

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment reserved on: 22nd September, 2011
Judgment pronounced on: 26th September, 2011

+ FAO(OS) 567/2006

D.D.A Appellant
Through: Ms.Anusuya Salwan, Advocate with
Ms.Renuka Arora and Ms.Neha
Mittal, Advocates

versus

M/S KRISHNA CONSTRUCTION CO Respondent
Through: Mr.Harish Malhotra, Sr.Advocate
with Mr.R.K.Modi, Advocate

FAO(OS) 568/2006

D.D.A Appellant
Through: Ms.Anusuya Salwan, Advocate with
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versus

M/S KRISHNA CONSTRUCTION CO Respondent
Through: Mr.Harish Malhotra, Sr.Advocate
with Mr.R.K.Modi, Advocate

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE SUNIL GAUR

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

PRADEEP NANDRAJOG, J.

1. OMP No.392/2001 and OMP No.393/2001 which laid a challenge to two awards dated 27.7.2001 and 28.7.2001 were disposed of by passing a detailed judgment dated 25.1.2006 in OMP No.392/2001 and a short order passed in OMP No.393/2001. The two awards pertain to agreements No.1/EE/DD-VIII/86-97 and No.41/EE/DD-VIII/86-97. The awards were challenged qua claim No.9 by filing objections under Section 34 of the Arbitration & Conciliation Act 1996.

2. Learned counsel for the parties conceded that both contracts were pari materia and spanned around the same time and nature of disputes were near identical, and in any case, pertaining to claim No.9 raised by the respondent, where sums awarded by the learned Arbitrator are ₹14,28,801/- in award dated 27.7.2001 and ₹15,14,800/- in award dated 28.7.2001, the legal issue which arises for consideration with respect to the challenge to the award is the same.

3. Undisputably, both contracts had a clause numbered 10CC which stipulated that price increase in cost of labour and material would be recompensed to the contractor on the formula prescribed in the clause and suffice would it be to note that in the decision pronounced by a Division Bench of this Court reported as 1999 (1) Arb.L.R. 88 DDA vs. U.Kashyap which was followed by another Division Bench in the decision reported as 2001 (II) AD (Delhi) 116 DDA vs. K.C.Goel & Co., with reference to the decision of the Supreme Court reported as 1991 (2) Arb.L.R. 180 Associated Engineering Co. vs. Govt. of A.P. & Anr. it was held that where the contract specifies the

method to recompense the contractor for escalation in the price of material and labour, the same would hold good even during the extended period of work. Same view has been followed by another Division Bench of this Court in the judgment reported as 2000 (VII) AD (Delhi) 743 DDA vs. M/s.S.S.Jetley.

4. Learned counsel for the parties were not in dispute that as per said decisions it was clear and that there was no scope for any argument that where a contract got prolonged beyond the stipulated date of completion, irrespective of who was at fault, price escalation towards material and labour had to be determined and paid as provided in the contract and in the instant case pertaining to the two contracts, the same had to be as per the formula prescribed in clause 10CC of both contracts.

5. With reference to the decision reported as 2006 (11) SCC 181 McDermott International Inc. vs. Burn Standard Co.Ltd. & Ors. as also the decision in K.C.Goel's case (supra), learned counsel for the parties conceded that a claim for damages, other than a claim for recompense on account of contract being prolonged, could be entertained by an Arbitrator, but the said claim for damages would require adjudication on proof of damages (not including the cost incurred towards material and labour on actual basis for the reason said escalation was agreed to between the parties as per contract to be determined as per an agreed formula), and on proper pleadings.

6. Mercifully and fortunately for us, learned counsel were not at variance with the legal principles and lest the reader of our decision is left wondering as to what then are we adjudicating, we highlight that we are adjudicating whether the principle of law, well recognized, that there cannot be any variance between pleading and proof as held in various decisions, only one which we highlight being the decision reported as 2004 (6) SCC 341 M.Chinnaswamy vs. K.C.Palanisamy & Ors. would be applicable before an Arbitrator in the context of an arbitration under the Arbitration & Conciliation Act 1996 keeping in view the law laid down by the Supreme Court in the decision reported as AIR 2003 SC 2629 ONGC Ltd. vs. Saw Pipes Ltd.

