

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

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Reserved on: 12.12.2011
Date of decision : 23.12.2011

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FAO (OS) No.294 of 2001

INDIAN FARMERS FERTILISER
COOPERATIVE LTD.

..... Appellant

Through: Mr. Ravinder Sethi, Sr. Advocate with
Mr. Manoj Verma, Mr. Motish Kumar
Singh, Advocates & Mr. D.S.S.R. Murty,
Authorised Representative.

Versus

M/s. DUGGAL CONSTRUCTIONS (INDIA) LTD. Respondent

Through: Mr. B.B. Sawhney, Sr. Advocate with
Mr. Sunil Kumar, Advocate.

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FAO (OS) No.374 of 2001

M/s. DUGGAL CONSTRUCTIONS (INDIA) LTD. Appellant

Through: Mr. B.B. Sawhney, Sr. Advocate with
Mr. Sunil Kumar, Advocate.

Versus

INDIAN FARMERS FERTILISER
COOPERATIVE LTD.

..... Respondent

Through: Mr. Ravinder Sethi, Sr. Advocate with
Mr. Manoj Verma, Mr. Motish Kumar
Singh, Advocates & Mr. D.S.S.R. Murty,
Authorised Representative.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE RAJIV SHAKDHER

SANJAY KISHAN KAUL, J.

1. M/s. Indian Farmers Fertilizers Cooperative Limited (for short 'M/s. IFFCO') floated a tender for construction of 'B' Type residential quarters for its township at its Fertilizer Plant in Aonla (District Bareilly, Uttar Pradesh). M/s. Duggal Construction (India) Ltd. (for short 'M/s. Duggal') submitted its bid for the same and vide letter dated 8.4.1985, contract No.117 was allotted to M/s. Duggal for construction of 257 quarters for contract value of ₹4,26,80,000.00. In response to the very same tender another contract No.117-A for construction of 128 quarters was awarded to M/s. Duggal vide letter dated 25.5.1985 of about the same value.
2. The contract was to be completed within a period of 18 months as per clause 2 of Letter of Intent (for short 'LoI') dated 8.4.1985. Any delay was to attract liquidated damages. The relevant clause 2 reads as under:

“The entire job has to be completed within a period of 18 (eighteen) months from the date of acceptance of this Letter of Intent. Any delay in completion of job will attract liquidated damages at the rate of ½ per cent (half per cent) of the contract price (as defined under clause 1 of the letter) for each week of delay or part thereof, subject to a maximum of 5 per cent of the contract price.”

The contracts were delayed by sixteen (16) months and twelve (12) months respectively.

3. The contract between the parties provided for reference of disputes to arbitration and since disputes arose about the payments to be made by M/s. IFFCO to M/s. Duggal, the same were referred to two learned arbitrators Mr. Justice M.S. Gujral (Retd.) and Air Commodore Mr. B.S. Gathwala (Retd.). The arbitrators framed two issues qua the disputes as under:

“a. Whether breach of contract has been committed, if so by which party and to what extent?

b. Which party is entitled to damages from the other party and to what extent?”

The arbitrators published their award on 6.6.1997 holding that M/s. Duggal was entitled to ₹1,31,22,353.00 from M/s. IFFCO while M/s. IFFCO was entitled to ₹98,654.00 from M/s. Duggal and, thus, a net award in favour of M/s. Duggal for ₹1,30,23,790.00 was made. M/s. Duggal was also held entitled to interest @ 18 per cent per annum on the aforesaid amount which itself amounted to ₹1,87,20,000.00. Thus, the total amount awarded under the award to M/s. Duggal was ₹3,17,43,790. Needless to say that this interest was calculated from the date of entering upon reference till date of award and further interest was also awarded from the date of award till date of payment on the sum of ₹3,17,43,790.00.

4. M/s. IFFCO filed objections under Sections 30 & 33 of the Arbitration Act, 1940 (hereinafter referred to as the ‘Old Act’), which was registered as Suit No.1412-A/1997. The principal grievance of M/s. IFFCO was that the arbitrators had exceeded their jurisdiction by awarding escalation over and above the ceiling limit of 5 per cent prescribed under the contract with a

further grievance against rate of 18 per cent per annum interest. The rate of interest of 18 per cent per annum was also stated to be disputed apart from the fact that interest on interest component under the award amounted to granting compound interest which was not permissible.

