

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Reserved On: 14th November, 2011
Judgment Pronounced On: 30th November, 2011

+ RFA(OS) 55/2011

DELHI DEVELOPMENT AUTHORITY ...Appellant
Through: Mr.P.K.Mittal, Advocate

versus

J.S.CHAUDHARY ...Respondent
Through: Mr.Dinesh Monga, Advocate for
Mr.M.S.Vinaik, Advocate

RFA(OS) 65/2011

J.S.CHAUDHARY ...Appellant
Through: Mr.Dinesh Monga, Advocate for
Mr.M.S.Vinaik, Advocate

versus

VICE CHAIRMAN DDA & ANR. ...Respondents
Through: Mr.P.K.Mittal, Advocate

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE S.P.GARG

PRADEEP NANDRAJOG, J.

1. J.S.Chaudhary carrying on construction business as the sole proprietor of M/s. J.S.Construction had filed a suit praying that a decree in sum of ₹1,24,99,474.30 (Rupees One Crore Twenty Four Lakhs Ninety Nine Thousand Four Hundred Seventy Four and Paisa Thirty only) be passed in his favour and against DDA. He pleaded that in response to a notice

inviting tender published by DDA inviting offers to construct 448 MIG Flats at Pocket-C, Phase-II Jhilmil, in the name of his sole proprietary firm he had submitted an offer which was accepted on 09.09.1991 and pursuant thereto a written contract Ex.PW-1/2 was executed on 16.09.1991 at the rates specified item wise as per the tender documents. 15 months was the period prescribed for the execution of the works and the same had to reckon with effect from 16.09.1991. Alleging delay in execution of the works attributable to DDA, it was pleaded that the work was eventually completed by 12.12.1994 and certificate of completion was issued by DDA on 06.07.1995. The claim in sum of ₹1,24,99,474.30 was split into two parts. Part 1 was ₹81,54,667.50 (Rupees Eighty One Lakhs Fifty Four Thousand Six Hundred Sixty Seven and Paise Fifty only) claimed as tabulated by us in the succeeding paragraph, and Part 2 was pre-suit interest in sum of ₹43,44,806.80 (Rupees Forty Three Lakhs Forty Four Thousand Eight Hundred Six and Paise Eighty only). Thus, our focus has to be on the sum of ₹81,54,667.50.

2. The sum total of Part 1 of the claim was divided, as per the pleadings in the plaint, in various sub-heads as under:-

(i) Balance due as per contractual rates for work billed for in the final bill.	₹5,23,195/-
(ii) Amount due under bank guarantee furnished to DDA	₹3,00,000/-
(iii) Incidental expenses incurred for revalidation of bank guarantee beyond stipulated date of completion of work	₹50,000/-

(iv) Loss incurred by contractor due to prolongation of work on account of increase in price of materials and cost of labour for work executed beyond contract stipulated date calculated at 30% of the value of the work done beyond contract stipulated date; value of work done as per final bill being ₹1,98,58,648/- and work done up to contract stipulated date being of the value ₹83,79,253/-: value of the balance work being ₹1,14,79,395/-, 30% thereof being:	₹34,43,818/-
(v) Amount illegally withheld from the running bills	₹20,000/-
(vi) Sum deducted in excess for supply of SCI pipes to the plaintiff for use in the works by applying a wrong formula for deduction	₹8,025/-
(vii) <u>Amount due for 17 extra item of works executed</u> , being:	
(a) Cost of centering and shuttering	₹7,559/-
(b) Cost of bitumen used to execute item No.2.6 of the works	₹4,726/-
(c) Cost of extra operations involved to execute item 6.1 of the works	₹38,119/-
(d) Cost of extra operations involved to execute item No.7.6 of the works	₹47,290/-
(e) Cost of extra operations involved to execute item No.9.7 of the works	₹31,042/-
(f) Cost of extra operations involved to execute items No.11.5 to 11.12 of the works	₹31,781/-
(g) Cost of extra operations involved to execute items No.12.1 and 12.2 of the works	₹37,480/-
(h) Extra cost to provide groove at junction of roof and wall	₹34,351/-
(i) Extra cost of plaster done above 10 meter	

height	₹22,871/-
(j) Cost of centering and shuttering for laying of cement concrete in pavements	₹2,635/-
(k) Cost of welding to fabricate M.S.Grill	₹95,652/-
(l) Cost of cement concrete blocks used for fixing M.S.Railing	₹7,143/-
(m) Cost of extra thickness of brick masonry and allied items for constructing open surface drain	₹69,647/-
(n) Cost incurred for dewatering sewer line	₹1,00,000/-
(o) Cost incurred to dispose of malba left by other agencies	₹1,17,065/-
(p) Cost incurred to provide extra thick base plaster for work as per item No.7.7	₹17,487/-
(q) Plastering of exposed surface of R.C.C. Shelves for work as per item No.3.2 of the contract	₹18,382.40
(viii) On account of work pertaining to item No.9.6 being short measured	₹2,81,217/-
(ix) Amount illegally deducted for work executed pertaining to item No.3.9	₹1,78,760/-
(x) Less compensation paid while implementing clause 10CC of the contract	₹18,28,690.50
(xi) Extra cost incurred for deploying staff, engineers and machinery beyond stipulated date of contract	₹6,03,000/-
(xii) Loss of profit on account of delay in completion of work calculated at 15% being the profit for work done after completion in value of ₹96,43,265/- i.e. ₹14,91,490/- and loss being 18% thereof	₹2,68,468/-

3. A word needs to be spoken here. We have twice totaled the aforesaid amounts and have reached the figure: ₹81,88,403.90 (Rupees Eighty One Lakhs Eighty Eight Thousand Four Hundred Three and Paise Ninety only) and not ₹81,54,667.50, captioned as the amount allegedly payable as pleaded in the plaint, in para 6 where it is stated that the sum due and as claimed is ₹81,54,667.50; followed by the break-up of the various sub-heads constituting the claim.

