulated date of completion as per agreement	₹ 83,79,253.00
30% of the above	₹ 34,43,818.00

Thus, says the plaintiff, DDA is liable to pay ₹ 34,43,818/- to the plaintiff on account of escalation of work.

7. The plaintiff claims refund of amounts withheld from the running bills to the tune of ₹ 20,000/- ; he also similarly seeks refund of payment in respect of issue of SCI pipe amounting to ₹ 8,025/-. It is submitted that in terms of the agreement between the parties, the DDA had to issue SCI pipes (under clause 10), amongst other items, at fixed rates to be used in the execution of work. The cost of issue of SCI pipes was deducted by DDA from the running bills. It is pertinent to mention here that the quantity stipulated for the issue was such that the mode of

measurement of work has to be the same. The DDA, according to the plaintiff, misconstrued and miscalculated the payment to be deducted for issue of SCI pipes as the mode of measurement adopted by it (DDA) was based on measure of individual pipes, leading to the plaintiff being over charged 7cm for each pipe length of 1.83 cm as detailed in the suit, as follows:

Size	Qty. issued	Qty. to be charged	Overcharge
100mm	655.20mm	$\frac{655.20 \times 1.76}{1.83}$	25.20m
75mm	1547.10mm	$\frac{1547.10 \times 1.76}{1.83}$	60.00 m

Cost of 25.20 m of 10mm size
@Rs.112.50 per meter

₹ 2835.00

Cost of 60.00 m of 75 mm size
@Rs.86.50 per meter

₹5190.00

Total ₹8025.00

Thus a sum of ₹ 8025/- is claimed by the plaintiff on this account.

8. The plaintiff claims the following, as cost of work done and services rendered beyond the scope of agreement:

- a) Cost of centering and shuttering for DPC (item 2.5) amounting to ₹ 7,559.00
- b) Cost of bitumen used in item No.2.6 amounting to ₹ 47,26.00
- c) Cost of extra operation involved in item No.6.1 amounting to ₹ 38,119.00
- d) Cost of while cement used in item No.7.6 amounting to ₹ 47,290.00
- e) Cost of primer used in item No.9.7 amounting to ₹ 31,042.00
- f) Cost of SCI collar provided in SCI stacks amounting to ₹ 31,781.00
- g) Cost of GI Unions provided in G.I. Pipe line amounting to ₹ 3,748.00
- h) Cost of groove provide 10064m
Cost 10064 x (2.20+55.15%) ₹ 34,351.00

i)	Extra cost of plaster done above 10.00m height amounting to	₹ 22,871.00
J)	Cost of centering and shuttering for laying of cement concrete In payments amounting to	₹ 2,635.00
k)	Cost of welding done in manufacture of M.S. grill amounting to	₹ 85.652.00
l)	Cost of cement concrete blocks used for fixing of M.S. railings amounting to	₹ 7,143.00
m)	Cost of extra thickness of brick masonry and other allied items for construction of open surface drain amounting to	₹ 69,647.00
n)	Cost of deployment of pumps used for dewatering for laying of sewer line amounting to	₹ 1,00,000.00
o)	Cost of disposal of earth/rubbish/malba left by other agencies. Agencies amounting to	₹ 1,17,085.00
p)	Cost of extra thickness of base plaster in item No.7.7 amounting to	₹ 17,487.00
q)	Plastering of exposed surface of RCC shelves amounting to	<u>₹ 18,382.40</u>
Total		<u>₹ 6,39,518.40</u>

9. The suit seeks refund of short payment due to wrong measurements in respect of No.9.6 amounting to ₹ 2,81,217.00. It is alleged that Item No.9.6 concerned provision for water cement paint on the outside surface of walls, which in turn were provided with rough cast. Plaster with graded or crushed stone aggregate 6 mm by item No.9.10 of the efficient of 250% for finishing of such a surface with water cement paint was used. DDA has measured this same without enhancing the actual surface area by 250% and as a result the plaintiff has been paid 150% less. The shortfall on this account comes to ₹ 2,81,217.00, the details of which are given in the suit, as follows:

Area paid under item no. 9.10	- 12653.07 sqm
Cost 12853.07 x 150% (9.55+ 55.15%)	- ₹ 2,61,217.00

10. The plaintiff seeks refund of what it terms as illegal deductions by operation of item No. 3.9 to the extent of ₹ 1,78,760.00. It is alleged that Item No.3.9 of the agreement provides for “Add/deduct for plastering of exposed surface of RCC surface” with a unit rate of ₹ 10.55 per sqm plus 55.15% contractors enhancement under clause 12 of the agreement. The exposed

surface is defined in sub para (c) para 5.4.7.2 CPWD specifications 1877 vol. I page 108. The plaintiff says that no deduction could be to be made for any area which is exposed and not plastered and is less than 0.5 sqm. The deduction made by DDA is alleged to be illegal and needs to be refunded to the plaintiff. The total deductions made are indicated thus:

11464.43 sqm @ Rs.10.05 + 55.15% ₹ 178760.00

Thus a sum of Rs.178760.00 is claimed.

11. The plaintiff next claims compensation payable under clause 10 CC of the agreement amounting to ₹ 18,28,690.00, and details the same as follows:

(i)	Due to wrong computation	₹ 1547101
(ii)	On cost of work done which are not paid.	<u>₹ 2,81,589.50</u>

Total ₹ 18,28,690.50

12. The suit claims, towards cost of deployment of staff engineer and machinery beyond the stipulated date of completion not originally contemplated at ₹ 6,03,000.00. It is submitted that the plaintiff, on account of delay in execution, incurred extra expenditure for deployment of staff, engineer and machinery beyond the period of 15 months stipulated for completion of work in terms of the agreement. The amount sought is detailed as follows:

a)	Graduate engineer 1 no. @ ₹ 5000/- p.m.	₹ 5000.00
b)	Diploma engineer 1 no. @ ₹ 3000/- p.m.	₹ 3000.00
c)	Head Mistry 1 Nos. @ ₹ 2500/- p.m.	₹ 2500.00
d)	Supervisor 4 Nos. @ 1250/- p.m. each	₹ 5000.00
e)	Chowkidar 6 nos. @Rs.1000/- p.m. each	₹ 6000.00
f)	Clerk 2 nos Rs.1500 p.m. each	₹ 3000.00
g)	Accountant 1 nos. @ 2500/-p.m.	₹ 2500.00
	T&P and other equipment ₹ 2.5 lacs	
	@ 18% pm	<u>₹ 3000.00</u>
	TOTAL	₹ 30,000.00

It is alleged that such expenditure of ₹ 30,000/- p.m. for work of the magnitude is justified as it is hardly 2.5% of expected monthly out turn of ₹ 12,21,501.00 keeping into consideration the tendered cost of ₹ 1,83,22,518.00 to be completed in 15 months stipulated in the agreement. The plaintiff complains incurring a loss (after applying the principle of mitigation of loss to the extent of 50% on ₹ 72,0000.00) ₹ 6,03,000.00

13. The suit also claims the sum of ₹ 2,68,488.00 towards loss of profitability due to delay in completion of the contract amount. Here, it is stated that the loss in profit suffered by due to delay in completion of the work wholly attributable to DDA, is on the following considerations:

Work done after the stipulated date of completion	₹ 96.43,265.00
Profit @ 15 %	₹ 14,91,490.00

Loss @ 18% on the delayed completion of work $\frac{1491490 \times 18 \times 24 \times 1}{100 \times 12 \times 2} = ₹ 2,68,468.00$

14. The plaintiff also claims interest of 18% p.a. on the outstanding sum of ₹ 81,54,667.50 w.e.f. 12.06.1995 till 28.05.1998 final realization of the amount, which is ₹ 43,44,806.80. DDA, according to the plaintiff, is liable to pay ₹ 1,24,99,474.30 till the date of the suit and further interest thereupon till actual realization. The plaintiff submits having sent a legal notice dated 24.10.1997 to DDA calling upon it to make payments; the legal notice did not evoke any response. The cause of action, says the plaintiff, arose, on the date of award of contract, on the date of completion of the work, on 12.12.1994; on 06.07.1995 when certificate of completion was issued by DDA, on 11.09.1996 when part payment was made but the balance outstanding remained unpaid.

