

*

THE HIGH COURT OF DELHI AT NEW DELHI

%

Judgment Reserved on : 19.04.2012

Judgment Delivered on: 02.05.2012

+

FAO(OS) No. 41/2007

NATIONAL PROJECT CONSTRUCTION
CORPN. LTD.

.... Appellant

Vs

M/S.JYOTI SARUP MITTAL ENGINEERS,
CONTRACTORS & BUILDERS

..... Respondent

Advocates who appeared in this case:

For the Appellant: Mr A.K. Singh & Mr Rajeev Chauhan, Advocates

For the Respondent: Mr K. Sunil, Advocate

CORAM :-

HON'BLE MR JUSTICE SANJAY KISHAN KAUL

HON'BLE MR JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J

1. This appeal is directed against the judgment of the learned Single Judge dated 04.12.2006 whereby, the objections of the appellant raised in OMP No. 248/2002 have been rejected. The impugned judgment thus, in effect, has sustained the award dated 23.03.2002, as corrected by order dated 19.04.2002, passed by the learned arbitrator, under Section 33(3) of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the Arbitration Act). The appellant had awarded to the respondent vide letter no. 7147605/122 dated 22.05.1990, work of construction of 37 dwelling units of different categories and a training hostel comprising of 120 rooms (hereinafter referred to as the contract).

2. The date of commencement as stipulated in the contract was 22.05.1990, with a time frame of 18 months indicated therein. Thus, the respondent was required to complete the execution of work assigned under the contract by 21.11.1991. There was, however, in fact a delay of approximately thirteen (13) months. The contract got actually completed on 31.12.1992. The tendered amount was Rs 1, 96, 82,410.90/-. The contract involved execution of both civil and electrical work.

3. At the behest of the respondent, initially, one Sh. S.M. Gupta was appointed as the sole arbitrator by the chairman-cum-managing director (C.M.D.) of the appellant in accordance with clause 43 of the contract. After preliminary steps had been initiated for filing of pleadings the said arbitrator resigned on 21.04.1999. Accordingly, a new arbitrator Sh. M.M. Kapoor was appointed as an arbitrator, once again by the C.M.D. of the appellant. A communication in this regard was issued on 15.06.1999. The aforementioned award has been delivered by the said arbitrator, who continued the proceedings from the point at which they had reached during the tenure of the erstwhile arbitrator, i.e., Mr. S.M. Gupta.

4. Before the arbitrator, claims and counter claims had been filed. The respondent is the original claimant. Upon appraisal of the evidence placed before him in the form of documents and affidavits, and on due consideration of oral submissions, the impugned award has been delivered.

5. We notice, however, on perusal of the orders passed by the predecessor bench that there is some argument raised that the award ought to have been set aside on the ground that the appellant was not given an opportunity to cross-examine the respondent's witness, who at the relevant time was the managing partner of the respondent. We have noticed this objection at the very beginning as this was not the submission made before us at the stage of final hearing or, in the written submission filed before us. Perhaps wiser

counsel prevailed and, the counsel for the appellant sought not to press the said ground before us. We may also notice that the learned Single Judge, before whom this ground was raised, has dealt with it quite extensively in paragraphs 17 to 20 of his judgment. Suffice it to note that the learned Single Judge on examination of the order sheets of the learned arbitrator found that, the dates which the appellant said were fixed for cross-examination, i.e., 30th & 31st July, 2001 were dates on which no proceedings were held. The record also demonstrated that no request was made for cross - examination of the managing partner, and that thereafter on several dates the submissions were made and heard by the learned arbitrator, before reserving judgment on the award. Therefore, as noted above, it is quite obvious that looking at the fact that this was a tenuous submission, the same appears to have been given up at the stage of final arguments.

6. The other aspect that we wish to notice at the very outset is, the finding on the attributability in the execution of the contract. The learned arbitrator, while discussing the aspect as to whether the respondent ought to be granted extension of time as per clause 12 of the general conditions of the contract, recorded several hindrances faced by the respondent in execution of the work. These were slotted under different sub heads; which as noted in the award, are as follows:-

- (i) late receipt of drawings and amendment to drawings;
- (ii) decision regarding change of specifications due to non-availability of modular bricks;
- (iii) shifting of the high tension line from the site of hostel block;
- (iv) increase in the scope of work; and
- (v) lastly, the non-release of payment in time.