4. Vide impugned judgment and decree dated 31.01.2011, the learned Single Judge has allowed the claims as under, pertaining to the works.

(i) Balance due as per contractual rates for work billed for in the final bill.	₹5,23,195/-
(v) Amount illegally withheld from the running bills	₹20,000/-
(vii) (b) Cost of bitumen used to execute item No.2.6 of the works	₹4,726/-
(vii) (c) Cost of extra operations involved to execute item 6.1 of the works. (As against claim in sum of ₹38,119/-)	₹9,028/-
(vii) (e) Cost of extra operations involved to execute item No.9.7 of the works	₹31,042/-
(vii) (g) Cost of extra operations involved to execute items No.12.1 and 12.2 of the works. (It be noted that the claim as per plaint is in sum of ₹37,480/- but inadvertently while noting the figure pertaining to the claim in para 40 the figure typed is ₹3,748/- which has been allowed and hence the sum allowed has been shown to be ₹3,748/-)	₹3,748/-

(vii) (h) Extra cost to provide groove at junction of roof and wall	₹34,351/-
(vii) (i) Extra cost of plaster done above 10 meter height	₹22,871/-
(vii) (m) Cost of extra thickness of brick masonry and allied items for constructing open surface drain	₹69,647/-
(vii) (p) Cost incurred to provide extra thick base plaster for work as per item No.7.7	₹17,487/-

5. Claims towards all other items of work tabulated under clauses (a) to (q) at serial No.(vii) as per table in para 2 above have been rejected. Holding that the bank guarantee was discharged, claims as per serial No.(ii) and (iii) in the table drawn in para 2 above were rejected. Holding that it was not proved that any excess deduction was made pertaining to the claim as per serial No.(vi) in the table drawn in para 2 above, the same was rejected.

6. Claim at serial No.(xi) under the caption: Cost of Deployment of Staff, Engineering and Machinery beyond the stipulated date of completion not originally contemplated amounting to ₹6,03,000/- has been discussed by the learned Single Judge in paragraphs 54 to 59 of the impugned judgment and the claim has been rejected holding that the claim is covered under the compensation already paid as per clause 10CC of the contract.

7. Thereafter the learned Single Judge has discussed claims Nos.(iv) and (xii) as noted in the table reproduced in para 2 above and on the reasoning contained in para 68 of the

impugned decision, the learned Single Judge has allowed a sum of ₹6,28,443.97. The reasoning, in para 68 of the decision, is that the contractor would be entitled to be recompensed 7.5% of the value of the work done upto contract stipulated date. Since value of work done upto contract stipulated date was in sum of ₹83,79,253/-; 7.5% thereof works out to ₹6,28,443.97, which has been allowed.

8. Thus, decree passed in favour of the plaintiff and against the defendant is in sum of ₹13,58,924.97 (Rupees Thirteen Lakhs Fifty Eight Thousand Nine Hundred Twenty Four and Paisa Ninety Seven only) i.e. ₹7,30,451/- (Rupees Seven Lakhs Thirty Thousand Four Hundred and Fifty One only) + ₹6,28,443.97 (Rupees Six Lakhs Twenty Eight Thousand Four Hundred Forty Three and Paisa Ninety Seven only).

9. We find a typographic error in the judgment. Apart from the sum of ₹6,28,443.97 recompensed to the contractor by way of compensation for the work being prolonged, for the remainder, the sum total of the various sums allowed by the learned Single Judge has been determined as ₹7,30,451/-. But, if we total the same, it comes to ₹7,36,095/-. As noted hereinabove, the sum claimed towards cost for extra operations involved to execute items No.12.1 and 12.2 of the works which has been allowed by the learned Single Judge in sum of ₹3,748/- is by wrongly noting the sum claimed as ₹3,748/-. As a matter of fact the sum claimed was ₹37,480/-. Correcting as aforesaid, the sum decreed should be ₹7,69,827/- + ₹6,28,443.97 i.e. ₹13,98,270.97 as against ₹13,58,924.97 decreed by the learned Single Judge.

10. Two cross appeals have to be decided by us. We note that in RFA(OS) 55/2011 DDA has not challenged the decree passed in favour of the plaintiff in its entirety. Only two amounts held payable have been questioned. The first challenge is to ₹6,28,443.97 held payable as per reasoning in para 68 of the impugned decision to recompense the contractor for delay in execution of the works held attributable to DDA. The second challenge is to the sum of ₹69,647/- held payable in respect of the work noted by us at serial No.(vii) (m) of the table in para 2 above.

11. As regards RFA(OS) 65/2011 filed by the plaintiff, we find that challenge is to the claims which have not been allowed.