DDA's stand:

15. The DDA disputes the petitioner's entitlement, contending that the work was awarded to a partnership firm, M/s. J.S. Constructions and not to the plaintiff, as a proprietor. It is submitted that there is no evidence or material to justify that the plaintiff is entitled to claim the suit amounts.

16. The DDA denies that there was any delay in the completion of the contract, attributable to its conduct or omission. It is submitted that there were perhaps minor hindrances, which were duly accounted for in the parties' *Extension of Time* documents, approval of which was granted to and enjoyed by the plaintiff. DDA disputes the plaintiff's entitlement for any of the claims. According to it, the plaintiff never suffered any losses or incurred any extra expenditure so as to be entitled to claim the amounts set-out in the suit.

17. The DDA disputes that any amount is payable to the plaintiff under the final bill. It is claimed that on the contrary, the Provisional Completion Certificate dated 12.12.1994 stipulated compliance with conditions spelt-out there, which were not in fact complied with, as a result of which the DDA is entitled to ₹ 9,14,276.21/-. This is claimed as a justification for the withholding release of bank guarantee.

18. On the question of delay, it is submitted that it is not attributable to DDA in not furnishing the drawings on time and failing to supply of materials and making timely payment of running bills are all not enforceable claims because in terms of Extension of Time *proformas* submitted by the plaintiff, no hindrances were in fact pointed nor was extension of time on such account was claimed by the plaintiff. It is also argued that the plaintiff cannot claim such amount in view of Clause-10 of the agreement and Clause-1 of the specifications and conditions. The same *rationale* is pressed into service in regard to other heads of delays, such as delay in handing-over of site, issuance of materials, delay in laying of electrical conduits by other agencies and delays in conveying decisions from time to time. The defendant relies upon a condition in the Extension of Time proforma Part-1, produced as Ex. DW-1/1, where the plaintiff agreed not to claim liquidated damages during the extended time.

19. The DDA denies that the plaintiff ever informed it about its condition of seeking 30% extra consideration for continuing to work. It is also submitted that there was no such agreement between the parties to pay any such additional amounts. Similarly, as regards alleged amounts wrongly withheld from running bills, it is submitted that such amounts were withheld due to objections raised by the Quality Control Cell, and in any case, cannot be refuted. The DDA has to recover an amount of ₹ 9.41 lakhs. The plaintiff's claim with regard to reimbursement or payment towards cost of SCI pipes is denied. The DDA submits that the actual measurement was taken as per CPWD specifications and relies upon Annexure-B to the written statement and further states that no amount was ever charged.

20. In regard to Claim No. (vii) – i.e. Work not completed as per description in Item by Agreement nor in the CPWD Specifications, 1977, all the claims are denied. The DDA submits that the cost of centering and shuttering had to be done as per Item 2.5 of the Contract and was covered as part of the work, in view of paras 64 and 6.4.6 of the specifications. With regard to

claim- vii(b), i.e. Cost of supply of bitumen, the DDA denies the amount, stating that the plaintiff was not entitled to the same, in view of Item Nos. 2.6 and 8.1 of the contract, the latter requiring that the spread coarse sand had to be carried-out. It is also submitted that the rate of execution of Item 2.6 includes cost of bitumen. As to claim vii(c), i.e. Payment towards M.S. Flats, C.C. Block etc., the defendant argues that the rate in Item 6.1 is inclusive in the operation and if at all the plaintiff is entitled to any amount it cannot exceed ₹ 9,028. On claim vii(d), i.e. Extra Costs for white cement, the DDA's counsel denies the same, contesting that there was no stipulation and that White Cement, wherever required, was to be provided by it in terms of the rate in Item 7.7. It is submitted that the DDA only provides Grey Cement, which is well-known in the trade amongst all the contractors. On claim vii(8), i.e. term 9.7 requiring use of primer, the DDA argues that such entitlement does not arise, since the plaintiff has placed reliance on Item 9.7, which relates to wood work whereas the primary and steel galvanized items/iron work is covered by Item 9.9. Likewise, the DDA submits that the claim of quantity being 139.26 does not deal with the work executed under Item 9.7 and, in fact, deals with work executed under Item 9.9. The DDA additionally states that the Item rates under 9.9 are exclusive of the cost of primer under para 13.33 and 13.34 of CPWD specifications.

21. The DDA denies claim vii(f), stating that any such amount towards drainage system, in addition to Clause 11.5 and 11.12 towards fitting collar etc., is payable in view of Special Condition No. 3.14, which stipulated that SCI collars required for fixing SCI pipe of the requisite size were to be provided by the Contractor free of cost. The claim towards fixing of GI pipes made by the plaintiff under Item 12.1 and 12.2 are denied. The DDA states that the rate of providing and fixing of GI pipes included cost of fitting and no extra payment was to be made for G.I. Union work which was paid in accordance with paras 19.8.1 and 19.8.2 of CPWD specifications. The DDA refutes the claim in item vii(h), i.e. payment for provision at the junction of roof and wall on the inside of rooms, kitchens etc. It is stated that this is not payable in view of condition No II of the additional conditions forming part of contract. Claim vii(i), for extra rates payable over 3 metres high construction or part thereto in excess of 10 meters and the plaintiff's reliance on condition 3.15 of the CPWD Specifications, 1977 and DSR 1989 is denied, saying that such amounts are not due. The DDA relies on condition 3.15 of the specifications and states that reference to DSR, 1989 is out of context in view of the specific condition forming part

of the contract. Claim vii(j), i.e. providing C.C. paths/payment around levels requiring laying of concrete in panels, centering and shuttering as being an additional portion, based on Items 10.1 and 5.11 are denied. It is argued that the rates of Items 10.1 and 5.11 are inclusive of such works. Reliance is placed on Item 16.1.6 and 16.1.7 of Volume 1, paras 17.10.2, 17.10.7 and 17.10.8, Volume-2 of CPWD specifications. All other items in Claim No. 7(k) to (q) are also denied.

22. Referring to claim viii, the DDA states that the plaintiff is not entitled to enhancement and proportionate payment on the basis of actual service being 250% or that he was paid 150% less. Here, the DDA says that the measurement was in accordance with para 13.25.6.1 and rate charged as per para 13.25.7, which indicate that the rates were inclusive of costs of materials and labor. It also relies upon clause 9.10 of the contract and argues that I.S. specifications are relied upon out of context and that the agreement between parties never provisioned for enhancement of the service by 250%. The plaintiff's claim (ix) that no deduction could be made for any area which is exposed, and plastered but is less than 0.5 square meters, is denied. The DDA relies upon para 3.9 of the schedule of quantities attached with the agreement and submits that in fact, no deducted as alleged, was made.

