

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

Reserved on: 18.10.2012

Date of Decision: 01.11.2012

+ FAO (OS) 734/2006

M/S PT. MUNSHI RAM & ASSOCATES ... Appellant
Through : Mr. Sandeep Sharma, Advocate.

versus

DDA ... Respondent
Through : Mr. Arun Birbal, Advocate.

A N D

+ FAO (OS) 59/2007

DDA & ANR. ... Appellants
Through : Mr. Arun Birbal, Adv.

versus

PT.MUNSHI RAM & ASSOCIATES (P) LTD. ... Respondent
Through : Mr. Sandeep Sharma, Advocate.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE VIPIN SANGHI

SANJAY KISHAN KAUL, J.

1. M/s. Pt. Munshi Ram & Associates (P) Ltd. (hereinafter referred to as, 'the Contractor') was awarded the work of construction of dwelling units in Vasant Kunj, New Delhi by Delhi Development

Authority (hereinafter referred to as, 'DDA') vide Agreement No. 18/EE/HD-II/84-85. One of the sites where flats were to be constructed was in Sector-C, Pocket-9, Vasant Kunj, New Delhi, which was not available and, thus, an alternative site in Sector-C, Pocket-2, Vasant Kunj, New Delhi was made available. In terms of the Agreement, the date of commencement of the work was 10.12.1984, while the stipulated date of completion was 09.12.1985. The work was, however, completed only on 15.07.1989.

2. Disputes arose *inter se* the parties and in terms of clause 25 of the General Conditions of Contract, the Engineer Member of DDA appointed Mr. R.J. Bakhru, retired Chief Engineer of CPWD, as the Sole Arbitrator to adjudicate upon the disputes. The learned Arbitrator made and published the Award dated 24.11.1994. It is significant to note that in terms of the Award, the delay was held attributable to DDA and the Contractor was awarded a sum of Rs.37,97,614/- under various heads along with simple interest @ 16% p.a. on the sum of Rs.10,43,292/- w.e.f. 15.01.1990 to date of decree or payment, whichever was earlier. Thus, interest was granted only qua two of the claims being claim No. 6 for work done, but not paid and claim No. 10 on account of outstanding amounts as per the final bill. The Contractor filed a petition under Sections 14 and 17 of the Arbitration Act, 1940 (hereinafter referred to as, 'the said Act') for filing the original Award in Court and for making it Rule of the Court, which was registered as CS (OS) No. 2794/1994. The Award was filed by the learned Arbitrator in Court and was registered as Suit No. 160-A/1995. On notice being issued, DDA filed objections under Sections 30 and 33 of the said Act vide IA No. 6920/1995. The objections

were partly allowed in terms of the impugned judgment of the learned Single Judge dated 05.10.2006. The Award was made Rule of the Court except qua claims No. 2, 4 and 5 and was modified pertaining to claim No. 9 reducing the interest from 16% p.a. to 12% p.a. till date of decree and modifying the amount awarded under claim No. 10 from Rs.10,31,942/- to Rs.10,00,368/- and post-decretal interest from date of decree till date of realization was granted @ 9% p.a.

3. The two parties have thereafter filed the present cross appeals – one by the Contractor to the extent the Award was set aside as also on account of stated ambiguity in respect of interest from date of Award to date of decree in respect of the claims allowed for which no *pendent lite* interest had been granted and the other by DDA qua the claims made Rule of the Court.
4. Learned counsel for the parties being conscious of the limitations of the jurisdiction under Sections 30 and 33 of the said Act or an appeal arising therefrom confined their submissions to limited aspects, which we now proceed to discuss.

- **CONTRACTOR’S GRIEVANCES :**

- **Balance amount due under clause 10CC as found by the Arbitrator:**

5. Mr. Sandeep Sharma, learned counsel for the Contractor drew our attention to the award on claim No. 2 under the Award, which was for the market rate for work done by the Contractor during extended period of the contract. The Contractor was awarded compensation due to increase in market prices of Rs.38,92,374/-. It may be noticed that this compensation was granted on a finding that the delay was completely attributable to DDA. Learned

counsel for the Contractor has rightly pointed out that the issue was not of delay on account of allotment of alternative site, which had taken place before the start of work, but on account of the said site not being fully handed over. The amount due calculated under the escalation clause 10CC amounted to Rs.16,88,332/- and, thus, the net amount payable under claim No. 2 was held to be Rs.22,03,542/-.

