

IN THE HIGH COURT OF DELHI AT NEW DELHI

OMP 2/2002

Reserved on: February 09, 2012

Decision on: February 24, 2012

NEW DELHI MUNICIPAL COUNCIL Petitioner
Through: Mr. Sandeep Sharma with
Ms. Kanika Singh, Advocates.

versus

NATIONAL BUILDING CONSTRUCTION
CORPORATION LTD. & ANR Respondents
Through: Ms. Ginny Jetley Rautray, Advocate.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT
24.02.2012

1. The New Delhi Municipal Council ('NDMC') has in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') challenged an award dated 4th October 2001 passed by the learned sole Arbitrator in the dispute arising between the Petitioner and the Respondent, National Buildings Construction Corporation Ltd. ('NBCC') arising out of the award of the work of construction of the New Delhi City Centre, NBCC Phase-II, by the Petitioner to the NBCC on 18th August 1994.
2. The date of commencement of the project was 2nd September 1994 and the scheduled date of completion was 1st September 1997. The stipulated date of completion was extended from time to time till 30th April 2001.
3. The disputes arising between the parties were referred to an arbitrator appointed by the Chairman of the NDMC on 16th June 1998. He was required to adjudicate eighteen claims raised by the NBCC. He gave an interim award

on 21st September 2000. It is stated that even before the interim award was published, NBCC raised ten more claims which were also referred to arbitration. Thereafter he passed the final Award on 4th October 2001.

4. The summary of the final Award of the learned Arbitrator is as under:

Claim No.	Particulars	Amount claimed	Amount awarded
2.	Earth filling on account of earth sliding during September 1995.	Rs.1,40,639.00	Rs.1,40,639.00
4.	Balance payment on account of shuttering in ribs slabs.	Rs.6,44,205.00	Rs.6,44,205.00
8.	Extra for laying cement concrete in floors.	Rs.1,91,081.00	Rs.74,070.00
9.	Extra for prolonged dewatering	Rs.1,05,66,398.00	Rs.70,00,000.00
10.	Reimbursement of extra expenditure on overheads	Rs.2,15,71,000.00	Rs.90,20,000.00
	Interest @ 15% p.a. on Claim No.2 from 17.6.1998 to 30.9.2001		Rs.69,414.00
	Interest @ 15% p.a. on Claim No.4 from 1.11.1999 till 30.9.2001		Rs.1,85,209.00
	Interest @ 15% p.a. on Claim No.8 from 17.6.1998 till 30.9.2001		Rs.36,558.00
	Interest @ 15% p.a. on Claim No.9 from 1.4.1999 till 30.9.2001		Rs.26,25,000.00

	Interest @ 15% p.a. on Claim No.10 from 1.5.2000 till 30.9.2001		Rs.19,16,750.00
	Future interest w.e.f. 1.12.2000 till payment is released @ 18% p.a. in respect of Claims No.2, 4, 8, 9 & 10 (w.e.f. 1.12.2001 to 31.12.2001)		Rs.2,53,184.00
	Total amount payable as on 31.12.2001		Rs.2,19,65,029.00

5. NDMC has in this petition under Section 34 of the Act laid a challenge to the impugned final Award only as regards Claim Nos. 2, 9 and 10. Mr. Sandeep Sharma, learned counsel for the NDMC submitted that the learned Arbitrator has not given any reason for deciding the aforementioned claims in favour of the NBCC. Reliance was placed on the decisions in ***Smt. Saroj Bala v. Rajive Stock Brokers Ltd., 118 (2005) DLT 472*** and ***Delhi Development Authority v. Sunder Lal Khatri, 157 (2009) DLT 555 (DB)***. It is also submitted that the learned Arbitrator could not have awarded interest on interest and that too at an exorbitant rate of 18%. Reference is made to the decisions in ***State of Haryana v. M/s. S.L. Arora and Co. AIR 2010 SC 1511*** and ***Munshi Ram & Associates (P) Ltd. v. DDA, 2010 IX AD (Delhi) 313***.

6. Appearing for the NBCC, Ms. Ginny Jetley, learned Advocate, defended the final Award and submitted that it had to be read in continuation of the interim Award. According to her, there were sufficient reasons given by the learned Arbitrator for allowing Claim Nos.2, 9 and 10.