23. The plaintiff's claim under clause 10(CC) has been refuted. It is contended by the DDA that the plaintiff is not entitled to such amounts as no details were furnished and the plaintiff merely relies upon unsubstantiated conclusions, based on its calculation. Similarly, with regard to Claim 11, i.e. extra expenditure of ₹ 30,000/- per month, for the 54% of the work done after the stipulated date, amounting to an alleged loss of ₹ 6,03,000/-, the DDA says that the plaintiff did not incur any extra expenditure or suffer any loss. It is argued that payment under clause 10(CC) was made, which also covered all such expenses. The DDA emphasizes that prolongation of the work was not on account of its acts or omissions. Similarly, with regard to claim 12, i.e. loss of profit incurred due to delay in completion of work, the DDA also denies any liability, relying upon the plaintiff's undertaking submitted at the time of extension of time in Proforma Part-1 was granted, stating that he would not claim liquidated damages incurred during the extended period. It is submitted by the DDA that such undertaking was neither retracted, nor withdrawn in any manner and that extension of time proforma in fact enabled the plaintiff to perform the work even though less than half the same had been done before the stipulated period.

Based on such undertaking, and other facts, the DDA agreed to extend the time which was actually approved for 732 days, ultimately ending with actual completion of work, on 12.12.1994. It is submitted that the plaintiff has not refuted this averment or the document.

24. On the basis of pleadings and documents on the record, this Court had framed the following issues on 06.11.2003:

- “1. Whether the suit is bad for non-joinder of necessary parties? OPD
2. Whether a valid notice was served under Section 53-B of Delhi Development Act, 1957? If not, to what effect? OPD;
3. Whether there was any delay in completion of the contract attributable to the defendant? OPP.
4. Whether the plaintiff is entitled to the payment of Rs.81,54,667/- under various heads as mentioned in para 6 of the plaint? OPP.
5. Whether the plaintiff is entitled to his claims in view of the undertaking given by him at the time request for extension was made by him? OPP.
6. Whether the plaintiff is entitled to interest on Rs.81,54,667/-, if so at what rate and from what period? OPD.
7. Relief.”

25. The Court directed the examination of parties' witnesses on commission. The plaintiff examined himself; the defendant examined one witness as DW-1. Both the parties have led voluminous evidence.

FINDINGS

Issue Nos. 1 and 2

26. As evident from the manner in which these issues were framed, the onus lay upon DDA to show that necessary parties were not impleaded. It has not led any oral evidence. As to the question of valid notice, there is no dispute that a legal notice was issued to DDA on 24-10-1997. A copy of the same is also on the record. The mere nomenclature adopted in the notice, of its being under Section 80 of the Code of Civil Procedure cannot detract from the plaintiff's intent of asking DDA to formally settle his claims; that is also the rationale for Section 53-A of the Delhi Development Act. The suit was filed much after the lapse of the stipulated period. Therefore, the second issue is answered in favour of the plaintiff.

27. As regards the first issue, the court notices that the agreement was with M/s J.S. Constructions; which, according to the plaintiff's deposition (as PW-1) is a registered Class – I contractor. He also deposed to being its sole proprietor. This evidence has not been challenged in the cross examination. In the circumstances, the court holds that there is nothing to suggest that the plaintiff cannot maintain the suit, or that other, necessary parties were to be impleaded, in whose absence the suit must fail.

Issue No. 3

28. The contract, awarded to the plaintiff and signed by the parties on 16-9-1991, was to be completed by 15 months. It is a matter of record that extensions for performance were granted by DDA and the contract was eventually performed on 12-12-1994; the completion certificate was issued in 1995.

29. In support of the argument that delay in execution of the works, with resulting extension in time (for performance) was on account of the DDA, the plaintiff relies on letters Ex. PW-1/6 (dated 27-11-1991); Ex. P-1 and P-2, letters dated 28th November, 1992 and 14-1-1992 and the letter dated 4-2-1992 (Ex. PW-1/7) and submits that these establish that the site was not handed over in a state where work could be commenced in time. DDA denies any liability and says that such claims towards delay are beyond the contract; it relies on Clause 10 of the Agreement and Clause 1 of the specifications and conditions. It also says, besides, that clause 10-CC was agreed by the parties towards charges for escalation, and any charges over and above the formulae agreed, cannot be claimed. The plaintiff having received the benefit of clause 10-CC, cannot claim amounts additionally. DDA also relies on the plaintiff's undertaking, furnished in the Extension of time proforma submitted by it, containing the following terms:

“I will not claim liquidated damages occurred by me during the extended period.”

30. Clause 10 of the contract speaks of stores to be supplied by DDA; the relevant part relied upon by it is as follows:

“ 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 materials and stores..”

Just as in the case of alleged delay in handing over the site, free from hindrances and encumbrances, the plaintiff relies on documents (Ex. P-3 dated 9-2-1992, Ex.P-7 dated 20-7-1992, Ex.P-8 dated 24-7-1992 – the last being written by DDA to the plaintiff, as well as Ex. P-16, Ex. P-17, Ex. P-23) and exhibits marked during evidence (Ex. PW-1/9, Ex. PW-1/10, Ex. PW-1/16, and Ex. PW-1/21) to say that there was delay in issuance of stipulated materials, by DDA to it. Similarly, in support of the delay in respect of release of amounts towards running bills, documents Ex. P-4, Ex. P-6, Ex. P-9, Ex. P-11, Ex. P-12, Ex. P-13, Ex. P-15 and Ex. PW-1-11, Ex. PW-1/18A, Ex. PW-1/12, Ex. PW-1-13, Ex. PW-1/14, Ex. PW-1/15 and Ex. P-31 are relied upon.

31. The above materials, in the opinion of the court, do establish that there was delay on the part of DDA in issuing various items, and for release of amounts, billed from time to time. The question of whether the plaintiff can claim amounts on such delays, however, is another matter, and would be discussed in the later part of this judgment, while considering other issues.

Issue Nos. 4 & 6

32. The above issues are to be considered together, as they pertain to common questions of fact and law, and involve examination of the same materials and pleadings. The first item of claim in the suit relates to balance of final bill amount, i.e ₹ 5,23,195/-. The plaintiff says that the final bill was payable within six months from completion, i.e 11-6-1995; DDA is alleged to have failed to pay this. The bill was submitted on 16-6-1996 (Ex. PW-1/2). The plaintiff admits to some part payment on 11-9-1996, after which it submitted a fresh bill on 10-9-1997. The sum of ₹ 5,23,195/- is claimed on this score. It is claimed that on the contrary, the Provisional Completion Certificate dated 12.12.1994 stipulated compliance with conditions spelt-out there which were not in fact complied with, as a result of which the DDA is entitled to ₹ 9,14,276.21/-. This is claimed as a justification for withholding the amounts, as well as release of the bank guarantee. The discussion would reveal that there is no dispute by DDA about the amount withheld; however, it does not justify why that course was adopted. No contemporaneous notice, showing whether the amounts were deductible for any noticed deficiency, or towards

overpayments, has been produced or relied on. In the circumstances, it is held that the plaintiff is entitled to ₹ 5,23,195/-. The next claim by the plaintiff is towards release of bank guarantee for ₹ 3,00,000 withheld by DDA, and the payment of ₹ 50,000/- towards renewal of such guarantees. Now, in support of the allegation for this claim, no evidence has been led; furthermore, the plaintiff, in the written submission furnished to the court on 18th of September, 2008, giving a summary of claims, gave up the main claim for return of bank guarantee, for ₹ 3,00,000/-. In the circumstances, the court is of opinion that these amounts are inadmissible.

33. The major head of claim in Para 6 is ₹ 34,43,818/- towards work performed during the extended period of the contract. This is on the assumption that the plaintiff is entitled to 30% extra on the total value of the contract, for such extended period. DDA denies this, arguing that once the parties agree to a formula, whereby the consideration for the extended period is consciously provided, it is not open to one party to claim such “extra” amounts. The court proposes to examine this aspect when it deals with the head of loss of profit, later, in this judgment.