6. This amount awarded has been set aside by the learned Single Judge in terms of the impugned judgment on the settled legal principle that where a contract prescribes a method for determining the price increase / escalation, no other method can be adopted by the Arbitrator. To this extent, learned counsel for the Contractor does not even assail the impugned judgment. The grievance made, before us, is that in view of the amount awarded under claim No. 2 by the learned Arbitrator, while computing the outstanding amounts under the final bill under clause 10CC, adjustment was made as there could not have been double payment. Under para 11.4.3, the total escalation under clause 10CC as computed under one of the aspects of claim No. 10 is Rs.18,14,838/-. This is against the calculations made by DDA in the final bill of Rs.17,46,243/-. The escalation actually paid for the extended period was Rs.16,88,832/- and, thus, the balance amount due under clause 10CC came to Rs.18,14,838/- less Rs.16,88,832/- amounting to Rs.1,26,006/-. This included the admitted amount of clause 10CC by DDA of Rs.57,421/-. However, actually this amount has not been awarded as it was adjusted against claim No. 2. Since claim No. 2 has been held by the learned Single Judge to be not payable, it was submitted that the sum of Rs.1,26,006/- was due and payable under the Award.

7. On the other hand, learned counsel for DDA submitted that the matter was not so simple as merely the amount becoming payable on account of claim No. 2 being disallowed. In this behalf, it was submitted while computing the amount payable under clause 10CC, the discrepancy between what the Contractor claimed and DDA computed arose on account of interpretation of certain clauses/paras of the contract. These are reproduced here-in-below:
- “5(a): The index relevant for any month will be arithmetical average of indices relevant to three calendar months preceding the month in question.
- 5(b): The base index will be the one relating to the month in which the tender was stipulated to be received.”
8. The Contractor pleaded that calculations of base index is to be on an average of indices of three months earlier to a month in which the tender was received. However, DDA was of the view that the base index is an index for the month in which tender was received. The learned Arbitrator found that the expression ‘*any month*’ in para 5(a) aforesaid includes the month in which tender was stipulated to be received as referred to in para 5(b) and, thus, the stand of the Contractor was correct. It is this basis for the calculation of the base index, which gave rise to the discrepancy of an amount of Rs.31,574/- upto 09.12.1985 and the balance amount found payable under clause 10CC was on account of the subsequent period.
9. On the other hand, learned Single Judge in the impugned judgment in para 58 has found that the base index has to be determined as per para 5(b) and has to be the one relating to the month to which the tender was stipulated to be received. Since the method of calculation of base index of DDA was accepted, the sum of

Rs.31,574/- awarded was set aside and so would be the fate of any amount, which becomes further payable as claim No. 2 has been set aside.

10. Learned counsel for the Contractor submitted that the matter in issue pertains only to an interpretation of the contract on which the view of the Arbitrator must prevail. He submitted that at best, there could be two views qua the interpretation of the contract, i.e., one as propounded by the learned Arbitrator and the other as propounded by the learned Single Judge, but that would not be a ground to interfere with the Award as the view taken by the learned Arbitrator was not *de hors* the contract or amounting to absurdity. In this behalf, learned counsel drew support from a judgment of the learned Single Judge of this Court in Pt. Munshi Ram & Associates (P) Ltd. (M/s.) v. Delhi Development Authority & Anr., 2006 (4) AD (Delhi) 644 *inter se* the same parties *albeit* for a different contract where a similar view propounded by the learned Arbitrator has been upheld by the learned Single Judge. On this factual aspect, there is no dispute *inter se* the parties.
11. We are, thus, of the view that there is force in the contention of learned counsel for the Contractor that the Contractor is entitled to the sum of Rs.1,26,006/- as computed by the learned Arbitrator being the differential of the amount payable under clause 10CC as the learned Arbitrator, for reasons, accepted a particular view qua the terms of the contract. It is not for the Court, while considering objections under Sections 30 and 33 of the said Act, to substitute its own view qua the terms of the contract, especially when the view taken by the Arbitrator certainly does not amount to absurdity and is at least one plausible view. This conclusion is reinforced by the fact that in another proceedings, another

Arbitrator has taken a similar view, which has found favour with another learned Single Judge. It may be noticed that the learned Arbitrator, namely, Mr. R.J. Bakhru is a retired Chief Engineer of CPWD, i.e., a technical person appointed to determine the disputes *inter se* and, thus, the view of such a technical person must be given due weightage. The Contractor is, thus, entitled to succeed qua this aspect.