7. The delay being attributable to the appellant; a finding was returned qua the period by which the contract ought to be extended under various

subheads. These being as follows:

7.1 Under Sub-head (i): Six months time was allotted for late issue of drawing and amendment to drawings. Under sub head (ii): Since, the delay under this sub-head, overlapped with the late supply of drawings no extension was granted under this sub-head. Under sub-head (iii): seven-and-a-half months was considered appropriate on account of the said impediment. Under sub-head (iv): for additional works, extension of two months and eighteen days was considered appropriate. As regards delay, on account of non-release of payments in time the arbitrator came to the conclusion the respondent had not proved this claim, and therefore, no extension was allowed under this head.

7.2 The sum total of extension granted under sub heads (i), (iii) and (iv), i.e., six months, seven-and-a-half months and two months and eighteen days comes to sixteen months and three days. Having come to the conclusion that the extension allowable to the respondent were more than the total period of delay which was thirteen months and ten days, the extension was restricted to the latter period, i.e., thirteen months and ten days. There is thus a clear finding that the delay in the execution of the contract was totally attributable to the appellant.

8. It is in the aforesaid background that we are called upon to once again examine various objections pressed almost as if, at the third stage of scrutiny the court is required to re-appreciate the evidence.

8.1 On behalf of the appellant, Sh. A.K. Singh appeared and confined his arguments to the claims referred to hereafter. In rebuttal submissions were advanced by Sh. K. Sunil, Advocate. We, therefore, propose to discuss the claims and the submissions in seriatim.

CLAIM NO. 1;

9. The respondent, had raised a claim in the sum of Rs 21,93,854/- against

its 34th Running Account (R.A.) bill; which is also its final bill. There were two issues discussed under this head. The first one being with regard to, discrepancy in the gross value of the executed work. According to the respondent in the 33rd running account bill the gross value of the works executed under the contract was a sum of Rs 2,25,65,057/-, whereas the appellant passed the 34th and the final bill for a gross amount of Rs 2,25,43,974.37/-. In effect the gross amount was reduced by Rs. 21,083/-.

9.1 The other issue raised was with regard to recoveries made by the appellant. The learned arbitrator came to the conclusion that since 33rd R.A. bill did not contain detailed measurements, the discrepancy in the gross value of the work executed as shown in the 33rd running account bill ought not to be relied upon. As regards the recoveries made by the appellant were concerned, the learned arbitrator examined them in detail. It is in this regard, that is, in regard to recoveries disallowed, that the learned counsel for the appellant has raised objections. The learned counsel's submissions in this regard is firstly qua a document being CP-217, filed in file no. 5 (which the appellant says is a "supplementary to the 34th final bill") which, according to him, has been ignored by the learned arbitrator. It is submitted that under this document recoveries to the extent of 11,60,861/- are quantified. If this recovery was allowed and adjusted, according to the learned counsel then, against the net final bill amount of Rs 8,14,540/- allowed by the arbitrator, nothing would be payable.

9.2. Similarly, an objection has been taken qua disallowance of recovery on account of excess cement consumed by the respondent. The recovery under this head is quantified by the respondent in the sum of Rs 4,11,120/-. This recovery is claimed towards unauthorized consumption of 41,058 cement bags. The learned counsel for the appellant in order to justify the recoveries

has relied upon a document appended as CP-144 in file no. 5.

9.3. In so far as the recovery in the sum of Rs 11,60,861/- is concerned, we find that the arbitrator has considered the document entitled : “supplement to the 34th and final bill (i.e., document CP-217)”; which was evidently filed on 01.02.2002, by breaking it up under various sub-heads. The learned arbitrator on an analysis, found that the sub-heads pertained not only to substituted items but also other items. The discussion of the arbitrator is found in para II under clause (a), (b) and (c). The sum of Rs 11,60,861/- (as rounded of) is broadly discussed under the following sub-heads: On account of difference in rate of substituted items Rs. 1,79,895/- deduction; on account of liquidated damages Rs 7,87,296/- and on account of defective work and deficiencies, (i.e., anti-termite treatment Rs 88,250/- and towards defective work Rs. 1,05,419/- amounting in all to Rs 1,93,669/-.