34. The next item is the sum of ₹ 20,000/- towards amounts wrongly withheld. In the written Statement, DDA does not dispute that these amounts were withheld; it however states that this was on account of objections by the Quality control cell. However, no evidence as to what these objections were, or whether they were communicated for rectification by the plaintiff, ever, and if so, when, has been led. In the circumstances, the plaintiff is entitled to the said amount of ₹ 20,000/-. The amount of ₹ 8025/- claimed by the plaintiff is in respect of deductions made by DDA from the running bills, for SCI (Sand cast Iron) Pipes. The plaintiff faults the deduction, saying that the method adopted was erroneous. It is contended that the DDA deducted the amount on the basis of measurement of individual pipes, which is erroneous. Here, the court is of opinion that individual measurement, as opposed to bulk measurement, favoured by the plaintiff, is a choice of the mode that could have been adopted. As long as the optional choice is not demonstrated to be palpably unreasonable, or unconscionable, the court cannot hold that adopting the mode of measuring pipes individually was wrong, or illegal. The plaintiff, is therefore, not entitled to the sum of ₹ 8025/-.

35. The plaintiff claims, in Para 6 (vii)(a) towards cost of centering and shuttering for DPC (item 2.5) ₹7,559.00, on the basis that this is part of Item No. 2.5 of the Agreement. It is stated that this is not covered in the DPC items of the CPWD specifications of 1977, and is therefore, an extra. The DDA, on the other hand, points to Paras 4.6.1 and 4.6.6 of the CPWD specifications to argue that such cost is included. Para 4.6.6 reads as follows:

“ The rate is inclusive of the cost of materials and labour involved in all the operations described above except for the application of a coat of hot bitumen and addition of water proofing materials which shall be paid for separately unless otherwise specified. ”

It is thus, clear that the parties understood, in respect of DPC items, that the rate quoted and accepted was inclusive of cost of materials and labour involved. In these circumstances, the plaintiff's claim is untenable, and therefore, rejected.

36. Basing on clause 2.6 of the Agreement, the plaintiff claims ₹ 4726/- as cost of bitumen. This condition prescribes ₹ 9.25 as the consideration payable for applying a coat of residual petroleum bitumen of penetration 80/100 of approved quality using 1.7 kg per/sq. m on damp-proof course, after cleaning the surface with brushes and finally with a piece of cloth lightly soaked in kerosene oil. DDA's explanation is to refer to the rates, in respect of Item 8.1 and says that the cost is included by implication. It however, does not dispute the measurement. The court is of the opinion that DDA's position here is not tenable, because in Para 4.6.6, there is a specific reference to application of bitumen, as excluding from the principle of non-payment of other items, whose costs are deemed to be included. Applying that logic, the sum of ₹ 4726/- is payable to the plaintiff.

37. Para 6 (vii) (c) claims ₹ 38,119/- towards cost of ingredients such as MS flat, hold fast, CC Block, etc. Reliance is placed on Clause 6.1 of the agreement, which states that 1815.60 kg of this material is required, and fixes ₹ 11.70 per kg, and the total amount is fixed at ₹ 21,243/-. The plaintiff does not say how the sum of ₹ 38,119/- is payable; DDA, however admits that ₹ 9,028/- is payable. Having regard to this state of pleadings and materials, the plaintiff is held entitled to ₹ 9028/- towards this claim.

38. The plaintiff's next claim is towards cost of white cement used, after deduction of the cost of grey cement. The amount sought is ₹ 47,290/-. It is stated that the type of cement is

unspecified; the plaintiff relies on clause 7.6 of the agreement, and says that it had to procure 991.1 kg of such cement, at ₹ 4300/- per square meter (application on surface). DDA's response is that white cement was not required for Item 7.6, and relies on Item 7.7 saying that the express mention of white cement slurry excluded the use of that kind of cement for Item 7.6. Besides this aspect, the court notices that the plaintiff has not led any evidence to show that indeed, such quantity of white cement was used. Therefore, it is not entitled to the said amount of ₹ 47,290/-.

39. The claim in Para 6 (vii) (e) is towards application of priming coat; a sum of ₹ 31,042/- is sought. Here, the plaintiff relies on Para 9.7 of the schedule which mentions the quantity of such application to be 216.54 sq. metres, for which ₹ 4.05/- per square meter is admissible. The DDA denies the claim, by reference to Para 9.9 of the Schedule to the agreement, and also submits such cost of primer is included under Paras 13.33 and 13.34 of the CPWD specifications. However, it admits that an amount of ₹ 22,347/- is payable, and not ₹ 47,290/-. DDA's interpretation of the contract, in this court's opinion, is erroneous, as both Paras 9.6 and 9.9 do talk of application of primer to separate surfaces. The DDA does not dispute that the plaintiff's claim, or its application is in respect of wood surface; therefore, the suit is justified in locating the cost or claim in relation to Para 9.6. So far as the amount ₹ 22,347/- is concerned, the DDA does not dispute the quantities set out in the suit; in the circumstances, the court is of opinion that there is no reason to deny the plaintiff the sum of ₹ 31,042/-, which it is entitled to.

40. The plaintiff next claims, in Para 6 (vii) (f) ₹ 31,781/- towards SCI stacking. Here, reliance is placed on Clause 12 and Clauses 11.2 and 11.3 of the Agreement. The plaintiff argues that drainage system, in addition to the fittings mentioned, also required fixing collars as well. The DDA relies on Condition No. 80, clause 3.14 to say that SCI collars' costs have to be paid by the contractor. The plaintiff counters, by relying on a correction slip of 11.11.1987. On an overall conspectus of the facts, the plaintiff, in the opinion of the court has not established how this claim is admissible. This claim, is, therefore, rejected. In Para 6 (vii) (g), ₹ 3,748/- is claimed towards cost of GI Unions; it is argued that in terms of Item No. 12.1, and 12.2, rates are specific for certain products, like fixings, fittings, GI Tee Bend, GI Tee socket, etc. However, GI unions were not provided, and they had to be supplied. The DDA counters by saying that according to its DAR (an internal instruction) such amount is inadmissible. The court is of

opinion that such a position is not tenable. The reliance of an internal document, to which the contractor is not a party, nor is ever shown to be made aware of during the time of contract formation, is misconceived. The court also notices that this court, in a judgment, *Madan Lal Maggon, v. Delhi Development Authority & Anr* 2001-(1)-Arb LR 201 upheld the award of an arbitrator for a similar claim. Therefore, the plaintiff is entitled to the said amount of ₹ 3,748/- towards cost of GI Unions.

41. The claim in Para 6 (vii) (h) is towards provision for grooves at various places in the flat; a sum of ₹ 34,351/- is sought. The total length of groove provided by the plaintiff was 10064 metres, for which ₹ 34,351/- is sought. The DDA denies the claim, stating that this item of work was included, free of cost. However, it admits that an amount of ₹ 37,220/80 is payable, and not ₹ 34,351/-. DDA's stand, in this court's opinion, is incorrect. The DDA does not point to any specific clause or condition in the contract, in support of its contention, but admits at the same time that the grooves were provided. In the circumstances, the court is of opinion that there is no reason to deny the plaintiff the sum of ₹ 34,351/- as sought. The said amount is held payable to the plaintiff.

42. The next claim, under Para 6 (vii) (h) for ₹ 22,871/- is towards extra cost of plaster needed towards the height above 10.0 metres. The claim for extra rates is on the basis that the plastering had to be done on the building which were about 30 metres in height, and the labour cost was higher. The DDA relies on clause 3.15 of the Agreement, but does not deny that such labor costs have to be incurred; according to its calculation, the amount payable is ₹ 20,620/-. The DDA's denial here appears to be arbitrary. There can be no gainsaying that the cost of labor for plastering the building, at higher levels is higher; the plaintiff's claim for the amount is reasonable. The DDA implicitly admits the logic, but disputes the amount, without saying how. In these circumstances, the plaintiff is held entitled to ₹ 22,871/-.