7. We extract the reasoning of the learned Arbitrator pertaining to claim No.9 (noting that it is pari materia in both awards) and since learned counsel for the parties had argued with reference to FAO(OS) No.567/2006, we may note the reasoning of the learned Arbitrator pertaining to award dated 27.7.2001 which concerns said appeal. While awarding ₹14,12,800/- the learned Arbitrator has reasoned as under:-

“CLAIM NO.9 The claimant claims an amount of ₹16,00,000/- on account of payment by way of compensation for additional cost in execution beyond the stipulated date of completion on account of prolongation of work caused by lapses, defaults and breaches of the DDA together with interest at 18% per annum from the date the amounts became due till the date of reference.

Under this claim, the claimant has claimed compensation on account of prolongation of work caused by lapses, defaults and breaches on the part of

the DDA together with interest. In this regard, claimant stated that as per the contract between the parties, the stipulated date of start of work was 17.04.1986 and stipulated date of completion was 16.04.1987 while the work was actually completed on 02.05.1989. It was further contended by claimant that the entire delay in completion of work is attributable to the respondent which fact is clear from the fact that the time was extended without levy of any compensation, which is only done if there is no delay attributable to the contract. The claimant stated that work was delayed on account of the following reasons-

- a) the delay in supplying the drawing for various items including the drawings for foundation work, external sewerage, water supply, drainage work;
- b) the delay in giving the decisions of various items including the decision of colour scheme;
- c) the delay in giving road decisions;
- d) the delay in giving the payments on due times;
- e) the failure in nor arranging good earth;

The claimant referred to various documents, details of which were given in the statement of claims. It was stated by the claimant that on account of the said delay, the claimant suffered losses, which is the subject matter of this claim. The claimant says that whenever the work is delayed, the contractor is bound to suffer the losses for the prolongation of the contract and as such the claimant is fully entitled to claim compensation in this regard. The claimant relied upon various judgments and filed in this regard written submissions, rejoinder written submissions, as well as made oral submissions before me. The claimant also stated that the claimant had notified to the respondent that on account of the delay being caused in completion of the work, despite claimant being ready to complete the work, the claimant will be

entitled to claim extra rates and in fact vide Exhibit C-36 claimed 18% over and above the quoted rates. The claimant also stated that the respondent cannot escape from its liability by taking recourse to clause 5, 10, 10CC and additional specification No.1, as they are not applicable in the facts and circumstances of the case and furthermore, the delay is more than 6 months as envisaged under clause 10. On the contrary, the respondent refuted the said claim of the claimant and stated that claimant is not responsible to make payment of compensation as claimed under claim No.9 and referred to clause 1 of the specification and conditions and also stated that in view of the fact the escalation has already been paid under clause 10CC of the agreement, therefore, no further compensation is liable to be paid and relied upon the decision of the Hon'ble Division Bench of Delhi High Court in case of *Delhi Development Authority Vs. U.Kashyap* and also in case titled *Delhi Development Authority Vs. K.C.Goel* and stated that in view of clause 1 of the specification and condition and clause 10CC, the claimant is not entitled to claim anything except what has already been paid under clause 10CC of the agreement. In rejoinder, claimant refuted contentions of the respondent and stated that the judgment of Hon'ble Division Bench as given in *DDA Vs. U.Kashyap* and *DDA Vs. K.C.Goel* is not applicable to the facts of the case, as the present claim is for compensation for prolongation of the contract and also relied upon the subsequent judgment of the Hon'ble Division Bench of Delhi High Court in *Delhi Development Authority Vs. S.S.Jaitley* in which the aforesaid judgment was also considered. The respondent also filed written submissions in this regard. I have considered arguments given by both the sides and I have also considered all the documentary evidence placed by both the parties in this regard. After carefully considering the entire arguments and the documents placed on record, I am of the considered opinion that the work has been delayed on account of various lapses on the part of the respondent alone and that is the reason, the