12. Pertaining to the appeal filed by DDA laying a challenge to the sum of ₹69,647/- determined payable as per the impugned decree towards cost of extra thickness of brick masonry and allied items for constructing open surface drain, the reasoning of the learned Single Judge qua said item of work, is in paragraph 45 of the impugned decision and we note the same. It reads as under:-

“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 meters. 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/-."

13. Challenging said sum allowed, the only ground urged in the memorandum of appeal filed by DDA is as under:-

"(G) BECAUSE the judgment and decree passed by the learned Single Judge is legally incorrect inasmuch as there have been absolutely no evidence on record for the alleged work of extra thickness of masonry work to have been done by the Respondent and, therefore, the learned Single Judge has wrongly allowed a sum of ₹69,647/- to the Respondent as against the Appellant/DDA and, therefore, to that extent, the impugned judgment is perverse."

14. We highlight that the notice inviting tender had required item rates to be quoted and pertaining to the works qua sewage, drainage etc., under the caption '*STORM WATER DRAINS AND CULVETS*' various item of works have been listed. It has clearly been listed, as claimed by the contractor, that the surface drains were required to be completed with half brick thick masonry work on either side. The contractor has alleged that DDA desired full brick masonry work on either side, which was provided, and thus he was entitled to the said extra item of work; the said pleadings are in para 6 (vii) (m) of the plaint. The response is that no extra work was required to be executed.

15. Ex.DW-1/2 is the photocopy of the measurement book filed by DDA and proved through the testimony of Sh.N.Kishore DW-1, Executive Engineer DDA. We have

perused the same. The said extra item of work has been duly recorded in the measurement book. We further find that in his affidavit by way of examination-in-chief, Sh.J.S.Chaudhary has deposed on oath that he executed said extra works. We have perused the cross examination of Sh.J.S.Chaudhary and we find that not even a suggestion has been given to him that the said extra item of work was not executed by him.

16. Thus, in addition to the reasons given by the learned Single Judge, our additional reasons to uphold said claim raised by the contractor are a description of the work in the tender document and the actual works recorded as having been executed in the measurement book and no challenge during cross examination made to the statement on oath by Sh.J.S.Chaudhary that he had executed the said work.

17. We shall be dealing with the second challenge raised by DDA to ₹6,28,443.97 directed to be paid by way of recompense to the contractor with respect to the delay in execution of the works at the end of our decision as the discussion on said subject would consume a considerable number of pages.

18. We thus deal with RFA(OS) 65/2011 where the challenge is to the claims rejected by the learned Single Judge.

19. As we have noted qua the ground of challenge pleaded by DDA with respect to ₹69,647/- held payable for extra work pertaining to the item of work at serial No.4.3 of the tender documents; a vague and a general plea; similar is the position with respect to the grounds urged in the memorandum of appeal to the claims disallowed.

20. In virtually 99 out of 100 appeals filed against judgment and decrees passed by learned Single Judges of this Court, we find vague grounds of challenge; without dealing with the reasoning of the learned Single Judge and highlighting as to in what manner the conclusion arrived at is wrong.

21. Let us illustrate by way of highlighting one claim.

22. The contractor had claimed a sum of ₹8,025/- on the plea that said amount was deducted in excess with respect to SCI pipes supplied by DDA to the contractor for executing the works by wrongly measuring the pipes. The reasoning of the learned Single Judge while denying the said claim, in para 34 of the impugned decision reads as under:-

“The amount of ₹8,025/- 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 ₹8,025/-.”

23. The ground raised in the memorandum of appeals pertaining to said amount being disallowed may now be noted. It is ground ‘L’ and it reads as under:-

“L. Because the learned Single Judge, while declining the appellant’s claim for refund of payment in respect of issue of SCI pipes amounting to ₹8,025/- (Rupees Eight thousand and twenty five only), failed to realize that the respondent was actually required to measure the cost of SCI pipes according to the quantity used, and not the size of the individual pipes, because the quantity used for the work was in fact at par with the quantity issued.”

24. Where is the challenge to the reasoning of the learned Single Judge? Where is the challenge to the reasoning that where there were two options, adoption of one could not be said to be wrong?

25. We would simply highlight that a ground of challenge in a memorandum of appeal must be specific by drawing attention of the Appellate Court, if it relates to a finding of fact, to the manner in which the finding of fact arrived at is sought to be challenged and if it relates to a reasoning of law, the reason why the reasoning of the law culled out by the learned Single Judge is incorrect. It is useless to raise grounds by parroting ‘*Because the learned Single Judge has not correctly appreciated the issue etc. etc.*’

26. As a matter of fact we find, pertaining to the item of work in question, that neither party correctly focused on what was the subject matter of dispute. The subject matter of dispute arose from the fact that as per the contract, SCI Pipes had to be supplied by DDA and the contractor had to consume the same while executing the works. The cost of pipes supplied had to be deducted by DDA. SCI Pipes are commonly seen by each one of us. They are embedded in the ‘Gully