43. The next item, in Para 6 (vii) (j) is centering and shuttering for laying of cement concrete in pavements; the sum of ₹ 2635/- is claimed. This is denied by DDA, saying that rates for item No. 10.1 and 5.11 are inclusive of centering and shuttering cost; it also relies on Paras 16.16 and 16.17 of the CPWD specifications. The court is of opinion that such a claim is not admissible.

The plaintiff was aware that such work was needed, when it bid for the work; it apparently did not seek any clarification or specify that for such services, which are an integral part of pavement laying, separate amounts would be payable for centering and shuttering. For these reasons, the claim of this amount has to fail.

44. The next item of claim, in Para 6 (vii) (k) is towards welding in respect of manufacture or fabrication of MS Grill; the amount sought is ₹ 95,652/-. This is denied by DDA, which states that “assembled” in Para 6.8 means welding. Item 6.8 would be relevant in this behalf. It states that M.S. grill of required pattern by welding the frame of steel windows fabricated with M.S. flat square as per direction of Engineer-in-Charge. No drawings have been produced by the plaintiff to substantiate this claim. The plaintiff has thus failed to lead any evidence to show that the grill which has been installed was of some special pattern being an ornamental grill for which the plaintiff is entitled to recovery of extra amount. Moreover, the Item relied, 6.8 itself talks of welding. The claim of the plaintiff is, thus, to be rejected. This finding is reinforced by a previous decision of this court, in *M/s. K. R. Builders Private Limited (supra)*. Similarly, the court finds as untenable, the claim for ₹ 7143/- towards cement concrete blocks used for fixing MS Railings. This claim is denied – and rightly so, by the DDA, which says that for all other claims, the plaintiff refers to some specific item or other. Here, having regard to the nature of the contract, where MS Railings were to be fixed with supports, for which cement concrete blocks were used, the plaintiff cannot claim them as extras. The claim for ₹ 7143/- is, therefore, rejected.

45. The next claim under Para 6 (vii) (m) is for ₹ 69,647/- towards extra thickness of brick masonry and other allied items for construction of open surface drain. It is submitted that DDA wanted full brick masonry on either side, which was provided for the plaintiff. It is stated that this resulted in extra concrete and extra plaster in bed. The total length of the drain, it is submitted was 608 metres. DDA denies extra work, on this count, but does not point to any condition in the contract; it admits that if such item is admissible, the amount payable would be ₹ 26,571/-. The DDA, in this instance, has only baldly and generally denied its liability, without

saying what was the extent of the work actually done. In the circumstances, the plaintiff's claim is entitled to succeed; it is entitled to an amount of ₹ 69,647/-.

46. Para 6 (vii) (n) seeks ₹ 1,00,000/- as cost of deployment of pumps for de-watering, for laying sewer lines. It is submitted that this was necessary to provide for proper disposal of sullage water through underground as it had to connect it with the trunk sewer. The plaintiff relies on a letter Ex. P-41 dated 6-12-1993 to this effect. The DDA denies the claim altogether, submitting that any water pipe was running parallel to the trunk sewer, requiring the extra item of work. In the absence of any evidence, the letter alone, in this court's opinion, is insufficient to establish this claim; it is accordingly rejected.

47. The next claim under Para 6 (vii) (o) is for ₹ 1,17,065/- for disposal of earth/ rubbish left by other agencies. The plaintiff says that such waste/ rubbish was left behind by agencies such as DESU, MTNL, etc; DDA, however denies this. The plaintiff relies only on a letter to DDA dated 22-6-1994 (Ex. P-30) in support of this claim. However, no other material- in the form of certificates, inspection, or minutes of joint meeting, etc are relied on. This claim, therefore, has to fail.

48. In Para 6 (vii) (p) the plaintiff seeks ₹ 17,487/- towards extra thickness of base plaster, in terms of Item 7.7. It is submitted that instead of the originally agreed cement plaster of 12 mm thickness- in the kitchen, bath room and WC on the rough side of the brick wall- 15mm was actually provided. Calculating the area of white glazed tiles (3886.62 sqm) the extra cost is claimed in this regard. The DDA does not dispute this extra amount of work, but contests the amount; it admits the claim to the extent of ₹ 11,873/-. The plaintiff is therefore, entitled to the said amount.

49. In Para 6 (vii) (q), a sum of ₹ 18,382/40 is claimed on the ground that under the agreement, the description of Item No. 3.2 is distinct, in respect of RCC shelves. It is argued that no finishing had to be done, but was in fact done, and the amount is payable. The DDA denies this claim head, contending that under Para 5.4.7.2 of the CPWD manual and specifications, no such claim is admissible. Although the plaintiff is relying on Para 3.2 of the agreement, the court

notices that there are other paragraphs, such as Para 3.1 and 3.4 in respect of similar heads of work. Therefore, the plaintiff had to lead evidence, instead of merely claiming the amount on the basis of the work done. Since no specific minutes, or extract of the work measurement, or other document is shown, in this regard, the claim is inadmissible, and therefore rejected.

50. Now, in para 6 (viii) the plaintiff claims ₹ 2,82,217/- based on Item 9.6 claiming that water cement paint on the outside surface of the walls had been stipulated, and used. Reliance is placed on Item 9.10 to say that a rough cast, plaster with graded or crushed stone aggregate of 6mm thickness was provided for. The plaintiff further relies on ISI specifications to say that a co-efficient of 250% had been provided, which in turn shows that it was paid 150% less. The DDA denies the claim altogether, relying on Paras 13.25.6.6 and 13.25.6.7. The latter indicates that rates were inclusive of cost of materials and labour in all operations. Here, the court discerns that the description of work is in clause 9.6, which talks of *"Finishing walls with water proofing cement of approved brand and manufacturers and of required to give even shade.."* No doubt, the plaintiff may be correct in contending that the necessary cast had to be in accordance with the agreement. Yet, the court is of the opinion that the parties having stipulated the rate, specific for this work, and also agreed to the quality of products used, neither of them can be permitted to rely on extraneous materials to either claim an extra amount, or deduct what is legitimately payable to the contractor- plaintiff. In the circumstances, this claim is unmerited, and therefore, rejected.

51. In para 6 (ix) of the suit, the plaintiff claims ₹ 1,78,760/- based on Item 3.9 of the agreement, stating that this amount was illegally deducted. The stipulation reads as follows:

"Add or deduct for omitting in RCC work smooth finishing of the exposed surface with 6mm thick cement mortar 1:3 (1 cement : 3 fine sand).....654.59 sq.m Rs. 10.05 only."

The claim is denied, by the DDA, which submits that no such deduction, illegal or otherwise, was made. The plaintiff does not in support of this claim, show the demand made in the final bill, and the corresponding deduction, or refer to the relevant running bill, from which any relatable withholding of amount, or sum, was made. Derivatively too, the plaintiff does not

attempt to establish that such a deduction was made, as is now alleged. In the circumstances, this claim is unmerited, and therefore, rejected.

52. The next claim in the suit is on account of alleged wrong computation of the sum payable under Clause 10CC of the contract. It is submitted, in this respect that the amount paid was short, or less by ₹ 15,47,101/-. The plaintiff says that compensation under Clause 10CC had to be computed for the element of labour and material. It is submitted that the DDA applied the old formula, and not the revised one, resulting in this head of claim. The defendant does not deny applicability of Clause 10CC under the circumstances. It is however, stated that the correct formula was applied, and the correct amount was paid.