respondent had granted extension of time without levy of any compensation. The work has been delayed because of the delay in giving drawings and in fact the drawings have been substantially delayed; the foundation drawing without which the work cannot be started was given more than three and a half months of the commencement date, i.e. only on 28.07.1986 and thereafter the drawings have been given in fits and starts; the external sewerage, water supply and drainage work drawings were also handed over very late. Thus, there has been substantial delay on the part of the respondent in furnishing the drawings, which were the responsibility of the respondent. The respondent also failed to approve the sanitary stacks and delayed in giving various other decisions, which caused delay in execution of the work. Apart from this, the respondent also failed to arrange good earth, which was the responsibility of the respondent. The respondent also failed to release the payments on due dates. Apart from this, the respondent was also guilty in not supplying the materials in time and there was considerable delay in giving the stipulated materials. Since the work has been delayed on the part of the respondent along, therefore the respondent is liable to compensate the claimant for the ensuing losses, which every contractor is bound to suffer in the event of delay. The respondent cannot escape from its liability by taking recourse to clause 5, 10, 10CC and clause No.1 of the additional specification and conditions. Clause 5 only deals with grant of extension of time in the event of delay in work, but simply because time has been extended that cannot compensate a contractor for the losses, which the contractor has suffered. Clause 10 exonerates the respondent from payment compensation on account of delay in supply of materials, but clause 10 has limited application. It only exonerates the respondent from paying the compensation on account of delay in supplying the materials if the delay is confined to 6 months period, i.e., one-half of the stipulated period, but shall not exonerate the respondent from its liability to compensate, if delay is more than 6 months. In the

present case, the delay is not confined to material rather it is substantially confined to various other factors, like supplying the drawings, giving decisions, releasing the payments, which are not covered within the ambit and scope of clause 10 and since substantial delay is on account of supply of drawings, decisions and payment, therefore, the respondent cannot escape from its liability by taking recourse to clause 10. Similarly, reference to clause 1 of additional specification and conditions is of no avail to the respondent, as clause 1 only deals with change in programme of construction whenever any site or part site is not available at the time of doing a particular work and that too on account of non-supply of any material for unavoidable reason and has no application beyond the stipulated date of contract because it does not contain the provision of extension of time as is otherwise provided for in clause 10. In the present case, the respondent has not been able to explain any unavoidable circumstances for non-supply of material at a particular time. Moreover, the delay caused is on account of other factors, which are otherwise not covered in clause 1 and furthermore while issue NIT, it was specifically made clear by the respondent that site was fully available thus the respondent cannot escape from its liability by taking recourse to said clause No.1. The contention of the respondent that since compensation for prolongation has been paid under clause 10CC, therefore, claimant is not entitled for any further compensation is also of no avail. Clause 10CC is altogether different and talks about escalation and not about the losses, which a contractor is bound to suffer on account of prolongation of the contract. The judgment as relied upon by the respondent *DDA Vs. U.Kashyap* was considered in another subsequent judgment of the Hon'ble Division Bench in *DDA Vs. S.S.Jaitley* in which the Hon'ble Division Bench categorically considered the effect of the judgment of *DDA v. U.Kashyap* and held that it has no application where the compensation is claimed for prolongation of the contract. Here also in the present case the

compensation has been claimed on account of the prolongation of the contract. Since the work has been delayed for more than a period of two years and one month, therefore, the claimant is bound to suffer losses On account of escalation in price of materials and wages on account infructuous expenditure on overheads on account of idle machinery, tools and plants loss of profitability which are usual losses which every contractor is bound to suffer on account of delay on the part of the owner and the respondent cannot escape from its liability to compensate the claimant, particularly when I have held that the delay in the present case is entirely attributable to the respondent alone. Now, coming to the question as to how the damages should be measured. There are different modes of measuring the damages – one the damages can be measured by taking recourse to cost indices; secondly, damages can be measured by taking the difference of the rates prevailing at the time of tendering and during the delayed period; thirdly, by taking into consideration the actual losses suffered on account of the delay. In the present case, the claimant had vide Exhibit C-36 notified that because of the delay and because of the increase in the rates, the claimant would be claiming 18% extra over and above the quoted rates to which no rebuttal was ever given by the respondent. The claimant has tried to justified the compensation claimed by taking recourse to cost indices and details of which have been given in Annexure-4 wherein the claimant has worked out the losses on the basis of cost indices as ₹14,75,260.65. If the percentage method is adopted as was notified by the claimant vide Exhibit C-36, then the damages works out to ₹14,12,801/-. During the course of the argument, the claimant had given a note showing the details of the actual losses suffered by the claimant and if the details of the losses are worked out on account of infructuous expenditure in respect of the establishment, idle staff and idle tool and plants and reduced profitability of the firm, then the damages to suffered by the claimant comes to ₹20,04,000/-, the said details were given in Exhibit C-107. I have gone