- **Claim No. 4 on account of loss and damage due to idle manpower during over-run of the period of contract and claim No. 5 on account of under-utilised machinery and T&P, etc. due to prolongation of the work, partly allowed by the Arbitrator and disallowed by the learned Single Judge.**

12. The learned Arbitrator on consideration and appreciation of the evidence on record found a sum of Rs.2,89,000/- payable under claim No. 4 as against the claim made by the Contractor of Rs.5,28,093/- and a sum of Rs.2,30,580/- against a claim of Rs.7,20,880/- under claim No. 5. These claims have been set aside by the learned Single Judge in the impugned judgment despite the fact that there is no interference with the finding that the delay was wholly attributable to DDA.
13. What has weighed with the learned Single Judge are two communications – one of the Contractor dated 29.10.1984 and the other response thereto of DDA dated 31.10.1984. These have been held to form part of the contract between the parties as they relate to a stage when work had yet to commence. The Contractor's letter and DDA's response thereto have been extracted in the impugned judgment in paras 25 and 26, which are reproduced hereunder for the convenience of reference:

“25. Contractor’s letter dated 29.10.1984, inter alia, records as under:

“We are given to understand that the site of work for which we had submitted out negotiated offer of executing the work of 50% above the estimated cost (net rate) (of C/o 154 SFS house in Sector-C, Pkt.IX, Gr.IV), is not readily available on account of certain stay orders or other reasons, but another alternative site is available in Sector-C, Pkt.II, Gr.II, where these houses can be accommodated. We hereby agree to execute the above work at any alternative site in Sector-C, Pkt.II. We also agree that we shall have no objection to any change in designs or drawings or construction of these houses at a different design in the alternative pocket as may be decided by the DDA.”

26. DDA’s response dated 30.11.1984 reads as under:

“Your firm have also agreed that in case there is any difficulty in making this site available to you on account of any stay orders, you will execute this work at any other alternative, similar and comparable site at Vasant Kunj. Accordingly, it has been decided to allot an alternative site to you in Sector-C, Pocket-II, Group-II/III at Vasant Kunj. The No. of Dus allotted under the aforesaid work shall be constructed by you at this alternative site. Decision in this regard have already been conveyed to you vide F.O. to CE’s letter No.F.30(FO)/84/CII/51/Works/8860 dt. 31.10.1984.”

14. The learned Single Judge found that there was no dispute that an alternative site was handed over to the Contractor. After NIT had been issued by DDA and offers were received from Contractors, a third-party obtained an injunction in court proceedings affecting part of the site in question and during negotiations, this was made known to the bidders. Since the Contractor’s bid was being accepted, the Contractor was informed, at the pre-acceptance stage

itself, that full site may not be handed over to him and, thus, the Contractor would be required to utilize its labour, plant and machinery at an alternative site. Thus, compensation damages were held not payable as these documents are stated to have been ignored by the learned Arbitrator.

15. Learned counsel for the Contractor submitted that there is no dispute that an alternative site was offered to the Contractor in Pocket-II as against Pocket-IX and the Contractor never came back to Pocket-IX for the work of construction. The two communications, it is thus submitted, were sent to construct quarters at the alternative site in Pocket-II instead of Pocket-IX at the same rates and terms and conditions. Since these Pockets were in close proximity to each other being around 1 km. difference, no prejudice was being caused to the Contractor. However, the occasion to claim the amounts under claim Nos. 4 and 5 arose as DDA did not hand over the site at Pocket-II at one go, but in piecemeal. Not only that, DDA failed to supply the drawings and designs in time and failed to make timely payments apart from there being delays due to the electrical agency and other hindrances. Thus, claim of the Contractor was not predicated on shifting of sites, but on the alternative site never being handed over at one go. It is not DDA's case that even the alternative site was not required to be handed over at one go.
16. We find force in the contention of the learned counsel for the Contractor as it appears that the basis for the award of the amounts under claim Nos. 4 and 5 by the learned Arbitrator was different, while the reason for setting aside of the same by the learned Single Judge is predicated on a different reasoning. It has rightly been pointed out by the learned Single Judge that in view of the two

communications extracted aforesaid, there could be no question of damages on account of idle labour or machinery due to prolongation of contract by reason of shifting of sites. However, this does not imply that DDA was at liberty not to hand over even the alternative site at one go. The damages claimed by the Contractor arise from the delays at the alternative site and not due to the change of the site. It is also based on a pure appreciation of evidence by the learned Arbitrator and it would not be the function of the Court, while considering objections, to re-appreciate the evidence.

