

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

Judgment Reserved on: 3rd March, 2011
% Judgment delivered on: 10th March, 2011

+ **LPA No. 2304/2006**

I.T.D.C. Appellant

Through: Mr. V.K. Rao, Sr. Advocate with
Mr. Karunesh Tandon, Adv.

versus

BALLWANT SINGH VIRDEE Respondent

Through: Mr. Rajesh Yadav, Ms. Ruchira,
Advocates

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SANJIV KHANNA

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| 1. Whether reporters of the local papers 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 |

DIPAK MISRA, CJ

The present intra-court appeal is directed against the order dated October 6, 2006 passed by the learned Single Judge in Execution Petition No.70/2003 arising out of C.S. No. 1494/1993.

2. At the very outset, we may note with profit that the present appeal was initially registered as EFA (OS) No.23/2006 and thereafter, on 5.1.2006, recording the submission of the learned counsel for the appellant that the same should have been registered as an LPA, it was directed that it should be registered as an LPA. The issue of maintainability of the appeal was kept open. In the course of hearing of the appeal, the learned counsel for the parties fairly conceded that the appeal be decided on merits without adverting to the issue whether EFA would lie or an LPA would lie. Accordingly, we proceed to deal with the merits of the appeal keeping the issue of maintainability open.

3. The facts which are essential to be stated for adjudication of the appeal are that the respondent was awarded the work of supply, installation, testing and commission of electrical system at Hotel Ashok, Bhopal (MP) by the India Tourism Development Corporation (ITDC) vide Work Order dated 11.10.1985. As disputes arose between the parties, the matter was referred for arbitration. The learned arbitrator passed an award on 26.5.1993

and sent the proceedings to this Court which was registered as Suit No. 1494/1993. The notice of filing of the award was issued to the parties and in response to the said notice, the ITDC filed objections resisting the award in relation to the allowing of the contractor's claims 1(a) and 1(b). This Court, vide order dated 9.1.1998, upheld the award in all aspects except the award passed pertaining to claim item Nos. 1(a) and 1(b). It was held that the arbitrator had not quantified the amount awarded to the contractor in respect of claim No. 1(a) and, therefore, to that extent, the award was indefinite and incapable of execution. As regards claim No.1(b), the contractor was awarded a sum of Rs.3 lakhs. The learned Single Judge scanning the anatomy of Clause 18 of the agreement, which stipulated that if the amount awarded was Rs.50,000/- or more, came to hold that the arbitrator was under obligation to give reasons, but the arbitrator had ascribed no reasons

4. In view of the aforesaid analysis, the matter was remitted to the arbitrator only in respect of the aforesaid two claims.

5. After the award was passed, the appellant filed its objections but the same were rejected and the award was made Rule of Court vide order dated 27.1.2003. Thereafter, the respondent filed execution petition for execution of the award dated 10.5.1998 and in pursuance of the decree, the appellant paid the entire amount to the respondent and satisfied the decree. After the amount was paid, the respondent filed an application under Section 152 of the Code of Civil Procedure stating that at the time of preparation of the decree sheet, on account of accidental slip, certain clerical mistake had crept-in in the decree sheet and due to such a ministerial mistake, the date of filing of the award was mentioned 20th May, 1998 in place of 15th December, 1993 and, therefore, the said mistake should be rectified and he should be entitled to the interest from the first date, i.e., 15.12.1993.

6. After the remit, the learned arbitrator considered the matter and passed an award dated 10.5.1998. In the said award, the learned arbitrator quantified the amount in respect of claim No.1(a)

and also ascribed the reasons for the amount awarded under claim No.1(b).

7. Before the learned Single Judge who was dealing with the execution case arising out of the suit, it was contended that when the suit was pending and the matter was remanded to the arbitrator in respect of a particular claim on two scores, namely, to quantify a particular claim and to ascribe the reasons on the other, the award remained alive and the order of remit does not amount to a fresh reference of disputes to the arbitrator to arbitrate upon or send the reference back to him for re-consideration within the parameters of Section 16 of the Arbitration Act, 1940 (for short 'the 1940 Act'). In this backdrop, it was further urged that the decree holder is entitled to get interest from the date of the first award and not from the second award and he was legitimately entitled to the interest from the initial award.