7. The requirement for reasons in an arbitral award is contained in Section 31

(3) of the Act which states that unless “the parties have agreed that no reasons are to be given” or “the award is an arbitral award on agreed terms under Section 30”, the arbitral award “shall state the reasons.” In ***Smt. Saroj Bala v. Rajive Stock Brokers Ltd.*** this Court explained the legal position thus (DLT, p. 475):

“6. The obligation to record reasons has a salutary purpose to serve. The parties to a *lis* whether before a court or a domestic forum chosen by the parties like the arbitrator, are entitled to know the reasons that led to the success or the failure of a claim brought before it. The need for disclosure of reasons in support of the conclusions is essential also because it is the disclosure of reasons alone that can effectively demonstrate that the arbitrator or the court before whom the matter was brought had applied its mind. Application of mind by the authority deciding an issue in controversy, is a *sine qua non* for a proper exercise of the jurisdiction vested in any authority determining the rights and obligations of the parties. The duty to act judicially arises from the nature of the jurisdiction exercised by the authority. Implicit in the duty to act judicially is the obligation to pass an order only after due and proper application of mind. Application of mind in turn can be demonstrated by the disclosure of the mind which is best done by recording reasons for the conclusion drawn by the authority. That apart, an award made by an arbitral tribunal is open to challenge before the Court under Section 34 of the Act. The decision of the Supreme Court in *Oil and Natural Gas Commission Ltd. v. Saw Pipes Ltd. (2003) 5 SCC 705* has dealt with and elucidated the scope and parameters of the jurisdiction of the Court to examine the validity of the arbitral awards. Disclosure of reasons except in cases where parties agree that the same need not be recorded would, therefore, provide a vital key to the Court exercising jurisdiction under Section 34 of the Act to examine whether the award suffers from any illegality to call for modification or setting aside of the same. The necessity of recording reasons cannot, thus, be undermined, having regard especially to the fact that arbitration as an alternative dispute resolution mechanism is catching up and cases involving stakes and issues of far reaching importance in the commercial world are being referred for adjudication by arbitration.”

8. Later in ***Delhi Development Authority v. Sunder Lal Khatri***, it was held that failure to give reasons would amount to legal misconduct. It was

observed (DLT, p. 566):

“34. It is the obligation to give reasons cast on the Arbitrator, which provides parties with comfort and assurance that the award would be free from arbitrariness, illegality, non-application of mind and corruption. This obligation is all the more essential as there are very limited grounds for interference with the arbitrator's award. Such an assurance becomes all the more pertinent where the parties have, while entering into an arbitration agreement, not named a specific individual person/persons to act as arbitrator(s). Therefore, when such an obligation is cast on the Arbitrator he cannot, only partly, discharge this obligation, and choose not to give reasons in respect of some part or aspects of the award. Merely because parties may have contractually agreed to resolve their disputes through arbitration, it does not mean that they are not entitled to be informed of the reasons on the basis of which the Arbitrator makes the award, and that they should suffer 'clueless' as to the reasons why they have been condemned by the arbitrator, particularly where they have expressly made it obligatory for the Arbitrator to give a reasoned award.”

9. The impugned final Award is therefore required to be examined in light of the law explained above to ascertain if the reasons given by the learned arbitrator for allowing the aforementioned claims satisfy the requirement of the law. The learned Arbitrator has framed the final Award (as well as the interim Award) in a tabular form. Claim No.2 was for “Earth filling on account of earth slided during September 1999”. In the column ‘award’ against the said claim, the learned Arbitrator has stated as under:

“Exhibits “C”, “D” and “E” as relied by the Respondents are dated 27.03.1995, 17.02.1995 and 17.06.1995 respectively, whereas earth had slipped in last days of Aug. 95 and early Sep 95. The quantity refilled in Sep 95 as claimed by the contractors and rate, are not in dispute except that the additional condition for execution of work does not permit. Various contentions of the parties as well merits and demerits have been considered. The claim is for refilling of portions from where earth had slipped. After examination of the records as relied upon by the parties, as well technical aspects/process, I hold that this claim is payable as such Rs.1,40,639/- is awarded to the Claimants.”

10. It was pointed out by Mr. Sharma that in terms of condition No. 5 of the

agreement, the contractor was to take adequate protection measures to ensure that the excavation does not damage adjoining structures. In particular, it was stipulated as that: “All measures required for the safety of the excavations, the people working in and near the basement pits, property and the people in the vicinity shall be taken by the contractor at his own cost, he being entirely responsible for and injury to persons and damage to property caused by his negligence or accident due to his constructional operation.” It is, accordingly, contended that there could not have been a separate claim for earth filling by NBCC. In any event, NBCC had in para 25 of the statement of claims stated that it had claimed and received payment against that risk from the insurance company. Reference is also made to condition No.3 of the agreement between the parties which provided that: “In case of flooding of site on account of rain or any other cause or any damage, whatsoever, no claim financially or otherwise shall be entertained notwithstanding any other provisions elsewhere in the tender documents.”