5. The learned single Judge in terms of impugned order dated 25.4.2001 has allowed only one objection, i.e., award of escalation which was stated to be under the garb of damages as according to the learned single Judge such amount could not have exceeded the maximum ceiling limit of 5 per cent of the contract value. Thus, the ceiling limit which was to prevail during the period of contract was held applicable also for the spillover period. The remaining part of the award was made rule of the court.
6. We are, thus, faced with a set of cross-appeals arising from the impugned order.
7. Learned counsel for M/s. IFFCO sought to urge the following aspects in his appeal:

Grant of compound interest:

8. The award contains both the principal amount and the interest component from the date of reference till date of award. For the post award period, interest had been granted @ 18 per cent per annum. Thus, learned senior counsel for M/s. IFFCO assailed the grant of compound interest, i.e., interest on the interest element.
9. The aforesaid issue, to our mind, is no more *res integra* in view of the judgement of the Supreme Court in State of Haryana & Ors. Vs. S.L. Arora & Company (2010) 3 SCC 690. While construing the provisions of Section 31 (7) of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the 'New Act') it has been

held that the expression “sum directed to be paid by an arbitral award” in Section 31 (7) (b) of the New Act refers to the award of sums of substantive claims, i.e., the principal amount awarded and not the interest awarded on that principal amount. An arbitral tribunal has been held not to award interest on interest or compound interest for pre-award or post award period unless there is a provision in the contract providing so.

10. In Pt. Munshi Ram and Associates (P) Ltd. Vs. DDA (2011) 163 PLR 20, a Division Bench of this Court examined various judgements on this issue while coming to the following conclusion:

“20. We are unequivocally of the view that the authority of an arbitrator to grant compound interest can only be under a contract as the applicable statutes, as interpreted by the Supreme Court, permitting grant of interest by an arbitrator being Section 29 of the old Act, Section 34 of the said Code r/w Section 41 of the old Act and Section 3 of the Interest Act do not permit specifically the grant of such compound interest. The position is thus same in respect of the authority to grant compound interest under the new Act and the old Act. We also make it clear that even where there is such a provision in the contract, the authority of the Court is not taken away not to grant such compound interest if it is in conflict with or in violation of the public policy of India as observed in para 18.3 of State of Haryana and Ors. v. S.L. Arora & Co. case (supra). As for the facts of the present case are concerned, as already noticed, there is no contract for compound interest and thus compound interest cannot be awarded.”

11. In the facts of the present case it is not disputed by learned counsel for M/s. Duggal that there is no specific term of the contract providing for compound interest. Thus, to the extent that for the post award period interest has been allowed @ 18 per cent per annum even on the component of interest contained in the award

of ₹1,87,20,000.00 is not sustainable. We accordingly set aside the award of this compound interest, i.e., interest post award on the component of interest forming a part of the award.

Rate of interest being excessive:

12. Learned senior counsel for M/s. IFFCO contended that grant of interest @ 18 per cent per annum throughout is excessive. In this behalf, we may notice that there was undoubtedly an interest regime of higher interest for the earlier period of the dispute and, thus, to the extent interest has been awarded @ 18 per cent per annum till the date of the award, i.e., 6.6.1997 cannot be faulted. It is also a matter of common knowledge that the regime of interest declined post that period and we do find that the award of interest @ 18 per cent per annum post the period of the award would be excessive. We are guided by the observations qua the issue of rate of interest by the Supreme Court's judgement in State of Rajasthan Vs. Nav Bharat Construction Co. & connected matter (2005) 11 SCC 197. We are, thus, inclined to grant interest @ 12 per cent per annum on the principal amount awarded under the award for the period post the date of the award till payment instead of 18 per cent per annum.