17. Learned counsel for DDA also relied upon a communication dated 30.12.1987 of the Contractor stating that the Contractor will not claim liquidated damages, if the extension of time is granted without levy of compensation. One may note that these are routine letters obtained by DDA while granting extension of time. However, this cannot imply that even where DDA has been found to be completely at fault for the delays, the Contractor is not even entitled to amounts due for idle manpower or idle machinery. In fact, it is normally when delays are attributable to Contractor, DDA still decides, in order to facilitate completion of contract, not to levy damages and such letter is obtained to ensure that the Contractor subsequently does not claim any damages predicated on a plea of extension of contract without levy of damages.
18. Such a communication has also been discussed in J.S. Chaudhary v. The Vice-Chairman, DDA & Anr., 183 (2011) DLT 723 where it has been held by a learned Single Judge of this Court that the bar could be only against claiming damages with respect to delays caused by the Contractor and not by DDA. This is on the principle of law propounded in various judgments of the Supreme

Court including A.T. Brij Paul Singh v. State of Gujarat, (1984) 4 SCC 59; Mohd. Salamatullah v. Govt. of A.P., (1977) 3 SCC 590; Dwarka Das v. State of MP, 1999 (3) SCC 500 that when the breach of contract is held to have been proved being contrary to law and terms of the agreement, the erring party is legally bound to compensate the other party to the agreement. In Delhi Development Authority v. Wee Aar Constructive Builders and Anr., 2004 (3) Arb. LR 291, a Division Bench of this Court upheld the grant of amounts for losses suffered on account of infructuous expenditure on labour; losses on account of idle tools, plant and machinery; losses due to hire charges, etc.

19. We are, thus, of the view that the setting aside of claim Nos. 4 and 5 by the learned Single Judge is not justified and the Award to that extent is also sustained.

○ **Interest from date of Award till date of payment:**

20. Learned Single Judge reduced interest rate from 16% p.a. to 12% p.a. and further granted post-decretal interest @ 9% p.a. Learned counsel for DDA could not seriously quibble with this rate of interest. However, the submission of the learned counsel was that under the Award, interest has been awarded only on claim Nos. 6 and 10 as would be apparent from the award under claim No. 9 pertaining to interest in para 10.0 of the Award. Such interest has been awarded from 15.01.1990 to date of decree or payment, whichever was earlier. In the present case, the date of decree is earlier. Learned counsel, thus, submits that insofar as *pendent lite* interest before the Arbitrator is concerned, he can have no quibble, but post-Award and prior to the decree, when the matter was pending in objections before the learned Single Judge, the Contractor is entitled to interest at the same rate not only for claim

Nos. 6 and 10, but also qua the balance amount awarded under different heads similarly for the post-decree period.

21. Learned counsel for DDA, on the other hand, pointed out that the learned Single Judge in terms of the impugned judgment has only modified the rate of interest and in terms of the Award, interest has been granted from 15.01.1990 to date of decree or payment, whichever is earlier. Thus, interest is payable till date of decree, but such interest should not be made payable post-Award till date of decree on the awarded claims for which no interest has been granted for the period when the matter was pending before the learned Single Judge. It is also his submission that no objections were filed to the Award by the Contractor and, thus, he cannot claim such interest.
22. Learned counsel for the Contractor, in support of his plea, has relied upon the judgment of the learned Single Judge (Arun Kumar, J.) of this Court (as His Lordship then was) in Babu Lal Barwa v. Delhi Development Authority and Ors., 63 (1996) DLT 35 where the objections to the grant of interest on the amount of the Award upheld from the date of the Award till realization was rejected. This was on the basis that once proceedings are pending before the Court, it is the domain and power of the Court to award interest for the time proceedings remained pending before it. This view has been adopted in Amar Industries v. Union of India, 2006 (2) Arb. LR 253 (Delhi) by one of us (Sanjay Kishan Kaul, J.) and it was observed that even where there was no prayer for grant of such interest, the Court was empowered to grant interest both for *pendent lite* and for future period. The rationale for this was noticed that when a matter is pending in the Court for which neither of the parties can be blamed, a succeeding party ought not

to be deprived of the interest on the amount, which falls to its share pursuant to the Award.