11. Ms. Ginny Jetley referred to the interim Award and in particular Claim No. 16 which was for “extra for earth work in excavation for changed specifications item No. 10 and 11”. The observations made in the interim Award cannot *per se* constitute the reasons for the final Award unless the learned Arbitrator has specifically stated so in the final Award. For instance, while discussing Claim No.10 in the final Award, the learned Arbitrator makes a specific reference to the interim Award. However, there is nothing similar stated as far as Claim No.2 is concerned. It is an admitted position that there have been a series of claims since the contract was an ongoing one. Consequently, there has been a series of awards some of which have been challenged by either party. Each Award, therefore, has to be tested on its own merits.

12. No reasons, consistent with the requirement of Section 31 (3) of the Act

as explained in the above decisions, have been given by the learned Arbitrator for allowing Claim No.2 of NBCC for a sum of Rs.1,40,639. The contents of Exhibits 'C', 'D' and 'E' dated 22nd March 1995, 17th February 1995 and 17th June 1995 referred in the impugned final Award to have not been discussed. It was not sufficient for the learned Arbitrator to observe that "various contentions of the parties as well as merits and demerits have been considered." Likewise the statement "after examination of records as relied by the parties, as well as technical aspects/process, I hold..." does not indicate what reasons weighed with the learned Arbitrator to come to the conclusion which he did in relation to Claim No.2. The documents if any produced by NBCC to substantiate the precise computation of the amount claimed have not even been discussed. Even if the arbitrator is not expected to give detailed reasons he must mention the basis for his conclusions. As held in ***Government of NCT of Delhi v. Ved Prakash Mehta, 2005 (Supp) Arb. LR 170*** there must be "a nexus of reasoning between the pleaded facts and the conclusion drawn by the arbitrator." Consequently, the impugned final Award as regards Claim No. 2 is not sustainable in law. It is required to be determined afresh by the learned Arbitrator in accordance with law.

13. Claim No. 9 of NBCC was for 'extra for prolonged de-watering due to handing over of site in parts and delay in release of drawings'. The reasons given in the impugned Award for awarding a sum of Rs.70 lakhs against this claim are as under:

"It was not disputed that Claimants had continued the de-watering process except this that item viz., earthwork, piling, water proofing, R.C.C. etc. include element of dewatering. It was also not in dispute that site was handed over in parts till 07.12.1998 and drawings issued on 11.02.1999, were all related to execution of upper basement. It is only after completion of 3 basements that bailing out water could have been dispensed with. After examination of various technical datas, schedule of quantities, which is item rate, non denial of bailing out water process, relevant specifications etc. I hold this claim is partly justified and award

Rs.2.50 lakhs per month for 28 months as against 35 months period during May 1996 till March 1999. The amount of Rs.70.00 lakhs is thus awarded to the Claimants.”

14. Mr. Sharma submitted that de-watering process was part and parcel of the rectification work and NBCC was not entitled to extra payment for prolonged de-watering. According to him this claim was contrary to condition No.5 of the agreement which reads as under:

“...it shall be noted all the items in the Schedule of Quantities in which clause ‘5’ is referred include de-watering or working under water and therefore nothing extra shall be paid for de-watering in this work, irrespective of whether specified or not in the items or in the specifications/conditions in this agreement.”

15. It is further submitted that NBCC was to carry out water proofing in the lower most basement. For this it had to lower the level and this procedure was carried out till 1st March 1999. All these facts were ignored by the learned Arbitrator in the statement of claims. Lastly, it is pointed out that in its statement of claims NBCC had claimed Rs.2.50 lakhs per month up to September 1997 (18 months) and thereafter Rs.1.25 lakh per month for the period from October 1997 till March 1999, whereas the learned Arbitrator has awarded Rs. 2.5 lakhs per month for a period of 28 months.