Trap' where affluent from a building first falls before it flows into the internal sewer line. They are black coloured pipes having thick coating of tar-coal. They move upward and rise about 2-3 feet above the roof of the building. They are installed so that noxious gases which form in the sewer line are discharged in the air at a height of about 2-3 feet above the roof of the building so that the foul smell does not create nuisance for the inhabitants or the visitors of a building. He who has observed the SCI Pipes being laid or when laid would know that one end of the pipe is pushed into the end of the other pipe and thus the total length segment of two individual pipes would be more than the length segment when two pipes are joined. Thus, the executed work would obviously have a length less than the individual length of the pipes, inasmuch as a small segment of one pipe, while joining the second, having an interface would result in coupling. The grievance of the contractor was that in this way a 7 cm length for each pipe got overcharged. If the parties had projected before the learned Single Judge as above, the answer would have been simple. The measurement of the executed work has to be as per the measurement formula prescribed under the contract. Deduction for material supplied by DDA had to be on the basis of the actual quantity of material supplied, unless the contract provided for a different mode of measurement. We may explain a little better for the benefit of the reader of this judgment. For RCC works, most of the contracts provide for steel reinforcement bars (popularly called 'saria') being supplied to the contractor who has to cut the standard size

steel reinforcement bars to the specified length segments required for the structural reinforcement of the RCC works. While cutting, wastage ensues. Further, the length of the steel reinforcement bars supplied may be of a standard size i.e. say six feet in length and structural reinforcement may require some bars to be cut into size two feet and eleven inches. There is bound to be a wastage of two inch length segment. If the contract provides that vis-à-vis the quantity supplied and quantity consumed, benefit of wastage would be given, the same would have to be given effect to. But if the contract does not provide for benefit of wastage to be given, it would not lie in the mouth of the contractor to urge that while effecting deductions for the price of steel reinforcement bars supplied the same should have a co-relation to the quantity actually consumed. While submitting the tender, the contractor would be expected to read the terms of the contract and if he feels that he needs to be recompensed for the wastage, in the item rate which he quotes for, the same must be factored in.

27. Since we find, pertaining to the works executed, loose, laconic and mechanical grounds of challenge to the reasoning of the learned Single Judge, we do not trouble ourselves to keep on repeating the reasoning of the learned Single Judge and would repel each and every ground of challenge by affirming the reasoning of the learned Single Judge, which we find is a reflection of the pleading and the claim with respect to the tender documents. We highlight that the learned Single Judge has painstakingly dealt with each and every item of claim and has given good reasons wherever the

same had to be allowed and good reasons wherever the same had to fail. Nothing was shown to us which requires a reflection on the reasoning of the learned Single Judge and we would simply highlight that except for saying that such claims which were rejected were wrongly rejected, learned counsel for Sh.J.S.Chaudhary could take the argument no further.

28. We now deal with the challenge to the impugned decision relating to three items of claim i.e. ₹34,43,818/-, ₹6,03,000/- and ₹2,68,468/-, in respect whereof the contractor had a grievance and so does DDA. We have already noted hereinabove that DDA's grievance relates to ₹6,28,443.97 allowed as per reasoning in para 68 of the decision and the grievance of the contractor is to the three claims being disallowed as laid, but a sum of ₹6,28,443.97 being allowed on a totally newly created head of claim, on the reasoning contained in para 68 of the impugned decision.

29. We note the pleadings in the plaint pertaining to the said three sums claimed i.e. ₹34,43,818/-; ₹6,03,000/- and ₹2,68,468/-. The same are in sub-paras (iv), (xi) and (xii) of para 6 of the plaint. They read as under:-

“(iv) Cost of work done beyond the stipulated date of completion @30% extra amount to Rs.34,43,818.00

Immediately on acceptance of the tender, the plaintiff expressed his willingness to commence the work in performance of the contract. However, the work could not be completed within the stipulated period on account of the following defaults of the defendant:

- 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.

Due to the aforesaid defaults on the part of the defendant, the work could be completed only on 12.12.94 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. It is pertinent to note here that the rates quoted by the plaintiff were in the month of May 1991. But the plaintiff was made to complete the work at the same rates even in the year 1994. The defendant is 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 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 defendant duly accepted the said condition of the plaintiff as no objection was raised by the defendant and continued to get the work executed from him. The following payment is thus due and payable to the plaintiff by the defendant on account of labour and material due to the delay in execution of work.

Cost of work done as per final : ₹1,98,58,648.00
bill

Less: cost of work done up to
18.12.92 which is the original
stipulated date of completion : ₹83,79,253.00
as per agreement

Cost of work done after the : ₹1,14,79,395.00
stipulated date of completion

30% of the above : ₹34,43,818.00

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

xxx xxx xxx

- (xi) Cost of deployment of staff, engineer and
machinery beyond the stipulated date of
completion not originally contemplated
amounting to ₹6,03,000.00

The plaintiff, on account of delay in
execution, had 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 defendant is liable to make good the loss
incurred on this account. The amount works
out to be ₹6,03,000.00 as under:-

- | | |
|---|----------|
| a) Graduate engineer 1 no.
@₹5000/- p.m. | ₹5000.00 |
| b) Diploma engineer 1 no.
@₹3000/- p.m. | ₹3000.00 |
| c) Head Mistry 1 no. @₹2500/-
p.m. | ₹2500.00 |
| d) Supervisor 4 nos. @₹1250
p.m. each | ₹5000.00 |
| e) Chowkidar 6 nos. @₹1000/- | ₹6000.00 |

p.m. each

f) Clerk 2 nos. ₹1500/- p.m. each	₹3000.00
g) Accountant 1 nos. @₹2500/- p.m.	₹2500.00
T&P and other equipment ₹2.5 lacs @18% p.m.	₹3000.00

	<u>₹30,000.00</u>

This expenditure of ₹30,000/- p.m. for the work of the magnitude is fully justified as it is hardly 2.5% of expected monthly out turn of ₹1221501.00 keeping into consideration the tendered cost of ₹18322518.00 to be completed in 15 months stipulated in the agreement. The plaintiff has thus suffered a loss of:

- i) Under initialization
 $30000 \times 15 \times 54/100$: ₹2,43,000.00
- ii) For extended period 30000×24 : ₹720000.00

Applying the principal of mitigation of loss to the extent of 50% on ₹720000.00, the total loss comes to ₹603000.00.