53. The court notices here that the claim is based on wrong computation of the agreed formula. The plaintiff's grievance is that the DDA adopted an outdated, or superseded formula, while arriving at the compensation amount; according to the claim, it ought to have been ₹ 15,47,101/- more than what was paid. The plaintiff does not specify what was in fact, paid, and when, on this aspect. The earliest correspondence is dated 12th September, 1997, by the plaintiff, after submission of the 27th RA bill, paid for by the DDA, in 1996. The plaintiff reiterated the same grievance, and suggested that according to its calculations, the amount payable was ₹ 1,26,437/-. Thereafter, the plaintiff caused a legal notice to be issued, (Ex. PW-1/380) where, for the first time, ₹ 15,47,101/- was claimed as the correct figure. While the applicability of the correct, or latest formula, stipulated under Clause 10-CC cannot be doubted, the court is of opinion that the least the plaintiff ought to have done, in this regard, is to show the exact amount paid by the DDA, towards clause 10-CC compensation, and how that was wrong. In this state of facts, the claim is inadmissible; it is accordingly rejected. The plaintiff has also claimed ₹ 2,81,589/50 towards cost of work done, but not paid for. No particulars or evidence have been alleged, or led in this regard. In these circumstances, this claim too, is inadmissible, and therefore, rejected.

54. The suit also claims ₹ 6,03,000/- towards cost of deployment of staff and engineer as well as machinery beyond the stipulated date of completion. It is alleged that due to delay in execution of the work, the plaintiff incurred extra expenditure for deployment of such staff,

machinery, engineer, etc. The DDA denies the claim altogether, submitting that it is untenable, since Clause 10-CC provides for payments towards expenses incurred in respect of increased cost of labor, and other charges; and that granting any amount, on this alleged claim, would be a duplication. In this respect, it is pointed out that the plaintiff had produced the relevant salary slips, vouchers, etc as Ex. PW-1/17 to Ex. PW-1/317. DDA objects to the submission, and contends that the marking and production of the documents had been objected to during the course of trial, as the documents were irrelevant.

55. The record would disclose that initially, in the original affidavit (examination in chief) filed by plaintiff, the documents were marked as Ex. PW-1/17 to Ex. PW-1/37. The plaintiff sought to amend the affidavit, and moved IA 4982/2004. On 24th August, 2004, the court noted (erroneously) that the original affidavit had marked Ex. PW-1/17 to PW-1/379, which was sought to be corrected to PW-1/17 to PW-1/37. The court also noted the application number as IA 8727/2002, whereas actually no such application seeking amendment to that effect is on the record. The application (IA 4982/2004) was allowed on that date, as being formal in nature. In the circumstances, the court is of opinion that the documents were not objected to when they were permitted to be brought on record. In the circumstances, the objection to their production at the stage of trial was groundless. The DDA has not shown how the documents are irrelevant; no effort was made on its part to impeach their credibility.

56. These documents, Ex. PW-1/17 to Ex. PW-1/379 are receipts of salaries for 24 months, in respect of various employees of the plaintiff, such as Engineers, Mason, Supervisor, watchman, etc. The monthly salary of these personnel has been indicated in the affidavit, sworn to by PW-1; there is no cross examination by DDA. Therefore, the court cannot doubt their credibility. The total expenditure said to have been incurred is ₹ 7,20,000/-. The plaintiff, after applying the principle of mitigation, restricts his claim to ₹ 6,03,000/-.

57. The DDA, in its defense, contends that where the parties in their wisdom have specified a formula where the methodology of working out of escalated costs both for escalation of material as well as for escalation of labour, which is under Clause 10CC, there is no *rationale* for awarding anything over and above such agreed formula, as the plaintiff is demanding by this head of claim.

58. In *P. C. Sharma And Anr. V. Delhi Development Authority* 2006 (1) Arb LR 403 this court held that:

“In my considered view, if there are establishment and other charges which are other than increase in rates of labour and material for the same period of time, the amount can be awarded. However what has to be considered is whether there was any overlapping in the amount what has been awarded under this claim and what has been awarded under Clause 10(CC). It cannot be disputed that once the mechanism of Clause 10(CC) is made available under the contract, in respect of those items in issue being increase in labour and material charges for the relevant period of time the only mechanism to be applied is of Clause 10(CC) and of no other. In this behalf, judgment of the Division Bench in DDA vs. M/s. S. S. Jetley, 2000 (VII) AD (Delhi) 743 = 2001 (1) Arb. LR 289 (Del.) (DB), may be referred to where it is held that the contractor is entitled to damages only as per Clause 10(CC).

The Division Bench of this court in DDA vs. K.C. Goyal & Company, 2001 (II) AD (Delhi) 116, has held that in view of Clause 10(CC), no other claim on this account would be permissible. This judgment of the Division Bench has been recently followed by this court in CS (OS) No. 2822/1994 titled M/s. Bedi Constructions vs. DDA and another, decided on 10.11.2005. While discussing the aforesaid judgments and other judgments it has been held that once the formula of Clause 10(CC) is provided for and is relied upon by the petitioner, it is that formula alone which should have been applied and no amount other than that formula could have been granted. Award to that extent is, thus, set aside.

The Division Bench of this court in DDA vs. Jagan Nath Ashok Kumar, 89 (2001) DLT 668 = 2000 (Suppl.) Arb. LR 281 (Del.) (DB), held that the procedure prescribed therein was mandatory and this judgment has been followed in Narain Das R. Israni's case.

Learned counsel for the respondent sought to draw the attention of this court whereby a reference has been made to the additional expenses/compensation on account of increase in price of material and wages of labour, etc. and submits that this payment has been taken into consideration by the arbitrator while making the award in respect of this claim. However a reading of the said paragraph shows that what has been noticed by the arbitrator is the contention of the petitioner while relying on the judgments cited in respect of the said claims that a separate amount can be claimed on account of such hindrances and other expenses apart from the amount it would be entitled to on account of increase in price of material and wages of labour. A perusal of the claim petition, thus, shows that what has been claimed is not increase in the price of material and labour but establishment charges, machinery charges, etc. for the period for which the respondent has been held liable for delay. That being the position there is no overlapping element in respect of this claim awarded and claim awarded under Clause 10(CC).

The plea of the learned counsel for the respondent that there is no reasoning cannot be accepted since again in respect of this claim the arbitrator has clearly observed that the

amount has been awarded "after carefully going through the various letters submitted by the claimants and respondents".

59. In view of the above settled legal position, the court cannot award these amounts, claimed to have been incurred by the plaintiff contractor, towards salary to engineering, supervisory and other employees during the extended period of the contract.

Issue No. 5

60. The plaintiff claims loss of profitability due to delay in completion of contract @ ₹ 2,68,468/-. It is alleged that the delay and prolongation of contract, prevented him from carrying out other works, and he should accordingly be compensated towards loss of profit which he would have otherwise earned. This claim is denied by DDA. He also claims the sum of ₹ 34,43,818/- towards work performed during the extended period of the contract stating his entitlement to 30% extra on the total value of the contract, for such extended period. There is no proof of these claims. It is argued that the unjustified delay caused by the DDA constrained the plaintiff to deploy resources, which could have been otherwise utilized profitably in some other contract. The DDA counters these claims, arguing that while there is delay, the plaintiff cannot claim any prejudice, because he stated, at the time of grant of extension, that no damages would be claimed, and further, that when the parties to the contract agreed to a formula which compensates the contractor for extension of time for performance, no question of damages on any head, or for loss of profit, can arise.

