

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

+ **FAO.No. 422/2005**

% *Reserved on : 22.03.2011*
Decided on : 29.03.2011

MUNICIPAL CORPORATION OF DELHI Appellant
Through: Mr. Saurabh Khanna, Adv. for Mr.
Gaurang Kanth, Adv.

Versus

M/s RAVI BUILDERS Respondent
Through: Mr. Moni Cinmoy, Adv.

CORAM:
HON'BLE MR. JUSTICE MOOL CHAND GARG

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to the reporter or not? | YES |
| 3. | Whether the judgment should be reported in the Digest? | YES |

: **MOOL CHAND GARG,J.**

1. This is an appeal filed by the appellant assailing the judgment dated 12.09.2005 delivered by the learned ADJ in having dismissed the objections filed by the appellant to an award dated 10.06.2004 made by the sole Arbitrator.

2. Briefly stating the facts of this case are that the respondent who was awarded a contract for the work of construction of 24 numbers Type IV Quarters at Gulabi Bagh, Phase-II vide order No.D/EE-VII/92-93/4 dated 06.07.1992 executed between the parties could not complete the work and as such differences and disputes arose between the parties which as per the orders passed by a learned Single Judge of this Court were referred to Mr. B.S. Sekhon, who was appointed as a sole Arbitrator vide its order dated 17.05.2004 in the Arbitration Petition.

3. After entering into the reference, the Arbitrator gave his award on 10.06.2004 in favour of the respondent/contractor. The appellant/MCD filed its objection under Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'the Act'). The objections were not

found favour with by the learned ADJ and as such the learned ADJ dismissed the objections vide the impugned order dated 12.09.2005. It is this order which has been appealed against by the appellant under Section 37 of the Act.

4. During the course of arguments, the learned counsel appearing for the appellant confined the lis qua the decision given by the learned ADJ on issues No.6 and 8. It was contended that insofar as issues No.6 is concerned, the same was decided by the Arbitrator without there being any evidence on record. This aspect has also not been considered by the learned ADJ. It has been contended that the respondent/contractor has not led any evidence to justify the award of compensation on issue No.6 and thus, the said portion of the award was not sustainable in law. The learned ADJ failed to appreciate this issue and thus, the order of the learned ADJ as well as the award on that issue is not sustainable.

5. As far as issue No.8 which is with respect to awarding of interest @ 10% it is submitted by the appellant that the interest could not have been awarded over and above 9%. Insofar as issue No.6 is concerned, the Arbitrator has awarded a sum of ₹ 54,000/- in favour of the respondent. This award pertains to salary of one Chowkidar as a watch and ward staff to keep a watch on 24 quarters during the period 15.10.1994 to 30.08.1996 when the site was taken over after due certification about the completion of the work. Thus, the claim basically relates to keeping the site idle on account of delay due to non-availability of cement and steel from the municipal stores; due to non-laying of electric conduct pipes by the electric contractor; non-providing and fixing of electrical installation connections and wiring; and due to re-arrangement of labour. It was submitted on behalf of the respondent that since over a period of 29 months, the site could not be utilized by the contractor due to fault of the appellant and the site had to be kept secured with a watch and ward staff, despite there being no specific stipulation in the contract regarding such a claim, the appellant was still entitled to claim this amount. In this regard details have been supplied by the contractor which have been taken note of by the

Arbitrator. Relevant portion of the discussion on the issue by the Arbitrator in are as follows:-

“Issue No.6

It would be appropriate to deal with the preliminary objections raised by the respondent in the first instance. This objection which was also urged by the Learned counsel for the respondent is that the instant claim and the claim under clause 10 CC over lap. This objection is plainly unsustainable as for one thing, clause 10 CC makes provision for price variation due to escalation in the components of materials and labour and the mode and principles to be followed for computing the compensation. Whereas, the claim for damages is founded on the provisions of Section 73 of the Indian Contract Act, 1872. For another, a plain perusal of this claim as detailed in Annexure ‘C’ makes it plain that the damages alleged to have been suffered are on account of salary paid to the staff and depreciation of machinery deployed at the site. Such a claim is far dissimilar to a claim for price variation based on clause 10 CC. Another equally merciless objection raised by the respondent and stressed by the learned counsel for the respondent was that there is no clause in the agreement to support such claim. Suffice it to say that if a claim is admissible under a statutory provision, section 73 of the contract Act, the absence of a stipulation in the contract does not render the claim inadmissible. The question as to whether the claim stands substantiated partially or fully is, however, an altogether a different question. The aforesaid objections are thus hereby repelled.”