- (xii) Loss of profitability due to delay in completion of the contract amount to ₹2,68,468.00

The plaintiff estimate was for a sum of ₹18322518.00. The loss in profit incurred by the plaintiff on account of delay in completion of the work which is solely and wholly attributable to the defendant. The defendant is thus liable to pay a sum of ₹2,68,468.00 on account, the details of which are as follows:

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

$$\frac{1491490 \times 18 \times 24 \times 1}{100 \times 12 \times 2} = ₹2,68,468.00"$$

30. Since for our discussion, clause 10CC of the contract has to be reflected upon, we note the same. It reads as under:-

““Clause 10(cc) . If the prices of materials (not being materials supplied or services rendered at fixed prices by the department in accordance with Clauses 10 & 34 hereof) and/or wages of labour required for execution of the work increase, the contractor shall be compensated for such increase as per provisions detailed below and the amount of the contract shall accordingly be varied, subject at the condition that such compensation for escalation in prices shall be available only for the work done during the stipulated period of the contract including such period for which the contract is validity extended under the provisions of clause 5 of the contract without any action under clause 2 and also subject to the condition that no such compensation shall be payable for a work for which the stipulated period of completion is 6 months or less. Such compensation for escalation in the prices of materials and labour, when due, shall be worked out based on the following provisions:

1. The base date for working out such escalation shall be the last date on which tenders were stipulated to be received.
2. The cost of work on which escalation will be payable shall be reckoned as 85% of the cost of work as per the bills, running or final, and from this amount the value of materials supplied under clause 10 of this contract or services rendered at fixed charges as per clause 34 of this contract, and proposed to be recovered in the particular bill, shall be deducted

before the amount of compensation for escalation is worked out. In the case of materials brought to site for which any secured advance is included in the bill, the full value of such materials as assessed by the Engineer-in-Charge (and not the reduced amount for which secured advance has been paid) shall be included in the cost of work done for operation of this clause. Similarly when such materials are incorporated in the work and secured advance is deducted from the bill, the full assessed value of the materials originally considered for operation of this clause should be deducted from the cost of work shown in the bill, running or final. Further, the cost of work shall not include any work for which payment is made under clause 12 or 12(a) at prevailing market rates.

3. The components of materials, labour, P.O.L., etc. shall be pre-determined for every work and incorporated in the conditions of contract attached to the tender papers and the decision of the Engineer-in-Charge in working out such percentages shall be binding on the contractor.
4. The compensation for escalation for materials and P.O.L. shall be marked out as per the formula given below:-

$$(i) \quad VM = W \times \frac{X}{100} \times \frac{(MI - MI_0)}{MI_0}$$

VM = Variation in material cost i.e. increase or decrease in the amount in rupees to be paid or recovered

W = Cost of work done worked out as indicated in sub-para 2 above.

X = Component of materials expressed as percent of the total value of work.

MI & MI₀ = All India whole sale index for all commodities for the period under reckoning as published by the Economic

Advisor to Government of India, Ministry of Industry and Commerce, for the period under consideration and that valid at the time of receipt of tenders, respectively.

(ii) $VF = W \times \frac{Z}{100} \times \frac{(FI - FI_o)}{FI_o}$

VF = Variation in cost of fuel, oil and lubricants, increase or decrease in rupees to be paid or received.

W = Value of work done, worked out as indicated in sub-para 2 above.

Z = Component of P.O.L. expressed as a percent of total value of work is indicated under the special conditions of contract.

$FI \text{ \& } FI_o$ = Average index number of wholesale price for groups (fuel, power, light & lubricants) as published weekly by the Economic Adviser to Govt. of India Ministry of Industry for the period under reckoning that valid at the time of receipt of tenders, respectively.

The following principles shall be followed while working out the indices mentioned in sub-para 4 above.

(a) The compensation for escalation shall be worked out at quarterly intervals and shall be with respect to the cost of work done during the three calendar months of the said quarter. The first such payment shall be made at the end of three months after the month (excluding) in which the tender was accepted and thereafter at three months' interval. At the time of completion of the work, the last period for payment might become less than three months, depending on the actual date for completion.

(b) The index (MI/FI etc.) relevant to any quarter for which such compensation is paid shall be the arithmetical average of the indices relevant to the three calendar months. If the period up to date of completion after the quarter covered by the last such installment of payment, is less than three months, the index MI and FI shall be average of the indices for the months falling within that period.

(c) The base index, MI_0 , FI_0 etc. shall be the one relating to the month in which the tender was stipulated to be received.