23. We are, thus, of the view that the Contractor is entitled to the same rate of interest, i.e., @ 12% p.a. simple interest on the various claims granted under the Award and not confined to only claim Nos. 6 and 10. Interest during the pendency of the proceedings before the learned Arbitrator may have been confined to claim Nos. 6 and 10 from 15.01.1990 to date of decree or payment, whichever is earlier, post-Award being made and the DDA, not having paid the amount but seeking to challenge the Award under objections, must be held liable to pay interest even on the other amounts. We, however, hasten to clarify that the interest @ 12% p.a. for the period from date of Award to date of decree and @ 9% p.a. from date of decree to date of realization have to be both computed only on the amounts computed under the Award under different heads of claims, but would not be payable on the interest component, which becomes payable. To clarify, no interest would be payable on the interest component of the Award, which is calculated on the sum of Rs.10,43,292/- from 16.01.1990 to date of Award/decreed and simultaneously post-decretal interest, would not be computed on any interest component either of pre-Award period or post-Award upto date of decree period.

• **GRIEVANCES OF DDA:**

24. The Contractor claimed amounts on account of outstanding under the final bill under claim No. 10. This includes agreement items, extra and substitute items, deduction items, payment under clause 10CC and work done, but not paid. Part V of this claim is the last category of '*work done, but not paid*' which in turn has various

items to it. It is qua three of these items that DDA has raised objections in appeal.

○ **Cutting and straightening of steel bars:**

25. A sum of Rs.77,719/- has been awarded for cutting and straightening of steel bars as this work is stated to be not covered under the Agreement as per the Award. Learned counsel for DDA has referred to the relevant paras where Item 3.1.1 of the Agreement deals with reinforcement of bars and reads as under:

“Reinforcement for RCC work including bending, binding and placing in position complete.”

26. Learned counsel submits that this matter is no more *res integra* in view of the judgment of the Division Bench of this Court in FAO (OS) No. 134/2002 titled ‘J.S. Construction v. DDA’ decided on 16.04.2009 reported as MANU/DE/1088/2009 where it has been held that the definition of reinforcement for RCC in the Agreement is ‘*illustrative*’ and ‘*not exhaustive*’. However, it has been simultaneously held that if the contractor puts DDA to notice for payment of extra money during currency of contract and DDA does not raise any objection, then the amount can be recovered on this account. The Division Bench, in turn, referred to the observations of the learned Single Judge of this Court, (being one of us Sanjay Kishan Kaul, J.) in Narain Das R. Israni v. Delhi Development Authority, 126 (2006) DLT 10 with approval and the same are in the following terms:

“19. The position, which emerges from the aforesaid, is that the definition of reinforcement for RCC work is illustrative and not exhaustive. Thus, no extra amount can be recovered for the same in view of the earlier judgment in M/s. Wee Aar Constructive Builders's case (supra). However, simultaneous legal position, which emerges, is that in case the contractor puts DDA to notice

during the currency of the contract and DDA does not raise any objection, then amounts can be recovered on this account. It may also be noticed that a correction slip No. 4 was issued in January, 1990 clarifying that cutting would be included. Thus, it appears that there were some doubt over this proposition and, thus, the clarification was issued. Once the contractor has put DDA to notice on this account, it cannot be said that the Award made in this behalf is erroneous. If reference is made to the earlier judgment of M/s. Wee Aar Constructive Builders's case (supra), it would be found that there is, in fact, no inconsistency in the judicial approach of various judgments. It was observed in paras 19 and 20 as under:

"19. The two other decisions relied upon by learned counsel for the petitioner, that is, K.C. Chibbar and Anant Raj Agencies are clearly distinguishable. In both the cases, the petitioner therein had notified the DDA that the cutting of steel or the straightening of steel bars was being treated as an extra item of work. This was not objected to by the DDA. The claim of the petitioner in both the cases was upheld. In the present case, this situation did not arise. No letter or intimation was sent by the petitioner to the respondent. The claim of straightening and cutting the steel bars was made by the petitioner for the first time before the learned Arbitrator. The respondent had no occasion to react (or not to react) to the claim, prior to the arbitral proceedings.