9.4. In so far as the first sub-head is concerned, the learned arbitrator came to the conclusion that the rates with regard to the extra/substituted items were revised nearly 12 months after the completion of the work, i.e., on 21.12.1993, whereas in terms of the contract they had to be settled within 3 months of the rates submitted by the respondent as per condition no. 10.1(iv) of the contract. It was also observed by the learned arbitrator that the reduction in rates had been brought about at the behest of the owner, i.e., PETS, whereas under the contract the engineer-in-charge of the appellant was the final approving authority for the rates. For these reasons, the said recovery of substituted items were disallowed. In so far as recovery for liquidated damages was concerned, it was observed that the same would be discussed after he had come to the conclusion with regard to extension of time. As noticed hereinabove by us, the learned arbitrator has come to the conclusion that the respondent was entitled to an extension of time of over sixteen months, but since, the delay in the execution of work was 13 months

and ten days, the extension was limited to the said time frame. In view of the fact that the delay was attributable to the appellant, there was evidently no liquidated damages to be levied. Therefore, the recoveries under this sub-head was disallowed.

9.5. As regards recoveries under the last sub-head, the learned arbitrator allowed the recovery in the sum of Rs. 88,250/- towards inadequate anti-termite treatment, while out of the total sum of Rs 1,05,419/- a sum of Rs 27,563.60 was allowed as recovery towards deficient work. The reason supplied by the learned arbitrator was that some of the recoveries had been made arbitrarily without quantifying the extent of damage and the actual detail of expenses incurred on their removal.

9.6 We find that contrary to what was portrayed before us, there is a detailed discussion of document CP-217 in the arbitrator's award. As a matter of fact, this aspect was not raised before the learned Single Judge, though it has been raised before us. The objection under this head are purely in the realm of appreciation of evidence which, under no principle of law can be examined by us at this stage.

9.7. As noticed by us above under claim no. 1, there is an objection raised to disallowance of recovery in the sum of Rs 4,11,120/- on account of excess consumption of cement. In order to buttress this argument, the learned counsel for the appellant, had relied upon a document appended at CP-144 filed in file no. 5, once again. This document, refers to issuance of cement vide MB-157/80 and 164/31 quantified at 41,058 bags. The learned counsel for the appellant submitted that the observation of the learned arbitrator that: how recoveries had been made on account of excess consumption of cement is, made in ignorance of this document.

9.8 On a perusal of the observations made qua the said recovery it is quite evident that the learned arbitrator was dealing with two objections raised by

the respondent in regard to the said recovery. The first that no notice was issued to it regarding penal recovery of cement vis-a-vis the allegation of the appellant that cement had been wasted. the second objection was as to how the recovery of the so called unauthorized consumption of cement contained in 41,058 bags had been worked out in the 33rd running account bill.

9.10 We had during the course of the argument put to the learned counsel as to whether any notice of unauthorized use of cement had been issued to the respondent. The learned counsel for the appellant submitted that no notice had been issued but, in view of the provisions of clause 14(7) of the General Conditions of the Contract (GCC), the engineer-in-charge had the discretion to issue a notice and, therefore, non-issuance of notice could not be held against the appellant. As regards recovery, the learned counsel for the appellant, as noticed above, relied upon the document CP-144 appended in file no. 5.

10. In our view, the objection of the appellant to the disallowability of the recovery under this head, is also misconceived. The reason being, as noted by the learned arbitrator, while the document relied upon, i.e., CP-144, adverts to consumption of 41,058 bags, the recovery is at the rate provided in the agreement, i.e., Rs. 80 per bag whereas, it should have been at double the rate as per the clause 14(7) of the GCC, on which, reliance has been placed by the learned counsel for the appellant. For the sake of convenience clause 14(7) of the agreement is extracted hereinafter:

“If on completion of works the contractor fails to return surplus materials out of those supplied by the corporation, then in addition to any other liability which the contractor would incur in the Engineer-in-Charge may, by a written notice to the contractor, require him to pay within a fortnight of receipt of the notice, for such unreturned surplus materials at double the issue rates.”
(emphasis is ours)

10.1. It is in this background, the learned arbitrator perhaps observed that he

was unable to decipher as to how the consumption of cement contained in 41,058 bags had been worked out in the 33rd R.A. bill.

