

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

Judgment reserved on: 17.09.2012

%

Judgment delivered on: 05.12.2012

+ **FAO(OS) No. 483/2008**

N.J.DEVANI BUILDERS P.LTD.

..... Appellant
Through: Mr. Sameer Parekh, Mr.D.P.Mohanty,
Mr. Kshtrashal Raj, Mr. Galav
Sharma & Ms. Sarabjyot Walia,
Advocates

versus

INDIAN FARMERS FERTILIZER COOPERATIVE LTD.

..... Respondent
Through: Mr. Ravinder Sethi, Sr. Advocate
with Mr. Manoj Verma & Mr. Rajiv
Kumar Ghawana, Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE VIPIN SANGHI

J U D G M E N T

VIPIN SANGHI, J.

1. The appellant, by way of the present appeal under Section 39 (1)(vi) of the Arbitration Act, 1940 (hereinafter referred to as the "Act"),

seeks setting aside of order dated 22.09.2008 in CS (OS) No. 1817A of 1997, being objections under Section 30 of the Act to the arbitral award dated 25.07.1997. By the impugned order, the Ld. Single Judge has dismissed the objections preferred by the appellant.

2. The dispute between the parties related to the claim of the appellant herein for enhanced payment- on account of escalation in minimum wages and material cost- during the scheduled period of the contract as also the extended time period.

3. The aforesaid contract was in relation to the work of construction of 161, Type-C quarters at Alona, Dist. Bareilly (U.P.), which came to be executed on 31.07.1985. The contract price was Rs. 2.89 Crores which was subsequently raised to Rs. 3.5 Crores. The original period of completion of the said work was 18 months i.e. up to 31.01.1987, which came to be subsequently extended up to 30.4.1987. After having completed the work within the extended period, the appellant submitted along with its final bill, a bill claiming escalation charges of Rs. 89,33,295.00/- and Rs. 3,97,159.00/- towards escalation of labour component and escalation of material component respectively. In response thereto, the respondent herein paid an amount of Rs. 16,83,357.00/- on the basis that clause 3 of the contract provided for a maximum ceiling limit- with regards to the payments of escalation of all items, being 5% of the contract value. The said clause reads as under:

“3.0 Escalation

A. The payments for escalation shall be payable as per the formula given hereunder:

i) Escalation for labour component

$$P = 0.2 W \times \frac{Li - Lo}{Lo}$$

WHERE Lo = is the minimum wage rate for Bareilly on date of opening price bids

Li = is the revised minimum wage rate at Bareilly as per Government Notification.

W = Value of the work done after the minimum wage rate is revised as per Government Notification.

P = Amount payable to contractor extra over the contract price due to labour escalation.

ii) Escalation for materials procured by Contractor:-

$$P = 0.25 W \times \frac{Ci - Co}{Co}$$

WHERE P = amount of escalation payable to contractor.

W = Value of work done during the month under reference.

Ci = All India Whole Sale Price Index (all commodities as published by Reserve Bank of India for the month for

which amount towards escalation is payable.

Co = All India Whole Sale Price Index (all commodities as published by Reserve Bank of India for the month in which price bids are opened.

The contractor shall not specify any other formula for escalation/except referred to above If escalation coverage by above formula is not felt adequate by the contractor, the same shall be covered by the contractor in his quotation/lump sum amount quoted, as the case may be.

However, the total escalation on all items together will be limited to a maximum ceiling limit of 5% of the contract value. The ceiling for escalation as asked for will be taken for loading the Contractors bid.

Bill for escalation will be submitted every month if there is any change in wages of labour or whole Sale Price Index aforementioned in sub-clauses A(i) and A(ii).”

4. The said dispute, inter alia, came to be referred to arbitration, wherein it was averred by the appellant/claimant that at the time when the tender was opened, i.e. on 17.05.1985, and the contract was awarded- the minimum wages payable to the workers under the Minimum Wages Act was Rs. 8/- per day which, thereafter, came to be increased in an extraordinary and unexpected manner by the U.P. Government. In view of the same, it was submitted that the Ceiling of 5% fixed in the year 1985, had become impractical and uneconomic for the appellant/contractor and as such had become irrelevant. The increase in the minimum wages of the workers

during the relevant period, as culled out from the affidavit of the appellant herein before the arbitrator, is as under:

- “(1) From 24.2.85 to 28.6.85 Rs. 8/- per day*
(2) From 29.6.85 to 31.7.85 Rs. 16.65/- per day
(3) From 1.8.85 to 31.1.86 Rs. 16.80/- per day
(4) From 1.2.86 to 31.7.86 Rs. 17.96/- per day
(5) From 1.8.86 to 31.1.87 Rs. 18.70/- per day
(6) From 1.2.87 to 31.7.87 Rs. 20.15/- per day”