20. In view of these facts, the decision rendered in S.K. Mangla has to be followed. Moreover, this decision also recognizes pragmatic and down-to-earth facts in building contracts."

20. The aforesaid discussion shows that the material aspect taken into consideration by the learned Judge was that while in case the contractor puts the DDA to notice, a different position would emerge; if no such notice is given, then the work of cutting would be included in the already assigned work."

(emphasis supplied)

27. In fact, the Division Bench in J.S. Construction's case (supra) has noticed that even earlier in FAO (OS) No. 121/2006 titled 'M/s. Pt. Munshi Ram & Associates (P) Ltd. v. Delhi Development Authority' decided on 01.04.2009, the Division Bench of this Court had affirmed the view taken in Narain Das R. Israni's case (supra).
28. Learned counsel for the Contractor did not quibble with the legal proposition, but stated that the Contractor had put DDA to notice vide Ex. C-48 dated 21.08.1986 and since DDA had been put to notice, the extra amount was payable in view of the aforesaid judicial pronouncements. It was further urged that this aspect had not even been seriously contended by DDA before the learned Single Judge.
29. Learned counsel for DDA, while referring to Ex. C-48, has pointed out that the contents of the letter itself would show that while the Contractor was demanding this amount, DDA was refusing to pay the same. It was submitted that there could be no doubt about this in view of Ex. R-6, which is a letter dated 20.09.1986 of DDA, which clearly denied the claim, the contents of which are as under:

“Your claim for the enhanced rate was denied from time to time vide this office letter No. F(39)/85-86/HD-11/A/89 dated 17.01.1986 and SFS (39)/84-85/HD-11/A932 dated 08.05.1986. You were clearly told that you may continue with the execution of work if so desired by you at the Agreement rates only. As you are continuing after the receipt of the above said letter with the work, it clearly shows that you are executing the work at agreement rate only. It is once again made clear to you that you are continuing with the work at the agreement rates only and thus the question of any claim on this account at a later date does not arise.”

30. Learned counsel emphasized that the observations in Narain Das R. Israni's case (supra) approved by the Division Bench as aforesaid clearly state that the amount is recoverable if:

- (i) the contractor puts DDA to notice during the currency of the contract; and
- (ii) DDA does not raise any objection.

The second condition not being satisfied, the amount is not payable.

31. We find from the impugned judgment that it is not as if certain aspects were given up, but in para 53, it has been noticed that all and sundry objections have been filed, but only one objection is found sustainable relating to para 4 of the claim under clause 10CC. Thus, this aspect is liable to be examined by this Court, especially as the legal principles now stand settled qua this issue. Even if the Contractor has raised the claim as per Ex. C-48 putting DDA to notice, DDA has clearly repudiated this, as is apparent from Ex. R-6. Thus, this claim is not sustainable in view of the judgment in J.S. Construction's case (supra) and the Award of the amount under this head is accordingly set aside and to that extent, both the impugned Award and the judgment of the learned Single Judge are also set aside.

○ **Water-proofing cement paint:**

32. Under Item 7 dealing with water-proof paint, a sum of Rs.4,17,638/- has been awarded as extra payment at agreed rate for roughness of surface. Learned counsel for DDA has referred to Items 9.5 and 9.7, which read as under:

“9.5 15mm thick cement plaster 1:5 (1cement : 5 coarse sand) finished rough with sponge.

9.7 Finishing walls with water-proofing cement paint of approved brand and manufacture and of required shade to give an even shade on new work (three or more coats).”
(emphasis supplied)

33. It is the submission of learned counsel for DDA that the Contractor could not have asked for this amount as the work was done in terms of the contract and, thus, the contractual price has taken care of the roughness of surface as per Item 9.5 and applying of water-proofing cement paint under Item 9.7, referred to aforesaid. This claim is stated to be predicated on Ex. C-147, which is a letter dated 18.11.1988 of the Contractor. This Ex. C-147 dated 18.11.1988 has referred to the earlier communication of the Contractor dated 28.09.1985 to the effect that the rate of ‘*finishing walls with water-proofing cement paint*’ was applicable on plain plastered surfaced walls, whereas the job of finishing the walls as actually executed at site is over sponge plastered surface. There was no Item of sponge plaster in DSR 1981, which is applicable to contract agreement and, thus, it was claimed in the letter that the rate of finishing walls with water-proofing cement paint as provided in the Agreement was applicable to plain plastered surfaced walls and not sponge walls. The quantity of water-proofing cement paint would differ and accordingly analysis of rate was prepared and submitted. The Contractor, thus, claimed higher rate.
34. Learned counsel for DDA relied upon the Division Bench judgment of this Court in FAO (OS) No. 183/2005 titled ‘M/s. G.D. Tewari & Co. v. DDA’ decided on 14.02.2012. In the said case, 25% extra amount had been awarded by the Arbitrator for water-proofing cement paint required for sponge finish. The