through the details given in C-107. The claimant had given details of four engineers, 2 Head Mistries, 8 supervisors, 8 mechanics, 1 marketing incharge, two foreman, mechanics and thus it is stated that they have lost @ ₹30,500/- per month. The said details are on higher side. The claimant could have managed its work with the following persons:-

<u>Particulars</u>	<u>No.</u>	<u>Salary per month</u>	<u>Amount per month</u>
Engineers	2	₹1750.00	₹3500.00
Headmistry	1	₹1500.00	₹1500.00
Supervisor	6	₹800.00	₹4800.00
Store Keeper	1	₹800.00	₹800.00
Cashier	1	₹950.00	₹950.00
Mechanic	6	₹700.00	₹4200.00
Mechanic (Mixer Driver)	1	₹1000.00	₹1000.00
Marketing and Purchasing Watch and Ward	6	₹625.00	₹3750.00
Foreman Mechanic	2	₹950.00	₹1900.00
Total			₹22400.00

Thus the claimant was incurring ₹22,400/- per month on fixed maintenance. Since the work was delayed for 26 months and therefore the infructuous expenditure incurred by the claimant on account of maintenance of fixed site staff is ₹22400 x 26 = ₹5,82,400. So far as the infructuous expenditure on overhead is concerned that has been rightly worked out by the claimant at ₹53,730/-.

Regarding loss of idle tools and plants is concerned, I find that the amount claimed for T & P is on higher side as the work could have been managed with four mixers, four vibrators, three water pumps and 3000 steel shuttering plates, 1000 Scaffolding ballies 3000 roof ballies, 800 Battas, 250 bamboo challies. Other

expenses claimed for other items are not available to the claimant because the item regarding electric cable for temporary connection, welding set, car, scooters, mopeds are not only meant for a particular work and could be utilized some where else. Thus, cost of T & P which were rendered idle is ₹9,18,000 and accordingly the loss due for optimum use would be $918000 \times 20/100 \times 26/12 = 397800$. I have gone through the details regarding loss of reduced profitability, I find that the amount of ₹607100/- as worked out in exhibit C-107 is absolutely in order and reasonable. Accordingly the loss works out to ₹16,41,050/- on account of infructuous overheads, idle tools and plants and reduced profitability. I agree that the damages can also be well measured by taking recourse to cost indices and if cost indices are taken into consideration, it works out to ₹14,75,260.65, details of which have been properly given in Annexure-4. I have myself checked that details and I find the same in order, but since claimant has notified that claimant would be charging 18% over and above the quoted rates vide Exhibit C-36 and if calculated by that percentage, it works out to ₹14,12,801/-, details of which have been properly given in statement of claim. I have checked the details and find the same in order, which is less than ₹14,75,260.65 on cost indices and ₹16,41,050/- on account of infructuous expenditure idle tool and plant etc. I restrict the damage to ₹1412801/- alone though I feel that ₹16,41,050/- would be adequate compensation to the claimant. I, therefore, award only ₹14,12,801/- as compensation to the claimant under this claim against the respondent, which the claimant has suffered due to prolongation of the contract because of the lapses on the part of the respondent. However, I do not propose to award any interest from 01.22.1989 till 28.01.1994, which was not a determined liability till then. So far as granting of pendent lite and future interest of the said amount is concerned, that is separately dealt under claim No.17."