8. The learned Single Judge, considering the submissions and placing reliance on the decision in *Union of India v. M/s Swadeshi Karyalaya & Anr.*, AIR 1991 Delhi 53, came to hold that the

respondent-contractor is entitled to interest on the decretal amount from the date of the first award dated 26.5.1993.

9. In *M/s Swadeshi Karyalaya* (supra), this Court has opined thus:

“The original award is dated 21st June, 1977 and was filed in Court on 7th November, 1977 for making it rule of the Court. Thereafter, as noted above, the award was remitted under Section 16 of the Act for re-consideration limited to the question of limitation. Thereafter, the arbitrator submitted his decision on 25th May, 1984. This was within the time as fixed earlier at the time of remitting the award and as extended by subsequent orders of the court. When the award was first filed UOI did not file any objections to the claim which had been upheld by the arbitrator. Interest from the date of the award would, therefore, be calculated from 21st June, 1977 and not the date when the arbitrator submitted his decision after reconsideration under Section 16 of the Act as, to my mind, when the award is remitted for re-consideration on any point, the arbitrator has to give his decision within the time fixed by the Court otherwise the award which is remitted becomes void. In a case like this Court remains seized of the matter till the award is re-submitted by the arbitrator after re-consideration.”

10. The said opinion was expressed in the context of accrual of interest regard being had to the date of passing of the award but in the instant case, the fulcrum of the matter is whether the learned Single Judge while dealing with an application in an execution proceeding could have granted the interest as prayed for. To appreciate the ratio laid down therein, it is necessary to see while remanding the matter on the earlier occasion, what the learned Single Judge had stated:

“However, I find that the learned arbitrator has not worked out or determined the exact amount awardable to the contractor as against the claimed amount of Rs.25,44,910.95 paise against claim no.1(a). The amount for which award on claim no.1(a) could be said to have been made is neither specified in the award nor has it been shown to what figure it comes to and how. The award to that extent, being indefinite, is incapable of execution and deserves to be remitted to the learned arbitrator for quantification of the exact amount. It is ordered accordingly.

Against claim no.1(b), for Rs.25,44,911.05 paise, which formed part of the consolidated claim no.1 in the sum of Rs.50,89,822/-, claimed as escalation in labour and material

for the period from July 1986 to June 1990, to which period the work procrastinated due to non-competition of civil work by the ITDC and other delays on its part, the learned arbitrator has awarded a sum of Rs.3 lacs. It is true that the arbitrator is not supposed to give detailed reasons for his findings but it has to be discerned from the award as to how his mind operated to come to a finding.

Having perused the award, I find that while adjudicating on the said claim, though the learned arbitrator has observed that work could not be completed due to non-completion of civil work and there was delay of nearly four years, but it is not possible to discern therefore any basis for the award of a sum of Rs.3 lacs against the claim of Rs.25,44,911.05 paise. In view of clause 48 of the agreement, making it obligatory for the arbitrator to give reasons for the award of any amount, where the amount of the claim in dispute is Rs.50,000/- or more, the objection of the ITDC, regarding the legality of the award as being non-speaking, deserves to be accepted.

In view of the above, the award on claim no.1(a) and extra items no.2 to 7, being indefinite and inexecutable and no reason in support of finding on claim no.1(b) having been indicated, I am constrained to remit the award back to the learned arbitrator for quantifying the amount awardable against claim 1(a) and extra items no.2 to 7 and for recording his reasons for the award of the sum of Rs.3 lacs. The learned arbitrator shall

submit his decision to the Court on the above points within four months from today after affording reasonable opportunity to the parties of being heard. The arbitrator's record be sent back to him immediately on his present address, being furnished by the contractor within a week from today."