6. The compensation for escalation for labour shall be worked out as per the formula give below:-

i)
$$VL = W \times \frac{Y}{100} \times \frac{LI_0}{LI}$$

VL = Variation in labour cost i.e. amount of increase or decrease in Rupees to be paid or recovered.

W = Value of work done, worked out as indicated in Sub-para 2 above.

Y = Component of labour expressed as a percentage of the total value of the work.

LI_0 = Minimum daily wage in Rupees of an unskilled adult male mazdoor, as fixed under any law, statutory rule or order as on the last date on which tenders for the work were to be received.

LI = Minimum wage in rupees of an unskilled adult male mazdoor, as fixed under any law, statutory rule or order as applicable on the last day of the quarter previous to the one during which the escalation is being paid.

7. The following principles will be followed while working out the compensation as per sub para 6 above.

a) The minimum wage of an unskilled male mazdoor mentioned in Sub-para 6 above shall be the higher of the following two figures: namely, those notified by Government of India, Ministry of Labour and those notified by the local administration, both relevant to the place on work and the period of reckoning.

b) The escalation for labour also shall be paid at the same quarterly intervals when escalation due to increase in cost of materials and/or P.O.L. is paid under this clause. If such revision of minimum wages takes place during any such quarterly intervals, the escalation compensation shall be payable for work done in all quarters subsequent to the quarter in which the revision of minimum wages takes place.

c) Irrespective of variations in minimum wages of any category of labour, for the purpose of this clause, the variation in the rates for an unskilled adult male mazdoor alone shall form the basis for working out the escalation compensation payable on the labour component.

8. In the event the price of materials and/or wages of labour required for execution of the work decrease/s, there shall be downward adjustment of the cost of work so that such price of materials and/or wages of labour shall be deductible from the cost of work under this contract and in this regard the formula herein stated under this clause 10 (cc) shall mutatis mutandis apply, provided that:-

(i) No such adjustment for the decrease in the price of materials and/or wages of labour aforementioned would be made in case of contracts in which the stipulated period of completion of the work is six months or less.

(ii) The Engineer-in-Charge shall otherwise be entitled to lay down the principles on which the provision of this sub-clause shall be implemented

from time to time and the decision of the Engineer-in-Charge in this behalf shall be final and binding.

Provided always that the provision of the proceeding clause 10(c) shall not be applicable for contracts where provisions of this clause are applicable but in cases where provisions of this clause are not applicable, the provisions of clause 10 (c) will become applicable.”

31. As already noted hereinabove, the learned Single Judge had rejected the claim No.(xi) towards alleged costs incurred by the contractor for deploying engineers, supervisory and other staff and machinery during the extended period of contract on the ground that the said expenses are subsumed under clause 10CC of the contract as per reasoning in paras 54 to 59 of the impugned decision. Considering together claims No.(iv) and (xii) the learned Judge has decreed ₹6,28,443.97 on the reasoning that claim No.(iv) raised by the contractor for escalation in prices of materials and labour subsumed under clause 10CC of the contract does not grant benefit of *‘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.’* In other words, it has been held by the learned Single Judge that the amounts claimed by the contractor vide claim No.(iv) are not covered under clause 10CC of the contract as the same relate to loss of profits of the contractor due to delay in performance of the contract on account of fault of DDA and recompense has to follow for the same. The reasoning of the learned Single Judge may be

reproduced by noting the relevant paragraphs, being paragraph No.60, 62, 64, 65, 66, 67 and 68 as under:-

“60. The plaintiff claims loss of profitability due to delay in completion of contract @ Rs.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 Rs.34.43,818/- towards work performed during the extended period of the contract stating his entitlement to 30% extra on the total value of contract, for such extended period. There is no proof of these claims.....

....

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 courts 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.

....

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:

....

The above reasoning had earlier been 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 damages if it was based on guesswork.....

....

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:

....

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, in a DDA contract, like in the present case, was upheld.....

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:

.....

67. Two amounts claimed by the plaintiff, i.e. Rs.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 Rs.34,43,818/- towards work performed during 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 Rs.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 Rs.83,79,253/-. The DDA does not dispute the latter figure of Rs.83,79,253/-, but objects in principle to the grant of damages on other grounds, as 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 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 Rs.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 Rs.6,28,443.97." (Emphasis Supplied)

32. We find that the learned Single Judge has reached a somewhat correct destination, but on a faulty process of reasoning. On the one hand, the learned Single Judge has categorically negated the claim for deploying staff, engineers and machinery beyond stipulated date of contract as per findings in paragraphs 54 to 59 and has noted, in paragraph 67, that the claim in sum of ₹2,68,468/- towards loss of profit vide serial No.(xii) has an overlap with the claim in sum of ₹34,43,818/- i.e. claim vide serial No.(iv), but has allowed recompense towards damages on account of the contractor not being able to utilize his resources and earn money elsewhere. Recompense has been granted by awarding 7.5% of the value of the work done during contract stipulated period.

33. We have noted hereinabove clause 10CC which provides for escalation in the prices of materials and labour in relation to the work executed by the contractor during the original as also the extended period of contract. However, it assumes importance that the clause requires escalation to be granted only on 85% of the value of the work, which percentage has then been divided, 75% towards material and 25% towards labour and T&P. Thus, the contract treats 15% of the contract value as to be apportioned towards overhead expenses and loss of profits.