8. It is obvious that the learned Arbitrator has not awarded the sum of ₹14,12,801/- on the basis of labour and material escalation but has ostensibly recompensed, by way of damages, towards overheads in terms of staff deployed during the period the contract got extended and to recompense the contractor loss toward idle tools, plant, shuttering material and other equipment brought at the site for purposes of constructing the flats as per the agreement.

9. We now note the pleading in the statement of claim filed by the contractor pertaining to the award dated 27.7.2001. It reads as under:-

“CLAIM NO.9: THE CLAIMANT CLAIMS AN AMOUNT OF ₹16,00,000/- ON ACCOUNT OF PAYMENT BY WAY OF COMPENSATION FOR ADDITIONAL COST IN EXECUTION BEYOND THE STIPULATED DATE OF COMPLETION ON ACCOUNT OF PROLONGATION OF WORK CAUSED BY LAPSES, DEFAULTS AND BREACHES OF THE DDA TOGETHER WITH INTEREST AT 18% PER ANNUM FROM THE DATE THE AMOUNTS BECAME DUE TILL THE DATE OF REFERENCE

The Claimant has set out in detail in para 1 to 5 in particular in para 4 the numerous breaches of the Respondent. As a result of these breaches, the work had to be carried on beyond the stipulated period, subjecting the Claimant to additional cost and burden it with losses. The Claimant is not repeating the narration of the breaches and craves leave to have the contents of paras 1 to 5 of Statement of Claims read as part of this claim.

It is well settled that the additional costs and losses which are inflicted on contractor on account of the breaches of the employer must be compensated. The Respondent failed to fulfill its obligations that were fundamental and went to the root of the

performance of the contract. The failure to perform and non compliance with the conditions of the contract amounted to fundamental breach. Accordingly, there could be no exemption from liability on the part of the Respondent. Resort cannot be had to any provision of the contract seeking to give such an exemption. Such misperformance is not be condoned. The work had been executed for a period of nearly 25 months beyond the stipulated date of completion solely due to breaches and hindrances that were attributable to the Respondent. The extension of time granted by the Respondent is no compensation for the breaches and the losses suffered. Besides compensation under Clause 10 CC does not adequately cover the losses suffered by the Claimant due to escalation and enhanced construction cost. Firstly because 85% of the value of work is considered for working out the payment under 10 CC. Secondly, the whole sale price indices adopted for this clause is not reflective of the real escalation in construction cost. The computation of the Claimant's claim is as under:-

i. Quantum of work done upto the stipulated date of completion was ₹1,73,47,739.00 calculated at the tendered rates. As per 10th running bill paid.

ii. The quantum and value of work done from the date of stipulated completion to final bill paid is ₹1,18,70,627.00.

iii. Quantum of stipulated material issued from the stipulated date of completion to the final bill paid is ₹40,21,730.00.

iv. Work done beyond the stipulated date of completion therefore comes to ₹1,18,70,627/- less ₹40,21,730.00 = ₹78,48,897.00.

v. Calculated @ 18% extra rate on the aforesaid sum of ₹78,48,897.00 the quantum of claim under this claim comes to ₹14,12,801.00.

It will be recalled that the Claimant had duly notified the Respondent about its claim for increase @ 18% p.a. over and above the total rate for the work done beyond the stipulated date of completion. The Respondent did not require the Claimant to stop its work, instead kept on giving further instructions with regard to the execution of the work. The Respondent is accordingly deemed to have admitted the claim of the Claimant for payment @ 18% over and above the tendered rate. Reference is invited to Exhibit C-36.

The Claimant states that the amount of ₹14,12,801.00 claimed is even otherwise reasonably computed is fully justified in view of the steep escalation in construction cost. This is amply borne out by the Tenders accepted and for similar work at a higher rates during the relevant period. Besides the amount claimed is found to be justified even when computed on the CPWD cost indices. These have received judicial recognition as a fair and just method to determine escalation. The claim computed by applying CPWD indices works out to ₹14,75,260.00 (Annexure-IV). The Claimant states that the actual loss suffered and its entitlement to compensation works out to more than the amount claimed. The Claimant craves leave to substantiate its claim by such evidence as may be found necessary. The Claimant is entitled to interest @ 18% on the amount claimed as the amount had been wrongfully withheld. The Claimant also claims interest @ 18% p.a. on the said amount w.e.f. 1.11.1989 to 28.1.1994. The Claimant reserves its right to claim compensation for additional work done as may be crystallized after the adjudication of the quantities included in the arbitration."