10.2 As regards the aspect of non-issuance of notice, we are of the view that the measurement book at best would only show that cement was issued but that by itself would not show that the cement issued had not been consumed in the execution of the work, which was, the stand taken by the respondent. Therefore, de hors clause 14(7) of the GCC, it would have been, perhaps, in the interest of the appellant if such notice had been issued as the onus to prove the contrary would then have shifted on the respondent. Therefore, while it may not be incumbent on the engineer-in-charge to issue a written notice, it appears that there was no proof before the learned arbitrator to suggest that the cement contained in 41,058 bags had not been used in the execution of the work. As indicated hereinabove this is again in the realm of appreciation of evidence and this objection, in our view, once again has no merit.

CLAIM NO. 2

11. Under claim no. 2, the respondent had claimed interest at the rate of 24% per annum on the final bill which was pegged at Rs 21,93,854/- and later revised to Rs 17,75,986.70/- for the period 30.06.1993 till the date of actual payment. Under this head, the learned arbitrator awarded simple interest at the rate of 10% per annum w.e.f. 01.10.1993. The learned arbitrator pegged the amount at Rs 9,62,089/-.

11.1. The learned counsel for the appellant in respect of this claim submitted that no sum ought to have been awarded to the respondent under this head as it had failed to submit the final bill in terms of the time frame stipulated in clause 42 of the GCC. According to the learned counsel, it was the respondent who was required to submit the final bill within three months of the physical completion of works and thereafter the appellant was required to

pay the same within six months. It was submitted that in this case it was the appellant who had raised the final bill on 15.09.1993, since the respondent failed to do the needful. Therefore, according to the learned counsel for the appellant, the respondent could not have claimed interest on the delayed payment of the 34th and final bill. In the alternative, the learned counsel for the appellant argued that in any event the six month leeway available for payment of the bill should operate in favour of the appellant, i.e, the period between 15.09.1993 and 15.03.1994. Thus, at best the interest in favour of the respondent should run from 16.03.1994.

11.2. As against this the learned counsel for the respondent submitted that, as long as, the appellant was aware of the final bill amount it was incumbent on the appellant to pay the amount. Since, the appellant itself had prepared the final bill on 15.09.1993, fifteen days time for payment of bill was considered sufficient, and hence, the arbitrator had directed the appellant to pay interest w.e.f. 01.10.1993. It was further contended by the learned counsel for the respondent that, since respondent was deprived of the use of money, it was entitled to interest, as correctly concluded by the learned arbitrator as well as the learned Single Judge.

11.3. Having heard learned counsel for the parties qua this claim, we are of the view that there is no dispute about the fact that in terms of clause 42, the respondent, was required to submit the 34th and the final bill, within three months of the completion of the work. In terms of clause 42 of GCC, those items in the bill, in respect of which, there was either no dispute or where there was a dispute, to the extent the quantities and rates had the approval of the Chief-Engineer, amounts had to be paid within six months vis-a-vis contracts exceeding Rs.5 lacs. Therefore, the time frame though stipulated in the contract was not applied as the respondent it appears did not prepare the R.A. bills or the final bill and had all along relied upon the appellant for this

purpose. Notwithstanding this ground reality, it is quite evident on reading of clause 42 that retention of money after the time frame stipulated therein, could only be at the peril of the appellant. Having regard to the factual situation obtaining in the present case, the undisputed amounts as per the appellant got crystalized on 15.09.1993. The said bill, was passed on 17.09.1993, for the sum of Rs 8,14,540/-. The learned arbitrator, however, came to the conclusion that the amount payable under the final bill ought to be a sum of Rs 11,35,074/-. Therefore, in our view, the appellant ought to have paid the sum of Rs 8,14,540/-, which was undisputed according to it, at least within six months of 15.09.1993, i.e., by 15.03.1994. This sum having not been paid, the respondent deserves to be compensated by way of interest from 16.03.1994 till the date of payment. The arbitrator has awarded simple interest at the rate of 10% per annum. According to us, the rate of interest is reasonable. Therefore, the only modification under this claim that ought to be made in our opinion, is that, simple interest on the sum of Rs 8,14,540/- at the rate of 10% w.e.f. 16.03.1994 be awarded to the appellant. It is ordered accordingly.

CLAIM No.3

12. We may notice that in respect of security deposit even though in the written submissions the learned counsel has raised an objection both qua refund of security deposit and the award of interest on the delayed payment of security deposit, during the course of arguments Mr Singh categorically stated that he was not pressing this claim qua the first aspect, i.e., refund of security deposit. Therefore, we are called upon to deal only with latter aspect, i.e., the award of interest on the security deposit retained by the appellant.