16. In reply, it is pointed out by Ms. Jetley that NDMC had granted extension of time for 1156 days without levy of compensation and during the extended period the underground sub-soil water was required to be bailed out for execution of work continuously to avoid flooding of site. The de-watering work continued in the ‘C’ Block since the site of the ‘B’ Block could not be handed over to the Respondent within the stipulated time. Major portion of the ‘B’ Block was kept under hold and was ultimately cleared in September 1997 when the drawings were issued. The work of three basements could be completed by 31st July 1999 and it is only thereafter that the de-watering

system was removed. In its written submissions NBCC has pointed out that it had provided detailed analysis and calculations based on partial expenditure entered in the Measurement Book. It is stated that the claim was revised from Rs.91.31 lakhs to Rs. 1,05,66,398 and in the Statement of Case filed before the learned Arbitrator the claim was raised to Rs.2.75 lakh per month whereas the Arbitrator had awarded Rs.2.50 lakh per month. It is submitted that the reasons given by the learned Arbitrator were plausible and need no interference.

17. The impugned final Award in respect of Claim No.9 cannot be said to be entirely without reasons. It begins by highlighting the facts that were not in dispute and these concerned the delays in the handing over of the parts of the site and drawings by NDMC to NBCC and that the dewatering could not have been discontinued till the three basements were completed. The calculations that justified the claim were furnished by the NBCC. In its revised claim NBCC had claimed Rs.2.75 lakh per month. The learned Arbitrator allowed the claim partly for a period of 28 months at Rs.2.50 lakh per month. This was a plausible view to take. This part of the impugned Award cannot be said to suffer from an illegality that requires to be interfered with and is accordingly affirmed.

18. Claim No.10 was for reimbursement of extra expenses incurred on overhead expenses in the sum of Rs. 2,15,71,000. The learned Arbitrator held the claim as partly justified at Rs.4.10 lakhs per months for an additional period of 22 months and, accordingly awarded Rs.90.20 lakhs to the claimant.

19. As regards this part of the Award, it is not as if the learned Arbitrator has not given any reasons whatsoever. The learned Arbitrator has referred to the interim Award published on 21st September 2000 in which it was held that

the claimant would not be entitled to claim overhead expenses from 2nd September 1997 till 16th June 1998 and that the said interim award had been accepted. It was next noted that provisional extension had been granted up to 30th April 2001 and that escalation under Clause 10CC for labour and materials had been released and paid by NDMC to NBCC for the work executed after 16th June 1998. NDMC also did not raise any counter claim against NBCC. Consequently, the claim for overhead expenses was restricted to the period of twenty two and a half months, i.e., between 17th June 1998 and 30th April 2000.

20. In sub-para (d) the learned Arbitrator noted the contention of NBCC contended that after the expiry of the original period it had to incur full amount of expenses on overheads up to 30th April 2000, which had not been anticipated and considered while quoting rates.

21. However, in sub-para (e), the learned Arbitrator concluded as under:

“(e) I have considered merits & demerits of the case and fact that generally overheads are calculated and incorporated at the rate of 10% for the original period provided in the contract for completion of work with some reasonable margin, but considering documentary evidence as placed by the parties on records and relied by them including their respective stand as well fact that works are still continuing and as against original period of 3 years almost up to 30.04.2000 further period of 2 & 2/3rd years has passed, I hold that claim of the Claimants for overhead expenses is partly justified at Rs.4.10 lakhs per month for additional period of 22 months and Rs.90.20 lakhs is awarded to the Claimants.”

22. The above conclusion is based on two guesstimates. The first being that “generally overheads are calculated at the rate of 10% for the original period...with some reasonable margin.” The second is that the claim for overhead expenses was “partly justified at Rs.4.10 lakhs per month.” As pointed out by Mr. Sharma, there is no indication how the Arbitrator

computed the figure of Rs.4.10 lakhs per month and on what basis was the percentage of 10% for calculating overheads worked out. In its written submissions NBCC has sought to supply the reasons for the Arbitrator's conclusion by referring to a CPWD document on 'Delhi Schedule of Rates 2007' which states that contractor's profit and overheads at 15% had been adopted as approved by an OM dated 14th December 2007. However, the impugned Award does not refer to any document to justify the amount awarded. In any event the document now produced is of the year 2007 and it is not clear whether it would hold good for a claim for the relevant period i.e. 1999 to 2001. The other explanation sought to be offered by the NBCC is that in the first arbitration case, the overheads had been calculated on the said basis and a figure of Rs. 2.62 lakhs per month had been awarded. This still does not explain how the figure of Rs.4.10 lakhs per month was arrived at in the impugned Award. Although the learned Arbitrator states that he considered the "documentary evidence" placed "by the parties on record", he does not actually point out what is the documentary evidence that has been relied upon.