10. Annexure-IV referred to in the pleadings pertaining to Claim No.9, reads as under:-

"ANNEXURE-IV

CLAIM NO.9:COMPUTATION OF DAMAGES/LOSSES
DUE TO PROLONGATION OF THE
CONTRACT FROM 16.4.87 UPTO THE DATE
OF COMPLETION (CLAIM NO.9) BASED ON
COST INDICES.

A	Gross amount of Final Bill	₹2,92,18,366.61
	Less Cost of material supplied by the Respondent	₹1,22,07,820.61

		₹1,70,10,546.00

Value of work done after deduction
of cost of materials supplied by
Respondent

B	As per 10 th RA Bill paid immediately just after the stipulated date of completion	
	Gross amount bill	₹1,73,47,739.00
	Less cost of materials supplied by the Respondent	₹81,86,090.56

	Amount of the work done after deducting the cost of materials supplied by the Respondent	₹91,61,648.44

C Net amount of work done after the
stipulated date of completion and
after deducting the cost of material
supplied by the Respondent

$$1,70,10,546.00 - 91,61,648.44 =$$

D Cost of Indices approved by the
CPWD

13.3.84	-	274
27.6.85	-	312
11.7.86	-	340
16.6.87	-	370

Taking the cost of Indices on

Average cost index on 20.4.85
when the tender was accepted.

$$= 274 + (312-274) \times \frac{14}{16}$$
$$= 274 + 33.25 = 307.25$$

Applicable cost index on 16.4.87 the stipulated date of
completion

$$= 340 + (370-340) \times \frac{10}{12}$$
$$= 340 + 25$$
$$= 365.00$$

E Increased amount payable on account
of prolongation of work:

$$78,48,897.56 \times 365 - 307.25$$
$$= ₹14,75,260.65"$$

11. Since learned counsel for the respondent sought to urge that there is no variance between pleading and proof and for which he drew our attention to the preliminary pleadings in the statement of claim where the case set up by the contractor was pleaded, we note the relevant part of the pleadings in the statement of claim pertaining to the award in question, the same reads as under:-

“4. That in response to the notice received from the learned Arbitrator, the claimant is setting out the particulars of its claims as under:-

(a) For a proper appreciation of the claims, the following significant and relevant dates and particulars may be noted:-

(b)

i)	Date of tender	20.04.1985
ii)	Date of acceptance	07.04.1986
iii)	Date of Start	17.04.1986
iv)	Date of Stipulated Completion	16.04.1987
v)	Date of actual completion	02.05.1989
vi)	Estimated cost of Tender	₹1,30,37,025/-
vii)	Tender cost i.e. contracted value 61.25% (above DSR 1981)	₹2,10,22,202/-

(c) The execution of the contract which was required to be completed within a period of 12 months i.e. by 16.4.1987 was unduly prolonged. The work was completed only on 2.5.1989. The work had to be carried out for 37 months i.e. nearly 25 months beyond the stipulated date of completion due to the failure and breaches of the Respondent. The claimant was subjected to increased costs of materials (payment under 10 CC does not adequately compensate the claimant) overheads and erosion of profits. The breaches of the Respondent may be summarised as under:-

(i) From the very beginning of the work, the Respondent directed the claimant not to proceed with the Brick work as revised drawings were to be issued. The issue of the revised drawings was delayed which delayed the commencement of foundation work. The drawing of foundation work was issued only on 28.7.86 thus resulting in delay in commencement of work.

Reference is invited to Exhibit No.C-6, C-8, C-12 and C-42. The Respondent did not make available drawing for external sewerage, water supply and drainage work on time. The sewerage plan was handed over on 1.12.87. The water supply drawing was handed over on 30.5.87. Reference is invited to Exhibit C-30, C-31, C-32 and C-43.