CLAIM No.4

13. We may also notice that the security deposit was made over by the respondent in the following manner : Rs. 8 lacs was made over in the form of bank guarantees, Rs 2 lacs in the form of a fixed deposit receipt, while a sum of 1,27,199/- was withheld from the bills of the respondent.

13.1 The break-up given above is : as per the revised figure of the total amount of security deposit amounting to Rs 11,27,199/-, supplied by the respondent to the arbitrator.

13.2 The argument advanced in this behalf was based on clause 9.3 of the contract. For the sake of convenience, we may extract clauses 9.1, 9.2 and 9.3 of the agreement:

“9.1 Refund of Security Deposit: - One half of the Security deposit refundable to the contractor worked out on the basis of the value of work completed shall be refunded to the contractor on the Engineer-in-Charge certifying in writing that the work has been completed.

9.2 On expiry of the Defects Liability Period or on payment of the amount of the Final Bill whichever is later, the Engineer-in-Charge shall on demand from the contractor, refund to him the remaining portion of the security deposit provided the Engineer-in-Charge is satisfied that there is no demand outstanding against the Contractor.

9.3 No interest shall be payable to the contractor against the Security Deposit furnished/recovered from the contractor, by the Corporation.”

13.3. Under this head, the learned arbitrator even while noticing the provisions of clause 9.3, appears to have awarded compensation to the respondent in the form of bank charges qua bank guarantees furnished, and simple interest at the rate of 10% towards the cash component retained by the appellant. The total amount awarded under this head is a sum of Rs, 3,07,780/-. The rationale for award is contained in the following observations of the learned arbitrator:

“...Though as per clause 9.3 of the contract, the claimant is not entitled to any interest on the security deposit retained by respondent, yet the respondent was bound to refund the security deposit to the claimant at certain points of time as defined under clause 9.1 and 9.2 of the contract. Since the respondent has failed to refund the S.D. at points of time defined under the contract, the claimant has to be compensated for indefinite retention of the S.D. beyond the points of time defined under the contract...”

13.4. In our view, even though clauses 9.1, 9.2 required the appellant to refund the security deposit at pre-designated points in time; clause 9.3 specifically excluded the payment of interest on security deposit furnished/recovered from the contractor. Unfortunately, for the respondent even though a substantial amount of the compensation is towards bank charges on bank guarantee, it appears to have been calculated at a particular rate, i.e., 3% of the value, without proof in that regard being furnished by the respondent. Had proof been furnished in that regard, perhaps that portion of the awarded amount could have been allowed as what clause 9.3 prohibits is, the payment of interest. The calculation having been made as a percentage of the value, the compensation is calculated therefore in the form of interest even on the bank guarantee amount. In view of the prohibition contained in clause 9.3 of the contract and in line with judgments of the Supreme Court in the following cases : [*Sayeed Ahmed and Company Vs. State of Uttar Pradesh and Others, (2009) 12 SCC 26; Sree Kamatchi Amman Constructions Vs. Divisional Railway Manager (Works), Palghat And Others, (2010) 8 SCC 767; Union of India Vs. Krafters Engineering And Leasing Private Limited, (2011) 7 SCC 279*], this objection of the appellant would have to be allowed. Accordingly, the award of claim no. 4 to the extent of Rs 3,07,780/- is reversed.

CLAIM NO. 5

14. Under this head the respondent made a claim of a sum of Rs

10,87,796/- on account of escalation in the cost of materials and the work carried out during the period 01.01.1992 to 31.12.1992. The learned counsel for the appellant under this head has attempted to re-agitate the findings returned by the arbitrator qua extension of time. In other words, arguments are sought to be advanced as to why time ought not to be extended under the five sub-heads, referred to above by us, while discussing this issue. The clear attempt of the learned counsel for the appellant was to establish that since extension of time was not warranted, no escalation ought to have been awarded to the respondent. We may with profit note the observations of the learned single judge in this regard.

“63. Objections have been raised to claim no. 5. Claim No. 5 was on account of escalation under clause 45 of the contract. Arbitrator has held that since time extension stands granted to the claimant the escalation is also payable to contractor under clause 45 of the contractor.