Award of Loss & Profit Damages on account of increase in overheads:

13. The third aspect urged by learned senior for M/s. IFFCO before us pertained to the award of sum of ₹18,16,000.00 in contract No.117 and ₹7,18,000.00 in contract No.117-A on the aforesaid account. We asked learned senior counsel to explain as to where this aspect has been discussed in the impugned order by the learned single Judge. Learned counsel has failed to point out any such discussion. Learned counsel did seek to contend that as per his

instructions the said aspect was urged before the learned single Judge. We, however, are not inclined to examine this plea on account of the fact that there is no such discussion in the impugned order nor did M/s. IFFCO at any stage move the learned single Judge by filing an appropriate application claiming that some aspects which they had urged had escaped the attention of the learned single Judge resulting in non-adjudication thereof. We also asked learned counsel to point out as to whether in the grounds of appeal this aspect has been raised, i.e., that something had been urged over which there is no pronouncement. Learned counsel fairly conceded that such a plea had not been taken though there is a mention that the amount ought not to have been awarded.

14. We, thus, find no merit in this plea.
15. The aforesaid are, thus, the only three aspects raised by learned counsel for M/s. IFFCO qua FAO (OS) No.294/2001.

Limiting labour & material costs escalation to 5% for spillover period:

16. This brings us to the appeal of M/s. Duggal, i.e., FAO (OS) No.374/2001, where M/s. Duggal is aggrieved by the interference of the learned single Judge with the impugned award qua the restriction arising from the ceiling of 5 per cent of contract value even for the period post the original period within which the contract had to be executed.
17. To appreciate the plea, we would first like to turn to the reasoning of the learned single Judge in this behalf. The discussion is from page 8 onwards. The learned single Judge took note of clause 1 of the letter of award dated 8.4.1985 which prescribed the contract price and stipulated that price was subject to escalation as per

escalation formula stipulated in the NIT. Clause 2 prescribed the period of contract as eighteen (18) months with a provision for liquidated damages at half (½) per cent of contract price for each week of delay or part thereof subject to maximum of 5 per cent of the contract price. Article 38 provided for all prices to be fixed for the duration of the contract without escalation unless stated otherwise in the first schedule. Clause 3.0 of the first schedule to the contract provided for escalation for material procured by the contractor to be limited to a maximum ceiling of 5 per cent of the contract value.

18. The learned single Judge thereafter proceeded to discuss the findings of the arbitrators qua the claim in respect of labour and material escalation for spill over period. M/s. IFFCO had pleaded the limit of 5 per cent while M/s. Duggal pleaded that the claim for escalation was, in fact, a claim for damages for loss suffered by them because of breach of obligations on the part of M/s. IFFCO which had caused the delay in execution of the contract. The arbitrators found that there was no specific clause prohibiting M/s. Duggal from claiming compensation in a situation where a contract could not be performed within the stipulated period due to the fault of M/s. IFFCO and in such a situation M/s. Duggal was held entitled to escalation cost for performing the contract during the extended period.
19. The learned single Judge, however, did not agree with the interpretation of the clauses by the arbitral tribunal as the letter dated 8.4.1985 fixed the contract price subject to escalation formula. The extent of damages that M/s. Duggal could claim was, thus, held subject to 5 per cent of the contract price as per

clause 2. The duration of contract was held to imply the period during which the contract subsists and since the work went on beyond the originally stipulated date of the contract, the duration of contract was held to include the entire period during which the contract subsisted which was beyond the originally stipulated period of contract for completion of work.

20. The learned single Judge did not agree with the finding that the arbitral tribunal had power to award damages which could not have been granted under the heading of escalation. The objection of M/s. IFFCO was, thus, held to be wrongly decided by the arbitral tribunal as the terms of the contract were held to construe only one interpretation and not two plausible ones.
21. Learned counsel for M/s. Duggal invited our attention to claim No.2 for ₹32,40,929.40 on account of labour escalation by reason of statutory increases and claim No.4 for escalation in materials for ₹3,38,181.38. He emphasized that the formula for labour component applied was as per the contract and the labour rates were taken from the Government notifications. It was, thus, pleaded that there was really no dispute about the methodology of calculation but the dispute arose on account of ceiling of 5 per cent of the contract value. The claim, thus, arose especially on account of statutory increases in labour rates that occurred after the stipulated period of contract imposing additional financial burden on M/s. Duggal. Since the blame for delay lay on M/s. IFFCO, M/s. Duggal claimed that they were entitled to the full amount.