11. After the remit, the arbitrator passed the award on 10.5.1998 and, while dealing with the interest component, he has held thus:

"Interest As given in Award dated 26.05.1993 no pre-suit and pendentlite interest is payable. The claimant has not be paid the money for nearly 6 years, therefore, the amount of Rs.6,61,461.31 is to be paid to the Respondent within 4 weeks from the date of this Award. In case the payment is not made within 4 weeks, future interest at the rate of 15% simple interest shall be payable till the date of payable. The bank guarantee may also be released.

The Award is made this 10th of May, 1998."

12. The learned Single Judge, while repelling the objection and making the award Rule of Court, has initially in paragraphs 4, 5, 6 and 7 stated that:

“4. It is the agreed position that in relation to the amount awarded against Claim No.1(a) being Rs.3,59,911.31, there are no objections by respondent / ITDC at all. Accordingly, the said amount alongwith interest thereon at 15% p.a. from the date of the award, as directed by the Sole Arbitrator in the second award, is therefore clearly payable to and receivable by the petitioner.

5. Since the said amount has not been deposited by M/s ITDC with this Court, even though there no objections have been filed in relation to this awarded amount, I cannot agree with the submission of learned counsel for the respondent – ITDC, that the rate of interest should be reduced.

6. It is also to be noted that no pre-suit or pendent lite interest had been awarded, and this aspect has become final as a result of the earlier round of proceedings, and therefore the only interest which the petitioner stands to receive, is for the post award period.

7. In this view of the matter, interest at 15% is fair and reasonable, and the petitioner will be entitled to receive the same upto the date of payment.”

13. Thereafter, the learned Single Judge proceeded to state as follows:

“14. In this view of the matter, and there being no prohibitive clause cited by the respondent which bars the grant of escalation in the event of prolonging of the contract works, and keeping in view the clear-cut finding of the arbitrator to the effect that for no fault of petitioner’s work which was to have been completed within 6-9 months, actually took more than four years, no interference is warranted with the award in question.

15. Moreover learned Sole Arbitrator has adopted the CPWD methodology for calculating the escalation which is a time tested and well-established method.

16. In view of the above, I find no merit in the objections of the defendant / ITDC which are accordingly dismissed as unsustainable. The award is made a Rule of the Court.

17. The plaintiff will also be entitled to interest at 15% for the date of the award and upto the date when payment is received. No order as to costs.”

14. Thus, from the perusal of the award passed by the arbitrator after remit and the order passed by the learned Single Judge on earlier occasion, it is quite vivid that the interest component was not paid from 1993 but from the date of the award upto the date of the payment for the post award period. The post award period has

to be understood in the context in which the arbitrator has awarded the interest. We have already reproduced the said paragraph from the award. The arbitrator has mentioned that amount of Rs.6,61,461.31 is to be paid to the respondent within four weeks from the “date of this award” with the further stipulation that in case the same is not paid within four weeks, future interest @ 15% simple interest shall be payable till the date of payment. The terms used in the award and the grant of four weeks have their own signification.

15. The learned Single Judge made the said award Rule of Court. Thus, he accepted the award in entirety. The question that emerges for consideration is whether there is any justification to modify the decree on the ground that for the purpose of calculating interest, the date should have been 15.12.1993. The arbitrator on the earlier occasion, while passing claim on the earlier award, had specifically not awarded interest in respect of the amount and rightly so as the same was not quantified. He has clarified the position in the second award which was accepted by the learned

Single Judge. No objection was filed by the contractor. On the contrary, there was an agreed position. Under these circumstances, the question that emerges for consideration is whether a petition for rectification / modification of the decree under Section 152 of the Code of Civil Procedure, 1908 could have entertained by the learned Single Judge on the ground that there was no justification to deny the interest component in view of the decision rendered by this Court in *M/s Swadeshi Karyalaya* (supra). The decision in *M/s Swadeshi Karyalaya* (supra) dealt with a situation where the question arose after the award was remitted for reconsideration by the arbitrator and the arbitrator submitted the award after reconsideration. Thereafter, the Court was dealing with the objections raised before it. In that factual backdrop, this Court held that the interest from the date of the original award deserved to be calculated. In our considered opinion, there cannot be any quarrel over the said legal proposition. But, in the case at hand, as is perceived, after the award was made Rule of Court by the learned Single Judge a

decree was drawn up in accordance with the terms of the award. What is sought to be modified is the decree under Section 152 of the Code. Section 152 of the Code of Civil Procedure, 1908 reads as follows:

“152. Amendment of judgments, decrees or orders. – Clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be correct by the Court either of its own motion or on the application of any of the parties.”

16. In this context, we may refer with profit to a passage from *Shyamal Bihari Mishra and others v. Girish Narain Missir and another*, AIR 1962 Patna 116 wherein it has been held thus:

“17. It is a cardinal principle of the law of procedure that the decree should agree with the judgment. Where, therefore, its decree is at variance with its judgment, and, when the decree does not correctly express what was really decided and intended by the Court, it has an inherent power to vary or amend its own decree or order so as to carry out its own meaning and intention. In doing so, it does nothing but exercise a power to correct a mistake of its ministerial officer by whom the decree or order was drawn up. It only insists

that the decree drawn up in the office of the Court should correctly express the judgment given by the Court. In the words of Lindley, L. J. in *re Swire; Mellor v. Swire* (1885) 3 Ch. D. 239 at page 246:

"there is no such magic in passing and entering an order as to deprive the court of jurisdiction to make its own records true, and if an order as passed and entered does not express the real order of the Court, it would, as it appears to me, be shocking to say that the party aggrieved cannot come here to have the record set right but must go to the House of Lords by way of appeal."

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23. Section 152 however, permits clerical or arithmetical mistakes in judgments decrees or orders to be corrected at any time. Section 152, therefore, deals with one of the two cases, stated above, in which only the Court can amend or vary a decree or order after it is drawn up and signed. Under this section, where there has been a clerical or arithmetical mistake, or an error arising from an accidental slip or omission in a judgment, decree or order, it may, at any time, be corrected by the Court either on its own motion or on the application of any of the parties. The amendment petition under Section 152 of the Code is not a continuation of the suit or proceedings therein. It is in the nature of an independent proceeding, though connected with the order of which the amendment is

sought. The jurisdiction of the Court to amend its decree or order on the ground that by inadvertence, because of any clerical mistake, the decree or order as drawn up does not give effect to the intention of the Court as expressed in its judgment is undoubted. In order that the manifest rights of a party, which were intended to be effected by its decision may not be defeated, the Court always exercises its right to amend its decree or order, if as drawn up, it is not in conformity with its judgment due to a clerical or arithmetical mistake in it."

[Emphasis supplied]

17. In *Century Textiles Industries Limited v. Deepak Jain and another*, (2009) 5 SCC 634, the Apex Court has ruled thus:

"22. We are unable to persuade ourselves to agree with the High Court that the only course available to the decree-holder was to seek amendment of the decree under Section 152 CPC, as was canvassed before us by learned counsel for the respondents. A bare reading of Section 152 CPC makes it clear that the power of the court under the said provision is limited to rectification of clerical and arithmetical errors arising from any accidental slip or omission. There cannot be reconsideration of the merits of the matter and the sole object of the provision is based on the maxim actus curiae neminem gravabit i.e. an act of court shall prejudice no man. In our

judgment, the issue requiring adjudication by the executing court did not call for and was clearly beyond the scope of Section 152 CPC.”

[Emphasis added]

18. In the case at hand, as is evincible, the decree is not at variance with the judgment and, therefore, we have no agitation in holding that the learned Single Judge has fallen into error by directing modification / rectification of the decree under Section 152 of the Code of Civil Procedure, 1908.

19. Consequently, the appeal is allowed and the order passed by the learned Single Judge is set aside. There shall be no order as to costs.

CHIEF JUSTICE

MARCH 10, 2011
pk,dk

SANJIV KHANNA, J.