64. The petitioner had relied on clause 45, the relevant part of which reads as under :-

“..... Such compensation for escalation in price shall be available only for work done during the stipulated period of the contract including such period for which the contractor's validity extended under the provisions of clause 12.4 of the contract without any action under clause 29 and also subject to the condition that no such compensation shall be payable for a work for which the stipulated period of completion is 6 months or less....”

65. According to petitioner no compensation could be awarded for escalation beyond the stipulated period of contract.

66. I fail to find any merit in this objection of the petitioner. As time extension was granted to the claimant the arbitrator was justified in awarding compensation for escalation to the petitioner. In any case delay has been held attributable to the petitioner and said finding has been upheld by me.”

14.1 We may only reiterate that the learned arbitrator has come to a definitive conclusion that the respondent ought to have been given an

extension of nearly sixteen (16) months and three (3) days; however, keeping in mind that the total delay in the execution of the contract was thirteen (13) months and ten (10) days the extension was limited to the said period. Therefore, after a detailed examination of the evidence under this head the learned arbitrator has awarded, as noticed above, a sum of Rs. 7,94,025/-.

14.2 It has not been pointed out by the learned counsel for the respondent as to how the said sum was not payable except to quote clause 12.4 of the GCC, to support his stand that no money was payable to the appellant in the event of extension. It was also submitted that learned arbitrator had ignored correspondence on record to which reference has been made in the written submissions, to suggest that the delay was on account of the respondent. In our view, in so far as the reference to the correspondence is concerned, nothing of the kind emerges on the reading of the judgment of the learned Single Judge. If this correspondence was shown and ignored the only course available was to approach the learned Single Judge by way of review.

14.3 In any event, the arbitrator we take it has looked at the evidence on the aspect of delay in a holistic manner relying upon the evidence placed before him. It would be difficult, if not impossible, to fathom at this stage how he appreciated a particular document from amongst a sheaf of documents placed before him on the aspect pertaining to delay in execution of the work which has been attributed to various impediments already noticed by us. Any such inquiry at this stage would take us into a zone which would destroy the very purpose and the ethos behind appointment of arbitrators. An arbitrator is a judge privately chosen by parties. Unless there is discernable perversity in the conclusion arrived at by the arbitrator, the court will not substitute its view with that of the arbitrator. Appreciation of evidence is one such aspect, which is completely within the ken of the arbitrator. We do not intend to re-appreciate the evidence on this score and hence, reject the objection of the

appellant qua this claim.

14.4 As regards reliance in clause 12.4 is concerned, we may only notice that the said clause operates when the extension is granted by the engineer-in-charge. In the present case, the arbitrator after examining the evidence on record has come to the conclusion that extension ought to be granted to the respondent under the subheads indicated hereinabove. In our opinion, clause 12.4 would have no application in the said circumstances.

CLAIM NO. 9

15. Under this head the arbitrator has awarded simple interest at the rate of 10% qua amounts awarded under claim no. 5. The initial claim of the respondent was for interest at the rate of 24% per annum on the amounts claimed under claim nos. 5 & 6. Since, under claim no. 5, the learned arbitrator had awarded an amount of Rs 7,95,025/- and a nil amount under claim no. 6, he proceeded to award interest at the rate of 10% on Rs. 7,94,025/- w.e.f. 01.10.1993 till the date of award. The amount awarded is a sum of Rs 6,73,076/-. The reasoning supplied, is that, since the payment under claim no. 5 had to be released alongwith the final bill on 30.09.1993, the interest on the said amount would commence from 01.10.1993. For this purpose, the learned arbitrator has adopted the reasoning given under claim no. 2. Since, we have disagreed with the view taken by the learned arbitrator and hold that the final bill having been prepared by the appellant on its own i.e., on 15.09.1993, a period of six months would be available to it under clause 42 of the GCC - the interest, in our opinion, should be calculated from 16.03.1994 till the date of the award. This interest so calculated, will be simple interest at the rate of 10% per annum, on the awarded amount, i.e., Rs 7,94,025/-.

CONCLUSION:

16. In view of our discussion above, we partially modify reliefs under

Claim Nos.2 and 9, while Claim no.4 is rejected.

17. The appeal is thus partially allowed to the extent indicated hereinabove.

RAJIV SHAKDHER, J

SANJAY KISHAN KAUL, J

MAY 02, 2012

kk