22. Similarly in so far as the escalation in the cost of material is concerned the formula as per contract was applied and, once again, the ceiling limit came in the way.
23. Learned counsel for M/s. Duggal emphasized that clause 3.0 limit the escalation in cost of labour and material to the extent of 5 per cent of the value of the contract could not be a bar to M/s. Duggal claiming estimated expenditure as a component of compensation of damages under Section 73 of The Indian Contract Act, 1872 (hereinafter referred to as “the Contract Act”) for such part of the extended or spillover period as the delay was occasioned by the breaches on the part of M/s. IFFCO. The work had got delayed as much as 16 months and 11 months under the contract and the arbitral tribunal on consideration of the evidence and material on record held that M/s. IFFCO was responsible for having caused the delay to the extent of eight (8) months in relation of each of the two contracts while the remaining delays were occasioned over which neither party had any control. Thus, the excess expenditures incurred on account of spillover were liable to be reimbursed to M/s. Duggal.
24. The first aspect of the submission flows from the plea that the interpretation of the terms of the contract by the arbitral tribunal ought not to be interfered with unless such interpretation was absurd or contrary to law. As long as the view taken by the arbitral tribunal is plausible, though perhaps not the only correct view, the Court could not interfere or substitute its own opinion. We may notice that, in fact, this plea has been recorded by the learned single Judge but he came to the conclusion that the only view plausible was the one which he had taken. The escalation

had further been calculated as per the accepted formula given in the contract.

25. Learned counsel for M/s. Duggal referred to the judgement of the Supreme Court in K.N. Sathyapalan (Dead) By LRs. Vs. State of Kerala & Anr. (2007) 13 SCC 43. One of the questions which arose for consideration was a claim arising out of the failure of the opposite party to fulfill its obligations directly affecting the execution of the work by the claimant party. The claimant party was held entitled to the claim towards extra cost incurred by him as per Section 73 of the Contract Act. The arbitrator was held vested with the authority to compensate the second claim for extra cost incurred as a result of failure of the first party to live up to its obligations. In the facts of the case the contractor had been prevented by unforeseen circumstances from completing the work within the stipulated period of eleven (11) months which delay could have been prevented had the State Government stepped in to prevent the law & order situation which had been created at the work site. There were other reasons also on account of which the work could not proceed and compensation was awarded.
26. Learned counsel for M/s. Duggal relied upon the judgement of the Supreme Court in M/s. Associated Construction Vs. Pawanhans Helicopters Pvt. Ltd. AIR 2008 SC 2911, where the terms of the contract provided for no escalation during the pendency of the contract. It was held that the embargo would not be carried beyond the period for completion of the contract and in case the arbitrator awarded the amount, the court would not sit in appeal over the decision.

27. On the other hand learned senior counsel for M/s. IFFCO has relied upon the judgement of the Supreme Court in New India Civil Erectors (P) Ltd. Vs. Oil and Natural Gas Corporation AIR 1997 SC 980, to advance the proposition that where there is an expressed stipulation between the parties as to the price being firm and not subject to any escalation till completion of work, the contractor was not entitled to escalation for work completed after expiry of period of contract.
28. We have examined the aforesaid controversy. The first thing we would like to notice is that the arbitrator is a judge chosen by the parties and the undisputed legal position that the interpretation of clauses of contract made by the arbitrators must prevail even if there are two plausible views. Of course, if the arbitrator acts contrary to the terms of the contract or finds an absurd interpretation or an interpretation contrary to any law, the Court is not without jurisdiction to interfere with the same. It is in the context of this principle that the interpretation of the clause as made by the arbitral tribunal will have to be considered.
29. The other equally important aspect is that the escalation towards the labour and material cost has been made as per the formula stipulated in the contract and not something devised by the arbitrators themselves. The only issue, thus, is whether the ceiling of 5 per cent of the contract value which was applicable during the period of contract would also apply to the spillover period even if the contractor is not to blame. The undisputed position is that what the arbitrators have awarded is for the spillover period to the extent that the blame lay at the door of M/s. IFFCO. Now turning to the clauses of the contract, clause 1 states contract price and

restricts the escalation as per escalation formula stipulated in the NIT. The period of contract is 18 months and the contractor is to suffer liquidated damages @ ½ (half) per cent of the contract price for each week of delay or part thereof subject to a maximum of 5 per cent of the contract price. This is apparent from the wording of clause 2 because such liquidated damages are subject to a maximum of 5 per cent of the contract price is provided for “any delay in completion of the job”. The job had to be completed by M/s. Duggal/contractor. Clause 3.0 of the first schedule provided for escalation of all items together will be limited to a maximum ceiling limit of 5 per cent of the contract value. This was after the clause of escalation for labour component and escalation for material procured by the contractor giving the relevant formulas.