The work was also delayed as the Respondent failed to approve the Sanitary Stack and to supply C.I. fittings thereby delaying the execution of connected items such as flooring and dado/glazed tiles etc. of kitchen and bathroom. Reference is invited to Exhibit C-20, C-26, C-29 and C-53.

(ii) Failure to supply stipulated materials on time and in adequate quantities commensurate with the work requirement. The respondent failed in its obligation to make adequate issue of stipulated materials such as cement, steel, C.I.fittings, glazed tiles, shutters, bitumen etc. on time. The claimant state that the Respondent miserably failed to issue the requisite quantity of cement. The cement issued was far less than the required and indented quantity and many a times work was closed due to NIL cement balance. It resulted in idle labour, poor and under-utilisation of the claimant's T&P and staff. The claimant throughout called upon the respondent to improve and make supply commensurate to its work requirement. Similarly steel was also in short supply. The claimant suffered losses due to these short supplies. The claimant invite reference of the learned Arbitrator to letter bearing Exhibits No.C-2, C-4, C-12, C-14, C-16, C-18, C-19, C-21, C-22, C-23 and C-25. Respondent also delayed the issue of cast iron fitting, bitumen, glazed tiles and shutters which were to be issued to the contractors for incorporation in the work. Reference is invited to Exhibits No.C-33, C-37, C-

45 and C-53. This delay in issue of stores consequently delayed the completion of the project. The decisions in respect of cement concrete pavement on road side, water proofing treatment on open terrace as also were delayed. Reference is invited to Exhibits No.C-44 and C-47."

12. From a perusal of the pleadings i.e. the general pleadings in the Statement of Claim preceding the pleadings constituting the specific heads of claims, we do find that in para 4(c)(ii) it has been pleaded that as a result of the defaults committed by DDA there was poor and under utilization of claimants T&P and staff and that the labour remained idle.

13. However, we find that in the same para i.e. 4(c) there are pleadings that due to the contract being prolonged the claimant was subjected to increased costs of material and payments under clause 10CC did not adequately compensate the claimant.

14. But, what we find is that when the specific heads of claims were justified with reference to the evidence and the loss suffered, the pleading in its entirety, refer to cost indices to bring home the point that for the work done beyond the stipulated date of completion, the price rise was 18% and hence the claim was raised by specifically pleading that for the work done after the scheduled date of completion, after deducting the cost of material supplied, on the balance sum i.e. ₹78,48,897/- damage was claimed as the prices had escalated by 18% and hence the claim.

15. The law relating to pleadings guides us that there is a difference between a material fact to be pleaded and material

particulars to be pleaded. Order 6 Rule 2 of the Code of Civil Procedure requires pleadings to contain a statement in a concise form of the material facts on which the party pleading relies for its claim or defence and as per Rule 4 thereof, whenever necessary, material particulars in relation to material facts have also to be pleaded. Conscious of the fact that the strict rules of pleadings envisaged by the Code of Civil Procedure do not apply to pleadings before an Arbitrator, the principles contained therein would have general applicability to all pleadings and indeed we find that the contractor was fully conscious thereof inasmuch as after generally setting forth his case in the preliminary pleadings in the statement of claim, the contractor laid bare the material particulars thereof under individual heads of claim.

16. Contrasting and reconciling the general pleadings and the material particulars thereof, we find that under claim No.9 the contractor never claimed damages on account of overheads in the form of staff deployed, idle T&P, labour and other machinery brought at the site during prolonged period of the contract. The pleadings under claim No.9 clearly show that the contractor pleaded that recompense under clause 10CC of the contract was not enough to mitigate the expense incurred by him. It is apparent that the learned Arbitrator has awarded a sum, for which there were no pleadings.

17. It be highlighted that nowhere in the pleadings has it been pleaded that 2 engineers, 1 head mistry, 6 supervisors, 1 storekeeper, 1 cashier, 6 mechanic (mixer driver), 1 marketing and purchase officer, 6 watch and ward personnel and 2

foreman (mechanic) were stationed at the site. There are no pleadings that 3000 steel shuttering plates, 1000 scaffolding ballies, 3000 roof ballies, 800 battas, 250 bamboo challies or any other kind of tool or plant was kept at the site. There is no pleading with respect to the salary paid. There is no proof that staff as claimed in the number was stationed at the site. There is no proof of T&P and other equipment being on the site on the basis whereof the award has been pronounced.