clauses required thick cement plaster for '*finished rough with sponge*'. In the impugned judgment therein, learned Single Judge had opined that since the Contractor was required to give a finish with sponge surface, all consequences arising therefrom would form a part of the contract price and, thus, could not be awarded as extra items. This view was upheld by the Division Bench.

35. In J.S. Chaudhary's case (supra), it was observed that either of the parties cannot be permitted to rely on extraneous material to claim an extra amount for something covered by the Agreement.
36. On the other hand, learned counsel for the Contractor has pleaded that a technical man has gone into the merits of the case, which should not be interfered with. Such a claim is stated to have been upheld by one of us (Sanjay Kishan Kaul, J.) in Pt. Munshi Ram and Associates (P) Ltd. v. Delhi Development Authority, 2006 (1) Arb. LR 137 (Delhi).
37. In our view, the crux of the issue is whether a contract has made a provision for the nature of the work to be completed and the rate applicable as the Arbitrator, being the creature of the contract, cannot go beyond the terms of the contract. If the contract has provided for a particular manner of work to be done, then no extra amount is payable qua that work.
38. If, in the aforesaid context, we peruse the relevant clauses, Item 9.7 cannot be read *de hors* Item 9.5. A finished rough with sponge is required as per Item 9.5. The finish of the wall with water-proofing cement paint of approved brand and manufacture as per Item 9.7 has to be, thus, qua such finished rough with sponge. It was, thus, not open for the Contractor to claim the amount in question as the Contractor was doing only the work as per the specification and nothing more. This view has also found favour

in the pronouncement of the Division Bench in M/s. G.D. Tewari & Co.'s case (supra). We may add that the discussion in Pt. Munshi Ram and Associates (P) Ltd.'s case (supra) referred to above qua this issue only states that the amount had been awarded. There is no discussion qua the relevant clauses nor was the issue urged by reference to the relevant clauses.

39. We are, thus, of the view that this amount towards water-proofing cement paint ought not to have been awarded as the Items of work already provided for such water-proofing of cement paint on finished rough with sponge and, thus, no extra amount could be charged on that account. The amount so awarded as upheld by the learned Single Judge is, thus, accordingly set aside once again noticing that though there is no detailed discussion on this aspect in the impugned judgment, para 53 has referred to the objections and only one found favour with the learned Single Judge on the same principle as previous Item.

○ **Wax polishing to floor:**

40. The learned Arbitrator has awarded a sum of Rs.1,29,226/- under Item 15 as it was not covered under the Agreement Items. The synopsis of DDA only states it is covered under the Agreement without reference to any clause. Leaned counsel for the Contractor has pointed out that DDA has not even pressed objections qua this item in Delhi Development Authority v. Bhagat Construction Co. (P.) Ltd. and Anr., AIR 1984 Delhi 358 and Batra Construction Co. v. DDA & Anr., 1999 (1) AD 67 (Delhi). In DDA v. Bhagat Construction Co. (P.) Ltd. and Anr.'s case (supra), a Division Bench of this Court held that the specifications do not include wax polishing and spreading of saw dust and, thus, allowed the claim of the Contractor. On the same

principle, the amount has been awarded in Batra Construction Co.'s case (supra).

41. There is no material for us to interfere with the amount awarded under this Item by the learned Arbitrator as affirmed by the learned Single Judge.

○ **Conclusion:**

42. In view of the aforesaid, both the appeals are partly allowed in terms aforesaid and the impugned judgment of the learned Single Judge dated 05.10.2006 and the Award dated 24.11.1994, thus, stand modified accordingly.
43. In the given facts of the case, the parties are left to bear their own costs.

SANJAY KISHAN KAUL, J.

NOVEMBER 01, 2012
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VIPIN SANGHI, J.