61. The DDA relies on *Continental Construction Co. Ltd. vs. State of Madhya Pradesh* (AIR 1988 SC 1166) where it was held that once the parties have agreed that under a particular situation the contractor will not be entitled to claim any damages, then the Arbitrator would be misconducting himself, if, contrary to the specific provisions of the contract, any sum is awarded under that head. It also relies on *Pt. Munshi Ram & Associates (P.) Ltd. V. Delhi Development Authority* 2006-(1)-ARBLR -137 where, in the context of a dispute where the contractor had sought amounts on the basis of a claim other than the agreed formula, Clause 10-CC, it was held in that:

"In my considered view, the law is quite well settled on the issue of the mode and manner of calculation of such escalation or increase in cost. The position was little different

earlier under Clause 10(C) where no proper provision was made and that is why Clause 10(CC) was incorporated to take care of the position where the contract was not completed within the stipulated time and there was an extension granted. The escalations during the extended period of contract have to be calculated in terms of Clause 10(CC). There is also no doubt about the proposition that the extension should be in terms of Clause 5 of the General Conditions of Contract."

DDA also cites *M/s. K. R. Builders Private Limited V. Delhi Development Authority & Anr.* (in C.S.

(OS) 142/2003, decided on September 28, 2007) where it was held as follows:

"It cannot be lost sight of the fact that clause 10 (cc) para 2 stipulates that the cost of the work on which escalation will be payable shall be reckoned as 85% of the cost of work as per the bills, running or final bill "the value of material supplied under clause 10 of this contract or service rendered at fixed charges as per clause 34 of this contract" proposed to be recovered from the particular bill would be deducted before the amount of compensation for escalation is worked out. The basic concept, thus, is that where the material is supplied by the defendants or service rendered at fixed charges of labour, the plaintiff should naturally get the escalation. No doubt it was open to the defendants to have provided in the clause that this amount should be separately deducted in the formulas. This is, however, not known how the formula has been worded. In the present case there is no fixed charged labour provided but that would not make a difference to the working of the formula. Para 4 of clause 10 (cc) states that the compensation of escalation "shall be worked out as per formula given below." The 'W' in the formula states that it is the cost of the work done worked out as indicated, in sub-para (ii) above. Thus, 'W' has to be worked out only as per sub-para (ii). On the other hand, if the contention of the plaintiff was to be accepted, then this 'W' would not be worked out in the manner as given in the formula. The 'W' is the same in the formula for escalation of material in para-4 and for the escalation of labour in para 6. In the methodology of the plaintiff, the 'W' would be different for the escalation in material cost as compared to the 'W' in the escalation for labour cost. So, this would be contrary to the stipulation in the contract where even in respect of the escalation of labour, 'W' is stated to be the value of work done worked out as indicated in sub-para (ii).

The parties in their wisdom have specified a formula where the methodology of working out of 'W' is same both for escalation of material as well as for escalation of labour. The 'W' has to be worked out strictly as per para 2 of clause 10 (cc). If this is done, the defendants have correctly worked out the amount payable to the plaintiff as escalation under clause 10 (cc).

*In support of this plea, one can but not refer to the words of Lord Wensleydale, in *Monypenny v. Monypenny* (supra) that the question is not of the parties intended to do by entering into the contract but what is the meaning of the words used in the contract. Any disregard to this principle would lead to erroneous conclusions. A liberal construction has to be applied in considering such instruments. We must have regard not to presume intent of the parties, but to the meaning of the words that have been used, as held by the*

Apex Court in Delhi Development Authority vs. Durga Chand Kaushish (supra). In a different context where the question was whether the escalation should be given only as per clause 10 (cc) or some other methodology, it has been held in M/s. Bedi Construction Co. vs. DDA & Anr., CS(OS) 2822/1994, decided on 10.11.2005 that once the formula of clause 10 (cc) forms part of the agreement and it is agreed upon, no other methodology will be adopted for the said purpose. These observations have been relied upon by this Court in Pt. Munshi Ram & Associates (P) Ltd. vs. DDA, 128 (2006) DLT 619. The judgment in P.C. Sharma & Co. (supra) was only considering an award passed by an arbitrator. The learned single Judge did not deem it appropriate to take another view in view of the interpretation put-forth by the learned arbitrator. There is no discussion in the judgment in respect of the interpretation of the clause and, thus, the said judgment can hardly be said to be of any binding nature.

In view of the aforesaid, there is no option but to reject the claim of the plaintiff in this behalf.”

62. The Court notes that while the parties had indeed agreed for compensation towards increased costs and expenses contemplated under Clause 10-CC, that was towards certain heads. In an earlier part of the judgment, the plaintiff's claim towards salary paid to certain employees and staff members was rejected, on the ground that he could not claim anything more than the agreed formula. However, as far as the two claim heads under consideration are concerned, the court notes that these are made on account of a notional loss of opportunity faced by the contractor, towards the time expended and the likely amount or income he could have gained, during the period, if the contract had been allowed to be performed in time. The court has already found while answering Issue No. 3, that the delay in performance was attributable to DDA. The latter's argument, i.e that the plaintiff had agreed not to claim damages, and therefore the claim has to fail, on that ground, has to be first examined.

63. DDA also relies on the plaintiff's undertaking, furnished in the Extension of time proforma submitted by it, containing the following terms:

“I will not claim liquidated damages occurred by me during the extended period.”

Reliance is also placed on Clause 10 of the contract, which speaks of stores to be supplied by DDA; the relevant part relied upon by it is as follows:

“ 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 materials and stores..”

A conjoint reading of the two documents *prima facie* may suggest that the plaintiff could not claim damages on account of delay. As far as the first document, i.e the undertaking furnished at when extension of time was sought, is concerned, the court finds that the bar against claiming damages was in respect of delays caused by the contractor, not the DDA. The DDA has not established how there was delay. As regards Clause 10, what it aims to protect DDA from is claim for damages for delay in supply of stores. In this case, the extensive materials on record suggest that at different stages, supplies were not made to the contractor; also there were other delays. The work measurement books are on the record; they also evidence these facts, and the hindrances encountered by the plaintiff. In these circumstances, the court, in the absence of any evidence showing which part of the contract could nevertheless be proceeded with, by the contractor, cannot agree with the submission that such delays are not actionable.

64. The position when, in a works contract, the employer defaults or delays performance, or rescinds the contract without cause, can the contractor claim damages on account of loss of profit was first examined by the Supreme Court in *A. T. Brij Paul Singh v. State of Gujarat* (1984) 4 SCC 59). The court ruled that where, in the works contract, the party entrusting the work commits breach of contract, the contractor is entitled to claim the damages for loss of profit which he expected to earn by undertaking the works contract and that claim of expected profits is legally admissible on proof of the breach of contract by the erring party. It was observed:

"What would be the measure of profit would depend upon facts and circumstances of each case. But that there shall be a reasonable expectation of profit is implicit in a works contract and its loss has to be compensated by way of damages if the other party to the contract is guilty of breach of contract cannot be gainsaid. In this case we have the additional reason for rejecting the contention that for the same type of work, the work site being in the vicinity of each other and for identical type of work between the same parties, a Division Bench of the same High Court has accepted 15 per cent of the value of the balance of the works contract would not be an unreasonable measure of damages for loss of profit.

* * *

Now if it is well established that the respondent was guilty of breach of contract inasmuch as the rescission of contract by the respondent is held to be unjustified, and the plaintiff-contractor had executed a part of the works contract, the contractor would be

entitled to damages by way of loss of profit. Adopting the measure accepted by the High Court in the facts and circumstances of the case between the same parties and for the same type of work at 15 per cent of the value of the remaining parts of the works contract, the damages for loss of profit can be measured."