34. The issue is no longer res integra. The distinction between recompense for escalation and damages on account of prolongation of work for idle tools, plant and machinery as also labour was recognized by a Division Bench of this Court in the judgment reported as Delhi Development Authority v M/s S.S. Jetley 2001 (1) Arb LR 289 (Delhi) wherein it was observed as under:-

“Claim no. 17 is in respect of damages for prolongation of the contract. Respondent/Contractor had claimed a sum of Rs. 1017727 on this account. Learned Arbitrator awarded a sum of Rs. 2,20,000/- in favor of the respondent. The basic contention advanced in challenging the award of claim is that no such claim could have been awarded inasmuch as if there was any delay on the part of the appellant, the respondent was entitled to the amounts as per Clause 10CC of the Agreement..... The respondent had preferred separate claim namely, claim no.19 under Clause 10CC of the Agreement and there is no dispute that the said claim was entertained and adjudicated upon, keeping in view the provision of Clause 10CC of the Agreement between the parties. The claim no. 17 is in fact founded on different premise altogether. It was the case of the respondent that because of prolongation of the Contract due to the fault on the part of the appellant, the respondent was made to incur the expenditure on idle labour, staff, machinery, centering, shuttering and other ancillary requirements like electricity, water, petroleum, etc. It was the case of the respondent that it was necessary for the respondent to keep regular establishment including graduate engineer at site till the work is completed as required under Clause 36 of the Agreement. The Arbitrator found that the respondent had in fact incurred expenditure on the aforesaid grounds and awarded the claim @ Rs. 5000/- per month for the period of delay which was 44 months and on this basis a sum of Rs.

2,20,000/- was awarded. It was clear, Therefore, that claim no. 17 was for damages on account of prolongation of Contract inasmuch as respondent was made to incur unnecessary expenditure due to the fault of the appellant in prolonging the Contract. This claim is, Therefore, maintainable as per Sections 73 and 74 of the Contract Act which gave entitlement to the respondent to claim damages/loss suffered due to breach of contract by the appellant. The award of claim No.17 was, therefore, justified and we see no merit in the aforesaid contention raised by the appellant."

35. Reference by the learned Single Judge to the decision of the Supreme Court in A.T.Brij Paul Singh's case (supra) to grant damages on account of loss of profits needs a clarification for the reason said decision is an authority on the point that where a contract is illegally terminated before it is completed, for the unexecuted works, the contractor would be entitled to loss of profits. The judgment is not an authority on the point that loss of profits have to be awarded for the works which are completed but beyond the contract stipulated date. Further, the decision is not an authority on the point that in each and every case 15% of the unexecuted work would be a measure of loss of profit. Said decision would reveal that the contractor was awarded two identical works to lay down roads and the period of the contracts were the same. Both contracts were terminated before the works could be fully executed. Termination was found to be unjustified. In one proceeding evidence was led through the account books of the contractor that 15% of the contract value was the profit. This finding was sought to be relied upon in the second dispute and the challenge was that the contractor had not led primary

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evidence to show the profits. It was in this peculiar circumstance that the Supreme Court held that the measure of loss of profit proved through primary evidence in the first arbitration would hold good even for the second.

36. Loss of a contractor's profit as a head of damage in a terminated contract requires to be distinguished from a quite different claim which contractors may be able to establish in cases where an owner's breach can be shown to have had the effect of delaying completion by the contractor. In a delayed contract the basis of the contractor's loss is the postponement of the time when the contractor's organization, viewed as a profit-earning entity, is free to move on and earn elsewhere in the market, the combined profit and necessary contribution to fixed overheads of which it is reasonably capable. A construction contractor's enterprise as a whole will incur a range of off-site expenditure which by its nature will not vary or be affected by the delay in performance of an individual contract, or the degree to which that contract may have been delayed, as a result of owner's breach of contract. This class of expenditure is commonly referred as '*fixed overhead*' expenses. A contractor pricing an individual project, therefore, after providing for the estimated total '*prime-cost*' of all kinds which will be required to carry out the contract itself must then additionally estimate for a *combined operating margin* which will not only produce his required net or '*pure*' profit, but will also serve to make an appropriate contribution, *together with that from his other projects*, to the *fixed* overheads of the enterprise as a whole. In case of a delayed contract, where the

concern is to ascertain the 'profit' which the contractor might have expected to earn *elsewhere in the market on other contracts*, it is this necessary combined operating margin of profit and fixed overhead, which in appropriate market conditions, the contractor's enterprise will have lost as a consequence of the period of owner-caused delay on the individual project, and to which he will be entitled as damages. However, in this regards, a distinction needs to be drawn, on the one hand, small contractors having few (and indeed sometimes no) overheads other than those of the '*jobsite*' itself, and on the other, large contractors with centralized offices, transport systems, yards and depots; and while again some main contractors may operate as little more than employers of sub-contractors, with virtually no overheads of their own. (See Articles 8-176-79, pages 1072-74, Hudson's Building and Engineering Contracts, XIth Edition).