23. In light of the law explained in the decisions noticed hereinbefore, the learned Arbitrator was required to explain the basis for arriving at a figure of Rs.4.10 lakhs per month towards overhead expenses incurred by NBCC in the additional period particularly when such figure is otherwise unable to be explained with reference to the pleadings or the evidence on record. Consequently, while the reasoning for entertaining Claim No.10 cannot be faulted, the calculation of the amount payable to NBCC under the said claim requires to be worked out once again with reference to the evidence placed on record.

24. As regards the award of interest, a perusal of the original Award filed shows that the learned Arbitrator has very clearly stated: "Interest on the

interest amount from 17.06.1198 till 30.09.2001 shall not be payable.” He has awarded *pendente lite* simple interest at 15% p.a and post-Award interest at 18% for the period after 1st December 2001 till the date of payment. The award of the above interest is not inconsistent with Section 31 (7) of the Act as explained by the Supreme Court in ***State of Haryana v. M/s. S.L. Arora and Co.***

25. To summarise the conclusions:

(i) The impugned Award as regards Claim No.2 is unsustainable in law as there are no reasons for the said Award as required by Section 31 (3) of the Act. The said Claim No.2 is therefore remitted to the learned Arbitrator for a fresh reasoned Award on the basis of the pleadings and evidence already on record.

(ii) The impugned Award as regards Claim No.10 is unsustainable only to the extent that it does not explain the basis for the learned Arbitrator arriving at the figure of Rs.4.10 lakhs per month as overhead expenses payable to NBCC. Therefore Claim No.10 is remitted to the learned Arbitrator for the limited purpose of re-determining the amount payable to NBCC on the basis of the pleadings and evidence already on record.

(iii) The award of *pendente lite* and post Award interest as regards Claims 2 and 10 is consequently stayed till such time the said two claims are decided afresh, to the extent and in the manner indicated in sub-para (i) and (ii) above respectively.

(iv) The impugned Award as regards Claims 4, 8 and 9 as well as the award of *pendente lite* and post Award interest in relation to those claims is upheld.

26. Claim Nos. 2 and 10 will now be placed before the learned Arbitrator for

a fresh Award in accordance with law, in terms of para 24 (i) and (ii) respectively. The learned counsel for the parties will ascertain from the learned Arbitrator within one week his willingness to undertake the above task and if he is so willing they will within one week thereafter inform the Registry of the address of the learned Arbitrator. The Registry will within a week thereafter send the entire arbitral record, together with a certified copy of this order, to the learned Arbitrator through approved courier at the address provided, with the costs of despatch to be borne by both parties equally. The learned Arbitrator will communicate to the parties his fees and expenses which will be borne by them in equal halves. The learned Arbitrator is requested to give the fresh Award on the aforesaid claims to the limited extent as explained before within three months of his receiving the arbitral record.

27. In the event that the counsel for the parties are unable to contact the learned Arbitrator within one week, or if he is for some reason unable or unwilling to undertake the above task, the NDMC will within a period of two weeks thereafter nominate another arbitrator. The Registry upon being informed by counsel for the NDMC of the address of the arbitrator so nominated will send the entire record, together with a certified copy of this order, to him within one week thereafter. The learned arbitrator so nominated will then perform the task in the manner indicated in para 25 above.

28. During the pendency of the present case, NDMC had on its own deposited the entire awarded amount in this Court and NBCC was permitted to withdraw it subject to furnishing a bank guarantee. In terms of orders dated 14th January and 16th February 2005 of the Court and an order dated 16th May 2005 of the Registrar General, an amount of Rs. 1,61,60,939 was permitted to be withdrawn by NBCC. Subsequently, the bank guarantee furnished by NBCC expired and was not renewed. By an order dated 2nd

February 2011, this Court found no justification requiring the NBCC to keep the bank guarantee alive any further since it is a public sector company.

29. The office noting of the Registry shows that after accounting for amount released to NBCC, there is a balance amount which was kept in an FDR which was renewed from time to time. The said balance amount together with whatever interest has been accrued thereon is directed to be released by the Registry to the NDMC, through an authorised representative, within two weeks.

30. The parties will furnish to the Arbitrator the complete calculations of the amount if any still owing to either of them, and depending on what is found payable to the other by either party in the fresh Award, consequential directions will be issued as part of the fresh Award by the Arbitrator.

31. The petition is disposed of in the above terms, but in the circumstances, with no order as to costs.

S. MURALIDHAR, J.

February 24, 2012

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