The above reasoning had been earlier indicated in *Mohd. Salamatullah v. Govt. of A.P.* (1977) 3 SCC 590). While approving award of damages in case of breach of contract, the court held that the appellate court was not justified in interfering with the finding of fact given by the trial court regarding quantification of the damages even if it was based upon guesswork. In both the cases referred to hereinabove, 15% of the contract price was granted as damages to the contractor. In the instant case however, the trial court had granted only 10% of the contract price which we feel was reasonable and permissible, particularly when the High Court had concurred with the finding of the trial court regarding breach of contract by specifically holding that

"we, therefore, see no reason to interfere with the finding recorded by the trial court that the defendants by rescinding the agreement committed breach of contract".

The Supreme Court, in *Dwarka Das v State of MP* 1999 (3) SCC 500, applied the *rationale* in the above two judgments, and held that:

"It follows, therefore, as and when the breach of contract is held to have been proved being contrary to law and terms of the agreement, the erring party is legally bound to compensate the other party to the agreement. The appellate court was, therefore, not justified in disallowing the claim of the appellant for Rs. 20,000 on account of damages on account of damages as expected profit out of the contract which was found to have been illegally rescinded."

65. The logic and reasoning why award of damages for loss of profit can be granted has been followed by two successive Division Benches of this court. In the judgment reported as *Delhi Development Authority, Appellant V. Anand And Associates* 2008 (1) Arb LR 490, the award of amounts towards loss of profit, towards a contractor, in a DDA contract, like in the present case, was upheld. The Division Bench, which decided the case, held as follows:

"...the award of a sum of Rs. 3,50,000/- on account of the increase in the price of material was also held to be justified as was the sum of Rs. 1,91,659/- on account of increase of labour charges. Relying upon the decision of the Hon'ble Supreme Court in Brij Paul Singh vs. State of Gujrat AIR 1984 SC 1703 the Court upheld the award made by the arbitrator even in regard to a sum of Rs. 3,48,563/- on account of loss of profit. The Court upheld even the award of interest by the arbitrator relying upon the decision

of Hon'ble Supreme Court Santok Singh Arora vs. Union of India and Ors. AIR 1992 SC 1809 and dismissed the petition.....

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Similarly, the award of a sum of Rs. 3,50,000/- on account of the increase in the price of material was also held to be justified as was the sum of Rs. 1,91,659/- on account of increase of labour charges. Relying upon the decision of the Hon'ble Supreme Court in Brij Paul Singh vs. State of Gujrat AIR 1984 SC 1703 the Court upheld the award made by the arbitrator even in regard to a sum of Rs. 3,48,563/- on account of loss of profit. The Court upheld even the award of interest by the arbitrator relying upon the decision of Hon'ble Supreme Court Santok Singh Arora vs. Union of India and Ors. AIR 1992 SC 1809 and dismissed the petition.

We have heard learned counsel for the parties and perused the record. The scope of the interference with an arbitral award has been settled by a long line of decisions rendered by the Hon'ble Supreme Court including those upon which reliance has been placed by the learned Single Judge. The decisions authoritatively declare that a Court hearing objections against an arbitral award does not sit in appeal over the same nor can it reappraise evidence adduced before the arbitrator to substitute the findings recorded by the arbitrator by those arrived at by the Court. The jurisdiction of a Court while dealing with an arbitral award was limited to the grounds enumerated under Section 33 of the Arbitration Act, 1940 which provision is now replaced by Section 34 of Arbitration and Conciliation Act, 1996..."

66. In *Delhi Development Authority V. Wee Aar Constructive Builders And Anr* 2004 (3) Arb LR 291, a Division Bench had upheld the grant of amounts towards loss of profit, and observed as follows:

"The respondent No. 1 has suffered losses on account of infructuous expenditure on labour, losses on account of idle tools, plants and machinery, losses due to hire charges for longer period for the idle steel shuttering plates and losses on account of wastage on building material due to deterioration of wooden scaffolding, bailies, batons, planks, etc. and losses on account of expenses over huts, blocking of working capital, incurring administrative charges and loss of profit. The Arbitrator has gone into details while awarding this amount on the basis of material produced before the Arbitrator. This Court in appeal will not substitute its own opinion for that of the Arbitrator. The view taken by the Arbitrator is a plausible view keeping in view his handling of projects as an Engineer. This Court will not interfere with the view of Arbitrator, even if different inferences may possibly be drawn by the Appellate Court. The Arbitrator has considered the agreement and clauses in the agreement and the evidence led by the parties and after due application of mind has come to findings which can not be assailed on the grounds as has been alleged by the appellant."

67. Two amounts claimed by the plaintiff, i.e ₹ 2,68,468/- towards delay and prolongation of contract, on the ground that prevented him from carrying out other works, and he should accordingly be compensated towards loss of profit which he would have otherwise earned. This claim is denied by DDA. He also claims the sum of ₹ 34,43,818/- towards work performed during the extended period of the contract stating his entitlement to 30% extra on the total value of the contract, for such extended period. There is clearly an over-lap in these claims. Further, the court has noted earlier that the plaintiff has not led evidence in this regard. At the same time, the DDA's role in contributing to the delay, occasioned in the performance of the contract has been found by the court. The question therefore, is whether the court should grant any amount.

68. The sum of ₹ 34,43,818/- is derived as 30% of cost of work done up to 18.12.92 (which is the original stipulated date of completion as per agreement), which is ₹ 83,79,253/-. The DDA does not dispute the latter figure of ₹ 83,79,253/-, but objects in principle to the grant of damages on other grounds, noticed above. Although the plaintiff has not led evidence in this regard, the court is of the opinion that the effect of delay on account of various factors, such as increased expenses commitment to the contract for a longer period, the effect it may have upon the contractor who would be unable to commit (or enter into) other commercial transactions cannot be altogether lost sight of. In an expanding economy, where wage levels and availability of materials are dynamic factors, the possibility of a businessman to earn reasonable profits would depend on the time taken in the performance of contracts. If a contract performance is delayed on someone else's fault, he ought to be compensated, for the loss of profit, at least notionally. The Supreme Court authorities from *A.T. Brij Paul* onwards have consistently ruled that granting 15% of the contract value, towards loss of profit, is a reasonable standard. Those were in cases where the contractor led some evidence. Here, however, the plaintiff has not led any evidence, and has claimed ₹ 37 lakhs approximately. Having regard to the totality of circumstances, the court is of the view that a reasonable standard of damages in this case should be 7.5% of the value of the work done till the date originally agreed. This figure works out to ₹ 6,28,443.97.

Issue No. 6

69. The plaintiff seeks 18% interest on the amounts claimed in the suit. However, he has not led any evidence to show that the parties had agreed to interest @18% for delayed payments, or

towards any eventuality. The court has held that some of the claims are admissible; the total amount of such claims works out to ₹7,30,451/-. Having regard to the circumstances, the court is of opinion that a reasonable rate of interest @ 12% on the said amount, from the date of institution of the suit, till payment, is called for. The claim for interest is allowed to the above extent. However, as far as the claim for interest on loss of profit is concerned, the court does not see any justification in granting it, since there is no question of awarding interest on damages.

Issue No. 7

70. In view of the above findings, the suit has to succeed, to the extent of ₹ 13,58,924.97/- (Rupees thirteen lakhs, fifty eight thousand, nine hundred and twenty four and ninety seven paise only) against the defendant DDA. The plaintiff will be entitled to *pendente lite* and future interest on ₹7,30,451/- at the rate of 12% on the said amount, from the date of institution of the suit, till payment. The suit is decreed in the above terms. The plaintiff is also entitled to costs; in addition, counsel's fee is quantified at ₹ 55,000/-.

January 31, 2011

(S.RAVINDRA BHAT)

JUDGE