37. Delay in performance of contract due to owner's breach may also, of course, increase the contractor's prime costs or his site overhead costs. The contractor's various items of prime-cost for a project will themselves break down into some or all of the four prime-cost components of materials, plant, labor and salaries (including supervisory and other staff) and sub-contracts. Some items of cost will be obviously referable to individual parts of the constructed cost, such as the prime-cost elements of plant, labor and materials or sub-contracts for constructed concrete or brickwork, and so relatively easily applied to any additional *permanent* work directly necessitated by a breach of contract. Others, however,

usually referred to as 'site overheads', may not be conveniently referable to any particular part of the permanent work (for example, supervision, access roads, site huts or tower cranes etc), but will themselves contain some or all of the four elements. (See Articles 8-180 and 8-190, pages 1074-76 and 1080-81, Hudson's Building and Engineering Contracts, Xlth Edition).

38. From the aforesaid, it is clear that in case of a delayed contract caused due to owner's breach the contractor can claim damages under following heads: - (i) loss of profits; (ii) contribution to fixed overheads; (iii) increase in prime cost which includes components of materials, plant, labor and salaries and sub-contracts and (iv) increase in off-site and on-site overheads caused due to delay in performance of contract.

39. In the instant case the matter can also be looked at from another angle. As already discussed herein above, clause 10CC prescribes that the cost of the work on which the escalation is to be paid is to be reckoned as 85% of the cost of work as per the bills. Thus, if clause 10CC applies and cost of work as per bills is 100, the cost of escalation for materials and labor would be 85. The fact that only 85% of the cost of work as per bills is to be reckoned towards costs of escalation for materials and labor shows that the contract itself presupposes that 85% of the final bill submitted by the contractor is towards cost of work and remaining 15% of the bill is towards profits of the contractor and on-site and off-site overhead

expenses incurred by the contractor due to delay in performance of contract.

40. Thus, not on the reasoning of the learned Single Judge, but on the reasoning afore-noted, the contractor would be entitled to a fair recompense.

41. But before working out the same we need to highlight that with reference to the evidence led the learned Single Judge has found delay attributable to DDA and the various letters on the subject have been noted by the learned Single Judge in para 30 of the impugned decision. Indeed, the letters relied upon by the learned Single Judge establish that the entire delay was attributable to DDA.

42. The learned Single Judge has granted compensation at 7.5% of the value of the work done during contract stipulated period and suffice would it be to state that the same is faulty for the reason the recompense had to be on the work done beyond the contract stipulated date.

43. Notwithstanding the learned Single Judge having considered the claims for idle staff and machinery and loss of profits separately; for the law noted on the subject and as extracted from 'Hudson's Law of Buildings and Contracts', we are of the opinion that the contractor needs to be recompensed a fair amount on account of the contract being prolonged and during this period the supervision staff (ignoring labour for which compensation has already been paid under clause 10CC) as also some tools, plant and machinery remaining at site, which could have been used for some other works. Noting further that the contract has apportioned 15%

of the price breakup as overheads and profits, the contractor should be entitled to at least 7.5% of the value of the work executed beyond contract stipulated period in the instant case on account of insufficiency of evidence led entitling him to full recompense. In other words, we clarify that claim No.(iv) in sum of ₹34,43,818/- cannot be allowed as claimed, for the reason clause 10CC of the contract subsumes the same, but some recompense has to flow on account of the 15% of the value of the work executed which is not subsumed in clause 10CC and has been specifically excluded. Similarly, the contractor would also be entitled to a recompense under claim No.(xi) and (xii). Unfortunately the manner in which the claim was drafted has led the learned Single Judge into an error, but what is relevant in law is that if the three are taken together and what is subsumed under clause 10CC is removed, and then the law on the subject is focused on the remainder, the contractor would be entitled to a fair recompense on the value of the work executed beyond contract stipulated date which we find is again projected most erroneously by the contractor. Somewhere the figure disclosed is ₹1,14,79,395/- and somewhere it is ₹96,43,265/-, but we find with respect to the final bill as ultimately worked out that the value of the work would be ₹1,14,79,395/- and 7.5% thereof comes to ₹8,60,954.62.

44. RFA(OS) No.55/2011 filed by DDA is dismissed leaving the parties to bear their own costs.

45. RFA(OS) No.65/2011 is partially allowed. Suit filed by J.S.Chaudhary is decreed, as per clarification noted in para

8 above, and our finding in para 43 above in sum of ₹7,69,827.00 + ₹8,60,954.62 = ₹16,30,781.62. The decree passed by the learned Single Judge is in sum of ₹13,58,924.97 and thus noting the same we further direct that J.S.Chaudhary would be entitled to proportionate costs: proportion being in relation to the sum enhanced.

46. We find that pursuant to order dated 06.05.2011 passed in RFA(OS) 55/2011 DDA was directed to deposit the entire decretal amount as a condition for stay of execution. The amount has been deposited and has been invested in a fixed deposit. Since RFA(OS) 55/2011 has been dismissed and cross appeal filed by Sh.J.S.Chaudhary has been partially allowed and sum decreed has been enhanced, we direct that the decretal amount deposited by DDA be paid over to Sh.J.S.Chaudhary with the interest which has accrued thereon. We further clarify that on such sum which has been deposited by DDA, since benefit of interest accrued thereon shall flow to Sh.J.S.Chaudhary, DDA would not be burdened with any further interest on the said sum i.e. interest would stop accruing to the account of DDA on said sum from the date the same was deposited.

(PRADEEP NANDRAJOG)
JUDGE

(S.P. GARG)
JUDGE

November 30, 2011
mm/dk
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