6. The Arbitrator has further gone on the details as to the cause of delay in the completion of work attributable to the appellant, the reasons given on this point reads as under:-

“Turning to the question as to whether the claim is otherwise well founded, the first point to see is as to whether the delay is attributable to the lapses on the part of the respondent. Accordingly to the claimant the delay has been occasioned by the factors listed hereditable. The periods of delay as claimed are specified hereinafter

S.No. Reason	Period
(i)Due to non-availability of Cement & steel from the Municipal stores	5 months and 3 days
(ii)Due to non laying of electric conduct Pipes by the electrical contractor	2 month and 7 days
(iii) Due to non-providing and fixing of Electrical installation connections And wiring	22 months

(iv) Due to re-arrangement of labour 2 month

Saying that there was delay in payment of bills as detailed at P. 10 of the statement of facts, the claimant has averred that the actual delay of 33 months, 16 days is less than the delays referred to hereinabove.

(i) The ground and period of delay at (i) above stands substantiated by the communication of XEN-VIII X dated 12.09.2001 Ex A/R 9 and the entries dated 04.08.1992, 04.09.1992, 24.09.1992, 29.09.1992, 28.06.1992, 12.08.1993, 24.12.1993, 10.01.1994, 05.02.1994, 15.02.1994, 09.03.1994, 19.04.1994, June, 1994 and 24.06.1994 in the Hindrance Register Ex A/R-3.

(ii) This ground as also the period of delay is established by the entries dated 24.11.1992: 08.12.1992: 26.03.1993: 10.04.1993: 02.12.1993 and 10.01.1994 contained in the Hindrance Register but also by the commutations dated 19.10.1992: 17.12.1993 from the Engineer in charge to the Ex-Engineer (E) V. Copies Ex A/R 5 Ex A/R 6 respectively.

(iii) Entry dated 15.10.1994 in the Hindrance Register reads – final finishing work cannot be taken up as electrical department has not completed their wiring work. As per the entry dated 15.08.1996. Contractor was asked to complete the finishing work without electric wiring to avoid any legal dispute. It was also stated, 'Hence hindrance removed'. It is stating the obvious that finishing work cannot be taken up without the provision of electric wiring. As to whether such instructions could be given to the claimant by a vigilant supervision sing officer much earlier is, however, a separate question. Thus this ground and the period also stand established.

(iv) I am not inclined to uphold this ground for reason, firstly, an organized contractor could easily arrange the labour for doing finishing work in a week or so. Secondly, as per the doctrine for mitigation of damages, the claimant could have diverted the labour for the works, which the claimant was executing. It was conceded by the claimant in an answer to a specific query from the Arbitrator that he was executing other works also during the said period. Nor do I fell impressed by the alleged delay caused by delayed payment of running bills.

In view of the foregoing, I hold that delay of 29 months and 10 days is to the respondent's count.

Since the respondent was in breach of the reciprocal obligation of making available the cement, steel and the completion of electrical work to enable the client to execute

his part of the contractual obligation, the claimant is entitled to damages/ compensation.”

7. The Arbitrator has further calculated the amount of damages in relation to the salary of the staff such as Chowkidar etc. and the discussion is as follows:-

“As regards the other portion, the contention of the learned counsel for the respondent about lack of proof is no doubt for mixable, but, there can also be little doubt that at least one chokidar would be needed to keep watch and wearied for 24 quarters during the period 15.10.1994 to 30.08.1996 when the site was taken over after due certification about the completion of the work. The claim of salary at the rate of ₹1,800/- P.M. for one chokidar is minutely reasonable and as such justified. I would uphold such claim for the remaining period of delay of 29 months and ten days enumerated above. The claim is thus held entitled to ₹54,000/- only in rapt of this claim. The issue is decided accordingly.”

8. The learned ADJ has not interfered with the aforesaid portion of the award which is supported with reasons taking note of the law laid down by the Supreme Court in the case of MCD Vs. Jaganath Ashok Kumar & Anr. AIR 1987 SC 2316 and DDA Vs. Saraswati Construction Co. 2004 (3) Arb.L.R. 276 on the plea that when the parties chose a forum to refer their disputes to be adjudicated not under a common law forum or under a statute by filing a suit, civil Courts while exercising appellate board will not substitute its own opinion with that of the Arbitrator if the clauses of the contract are open to two plausible interpretations, it is legitimate for the Arbitrator to accept one or the other available interpretation and even if the court may think that the other view is preferable, the Court should normally not interfere. For the reasons as stated above, the learned ADJ held that in the present case, since the claim awarded by the Arbitrator is passed for valid reasons, no interference was caused.