18. The record would show that Ex.C-119 the document on which the claim was rested was not filed before the Arbitrator till parties argued their case on 1.6.2001. It was only thereafter that the said exhibit was filed, on a date not known as it is not emerging from the record, but when DDA learnt about the same, on 9.7.2001 its counsel addressed a communication to the learned Arbitrator highlighting that the claim No.9 was premised on escalation and not on anything else and highlighted the decision of this Court in K.C.Goel's case (supra).

19. The principle that there cannot be any variance between pleading and proof is not to be expressly found in any provision of the Code of Civil Procedure but has been evolved by Courts with reference to Order 6 Rule 2 and Rule 4 thereof as a general principle of law: You cannot win battles by springing surprises. Pleadings of parties are intended to focus the issues on which the parties seek a decision. It would be unjust if parties are permitted to plead and proof at variance. This principle would apply to pleadings and decisions before any Fora where civil disputes are adjudicated.

20. Indeed, the principle would govern an arbitration proceedings and where an arbitrator adjudicates upon a claim on proof entirely different than the pleading, it would amount to springing a surprise upon the opposite party and in violation of justice and would amount to a material irregularity requiring such an award to be set aside under Section 34 of the Arbitration & Conciliation Act 1996.

21. Since learned counsel for the contractor argued that the claim has been allowed with reference to the pleading in the context of there being an 18% increase in price and hence sought to justify there being no variance between pleading and proof, we would highlight that the learned Arbitrator has resorted to a strange process of reasoning which is rolled over. The learned Arbitrator has listed the number of staff and the stated monthly salary, notwithstanding there was no proof thereof, to hold that during the prolonged period staff salary in sum of ₹5,37,600/- would be payable and ₹49,600/- would be payable towards infructuous overhead expenditure. Loss towards T&P being idle has then been computed in sum of ₹3,67,200/- and loss towards reduced profitability has been determined at ₹5,60,400/-. The total has been worked out to ₹15,14,800/-. Thereafter the learned Arbitrator states that with reference to the cost indices and Ex.C-50, 18% increase in the price of materials would entitle the contractor to be recompensed in sum of ₹15,58,773/- and the learned Arbitrator concludes that he would prefer to award ₹15,14,800/- since this is the loss determined by him on account of idle machinery, tools and plants, infructuous expenditure and loss

on account of reduced profitability. Now, if the claim is towards overheads, idle machinery, tools and plants and loss on account of reduced profitability it fouls the principle of no variance can be allowed in pleading and proof. Further, the award pertaining to said claim would be bad in law inasmuch as there is firstly no evidence to establish said manner of claim being claimed or sustained and secondly, the learned Arbitrator, not having considered that it is the duty of every party to take all reasonable steps to mitigate the loss, a requirement of the explanation to Section 73 of the Indian Contract Act 1872. If the claim has been allowed on the strength of price increase, the same would be contrary to the law, on which issue, as noted above parties are not at variance.

22. The impugned decision by the learned Single Judge has proceeded on the basis that a claim for damages due to contract being prolonged on account of defaults of the opposite party is different than a claim for increase in the price of material and cost of labour during the prolonged period of contract, but has not dealt with the issue which actually arose for consideration. The pleadings pertaining to claim No.9 have not been noted. The law prohibiting variance between pleading and proof has not been noted. It has not been noted that there was no evidence to support the quantification of the claim as sought to be justified towards damages on account of idle T&P, labour and overheads etc. Principle of mitigation of loss has not been dealt with.

23. Under the circumstances both appeals are allowed. Impugned decisions, both dated 25.1.2006 are set aside. OMP No.392/2001 and OMP No.393/2001 are allowed to the extent that both impugned awards are modified by setting aside the sum awarded under claim No.9. Noting that it was only said claim which is subject matter of dispute before us we modify both awards by nullifying the claim awarded under claim No.9.

24. No costs.

(PRADEEP NANDRAJOG)
JUDGE

(SUNIL GAUR)
JUDGE

September 26, 2011
dk