30. On a conspectus of the clauses we are of the considered view that the finding of the arbitral tribunal cannot be faulted nor was any interference called for by the learned single Judge on this aspect. The arbitral tribunal was right in concluding that there was nothing prohibiting M/s. Duggal/contractor from claiming compensation in such a situation where the contract could not be performed within the stipulated period due to the fault of M/s. IFFCO. The conclusion arrived at by the arbitrators in following terms is unexceptionable:

“In our case there is no specific clause which prohibits the contractor from claiming compensation in a situation where the contract could not be performed within the stipulated period due to the fault of the owner. In our opinion in such a situation the contractor is entitled to escalation cost for performing the contract during the extended period. The relevant clause in this contract is only an enabling clause to allow the contractor to claim escalation during the contract period though that is limited to 5% of the contract period, but there is no prohibition

that if the owner has caused delay and has thereby created a situation where the contractor had to incur extra heavy expenditure, he could not claim the same as damages.”

31. We are unable to persuade ourselves to agree with the conclusion arrived at by the learned single Judge that this interpretation of the terms of the contract was either *de hors* the contract or that the conclusion arrived at by the learned single Judge could be the only correct conclusion. We find that the conclusion of the arbitral tribunal is not only plausible but we agree with the said conclusion.
32. The learned single Judge seems to have been persuaded to take a different view from the arbitrators on account of the meaning of duration, i.e., the duration of the contract stood extended beyond the original term. The question is not whether the duration stood extended but as to who is to blame for the extended period for which the duration of the contract became longer. The arbitral tribunal has given a finding that on account of various faults on the part of M/s. IFFCO there was a delay attributable to it and it is for this period that the amount has been awarded on the principles of Section 73 of the Contract Act. Such period has been specified as eight (8) months out of the total period of delay under the two contracts. In so far as the legal position in this behalf is concerned, of the various judgements referred to aforesaid, the most apposite to our mind is the judgement of the Supreme Court in K.N. Sathyapalan (Dead) By LRs. Case (supra). It has been clearly held that the parties would be bound by the terms agreed upon in the contract but in the event of one of the parties to the contract is unable to fulfill its obligations under the contract which

has a direct bearing on the work to be executed by the other party, the arbitrator is vested with the authority to compensate the second party for the extra costs incurred by him as a result of the failure of the first party to live up to its obligations. This is exactly what has happened in the present case. The arbitrators in their wisdom, thus, for the period of delay attributable to M/s. IFFCO (which finding cannot be really disputed being a finding of fact on appreciation of evidence) have calculated the compensation payable under Section 73 of the Contract Act and on the basis of the same formula as was agreed to in the contract for calculation for the escalation during the period of the contract albeit with the ceiling of 5 per cent.

33. We are, thus, of the view that no interference was called for in the award by the learned single Judge on this account and, thus, to that extent the impugned order is set aside and the award sustained.

Conclusion:

34. As a result of the findings which we have arrived at aforesaid M/s. Duggal is entitled to the amount as per the award dated 6.6.1997 except to the extent that for the post award period, the interest would not be payable on the interest component of the award. Thus, interest would be payable post award only on ₹1,30,23,790.00 and not on the interest component in the award from date of reference till date of award which was quantified at ₹1,87,20,000.00. Further the interest post the award would be @ 12 per cent per annum (simple interest) instead of 18 per cent per annum.
35. The award stands modified to that extent.

36. The appeals are accordingly allowed to the aforesaid extent leaving the parties to bear their own costs.

SANJAY KISHAN KAUL, J.

DECEMBER 23, 2011
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RAJIV SHAKDHER, J.