9. As far as the issue of interest is concerned in the case of State of Haryana & Others Vs. S.L. Arora & Company (2010) 3 SCC 690, the Hon'ble Supreme Court has explained the purpose of granting interest at a higher rate even to the extent of 18 % only to act as deterrent to award-debtors from avoiding payment or using delaying tactics. The

relevant extract from the aforementioned case is reproduced hereunder:-

“22. The principles relating to award of interest, in general, are not different for courts and arbitral tribunals, except to the extent indicated in Section 31(7) of the Act and CPC. A comparatively high rate of post-award interest is provided in Section 31(7)(b) of the Act, not because 18% is the normal rate of interest to be awarded in arbitrations, but purely as a deterrent to award-debtors from avoiding payment or using delaying tactics. In fact a provision similar to Section 31(7)(b) of the Act, if provided in Section 34 of Code of Civil Procedure, will considerably reduce the travails of plaintiffs in executing their decrees in civil cases. Be that as it may.

23. The difference between Clauses (a) and (b) of Section 31(7) of the Act may conveniently be noted at this stage. They are:

(i) Clause (a) relates to pre-award period and Clause (b) relates to post-award period. The contract binds and prevails in regard to interest during the pre-award period. The contract has no application in regard to interest during the post-award period.

(ii) Clause (a) gives discretion to the Arbitral Tribunal in regard to the rate, the period, the quantum (principal which is to be subjected to interest) when awarding interest. But such discretion is always subject to the contract between the parties. Clause (b) also gives discretion to the Arbitral Tribunal to award interest for the post-award period but that discretion is not subject to any contract; and if that discretion is not exercised by the arbitral Tribunal, then the statute steps in and mandates payment of interest, at the specified rate of 18% per annum for the post-award period.

(iii) While Clause (a) gives the parties an option to contract out of interest, no such option is available in regard to the post-award period.

In a nutshell, in regard to pre-award period, interest has to be awarded as specified in the contract and in the absence of contract as per discretion of the Arbitral Tribunal. On the other hand, in regard to the post-award period, interest is payable as per the discretion of the Arbitral Tribunal and in the absence of exercise of such discretion, at a mandatory statutory rate of 18% per annum.

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24.4 Where an arbitral tribunal awards interest under Section 31(7)(a) of the Act, it is given discretion in three

areas to do justice between the parties. First is in regard to rate of interest. The Tribunal can award interest at such rate as it deems reasonable. The second is with reference to the amount on which the interest is to be awarded. Interest may be awarded on the whole or any part of the amount awarded. The third is with reference to the period for which the interest is to be awarded. Interest may be awarded for the whole or any part of the period between the date on which cause of action arose and the date on which the award is made.

24.5. The Act does away with the distinction and differentiation among the four interest bearing periods, that is, pre-reference period, pendente lite period, post-award period and post-decree period. Though a dividing line has been maintained between pre-award and post-award periods, the interest bearing period can now be a single continuous period the outer limits being the date on which the cause of action arose and the date of payment, subject however to the discretion of the arbitral tribunal to restrict the interest to such period as it deems fit.

24.6 Clause (b) of Section 31(7) is intended to ensure prompt payment by the award-debtor once the award is made. The said clause provides that the "sum directed to be paid by an arbitral award" shall carry interest at the rate of 18% per annum from the date of award to the date of payment if the award does not provide otherwise in regard to the interest from the date of the award. This makes it clear that if the award grants interest at a specified rate up to the date of payment, or specifies the rate of interest payable from the date of award till date of payment, or if the award specifically refused interest, Clause (b) of Section 31 will not come into play. But if the award is silent in regard to the interest from the date of award, or does not specify the rate of interest from the date of award, then the party in whose favour an award for money has been made, will be entitled to interest at 18% per annum from the date of award. He may claim the said amount in execution even though there is no reference to any post award interest in the award. Even if the pre-award interest is at much lower rate, if the award is silent in regard to post-award interest, the claimant will be entitled to post- award interest at the higher rate of 18% per annum. The higher rate of interest is provided in Clause (b) with the deliberate intent of discouraging award-debtors from adopting dilatory tactics and to persuade them to comply with the award.

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34. Thus it is clear that Section 31(7) merely authorizes the arbitral tribunal to award interest in accordance with the

contract and in the absence of any prohibition in the contract and in the absence of specific provision relating to interest in the contract, to award simple interest at such rates as it deems fit from the date on which the cause of action arose till the date of payment. It also provides that if the award is silent about interest from the date of award till date of payment, the person in whose favour the award is made will be entitled to interest at 18% per annum on the principal amount awarded, from the date of award till date of payment. The calculation that was made in the execution petition as originally filed was correct and the modification by the respondent increasing the amount due under the award was contrary to the Award.”

10. As such, award of interest @ 10 % in the present case cannot be considered as unreasonable which requires any interference by this Court.

11. I have also examined the record and found that in the present case, the Arbitrator having made the award for cogent reasons, the learned ADJ was right that no interference was called for. This Court also does not feel any reason to disturb those findings of the learned ADJ. Accordingly, the appeal is dismissed with no orders as to costs.

12. TCR be sent back along with a copy of this order.

MOOL CHAND GARG,J

MARCH 29, 2011

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