5. The sole arbitrator, Justice G.C. Jain (Retd.) by award dated 25.07.1997 rejected the said claim of the appellant herein on the following grounds:

- I. The extra ordinary increase in the minimum wages, admittedly, took place before the work order dated 20.07.1985 was issued. The appellant/contractor with open eyes, without any protest and with its own free will, executed the contract on 31.07.1985, which contained the aforesaid ceiling clause. The appellant did not reserve any right to claim escalation in the wages at that stage. Therefore, the appellant cannot wriggle out of the said condition of the contract.
- II. The contention of the appellant/claimant that it received copy of the notification from the respondent with its letter dated 26.08.1985 is no excuse and would make no difference.

- III. The ceiling clause was unconditional. It does not say that it will not apply if there was steep, extra-ordinary or unexpected statutory increase in the minimum wages. The condition relating to the ceiling was binding on the contractor in all circumstances.
- IV. The plea of the appellant/claimant that due to steep rise in the labour wages, the contract became uneconomic is frivolous. There is no law of must earn profits in contracts. A party can suffer loss and sometimes huge loss. Even otherwise, there was no evidence of the appellant having suffered loss as a whole.
- V. The submission that the ceiling clause was limited to escalation for materials procured by the contractor and it was not applicable to escalation in labour component was never raised in the statement of claim. It was only averred that the ceiling had become irrelevant in view of the extra ordinary and unexpected increase in wages. Even otherwise, the said plea has no merit. The words “on all items together”, in the proviso, are wide enough to take in their fold both the material component and the labour component. It cannot be suggested that these words meant all items of material procured by the contractor. Even before the words “on all items together” the words are “total escalation”. The use of the words “total escalation” on all items together, mean that the maximum amount payable to the contractor towards escalation was 5% of the contract value. Further, as per the last Para of clause 3, the contractor is required to submit bill of escalation every month- if there was any changes in wages of labour or whole sale price index aforementioned in sub-clause (A) (i)

and A (ii). This Para mentions both labour component and material component and, therefore, it could not be said that the ceiling applied to labour component because the ceiling clause appeared after sub-clause A (ii). Read as a whole, the proviso covered both labour component and material component.

- VI. Escalation clause means a clause which takes care of the rise and fall in price but the parties can always agree that the contractor would not be entitled to any escalation whatsoever *or* that the contractor would be entitled to escalation limited to a certain amount or a certain percentage of the contract. Such a stipulation is not illegal or inconsistent. The contractor continues to be under a statutory obligation to pay to its workers minimum wages as fixed by the State Government from time to time. However, the liability of the respondent to compensate the appellant/contractor for such payment, in view of the ceiling clause, is limited to 5% of the contract value. Clause 3 of the agreement is not a ceiling on the statute. It is a ceiling on the right of the contractor to get an escalation on account of the increase in the prices of material or wages statutorily, or otherwise. The ceiling clause does not say that the contractor would not pay to its workers more than 5% of the wages prevalent on the date of opening of the price bids. For such reasons, it could not be said that the ceiling clause or the interpretation thereto as given by the respondent was opposed to all norms of law and equity and was illegal and void.
- VII. The decision of the Supreme Court in *Tarapore & Co. v. Cochin Shipyard Ltd. Cochin*, (1984) 2 SCC 680 and of the High Court of

Delhi in *Arvind Khanna v. International Airport Authority of India*, (1994) 31 DRJ 374, as relied upon by the appellant/claimant, do not apply to the facts of the present case. In these cases, there was no express clause providing for a ceiling on the escalation or compensation for increase in price. The contract, in these cases, unlike the present one was silent about any escalation.

6. The appellant filed objections to the aforesaid award, under Section 30 of the Act, before the Ld. Single Judge. The Ld. Single Judge upon examination of the facts, along with the afore-stated observations and findings of the arbitral tribunal vide the impugned order dated 22.09.2008 dismissed the objections as meritless.

7. In addition to the afore-stated reasons, as cited by the arbitrator, Learned Single Judge observed that the appellant/objector cannot on the one hand rely upon Clause 3 for the purpose of computing escalation amount and, on the other hand, claim that the ceiling limit of 5% prescribed in the said clause would not be applicable. The said clause has to be read as a whole and cannot be bifurcated into two parts.

8. Learned Single Judge also examined the various decisions relied upon by the appellant/objector, some of which have also been cited before us, and observed that where the contract is silent on payment of compensation on account of enhanced minimum wages, an arbitrator can certainly examine the implied terms and on applying principles of equity award compensation. The Ld. Single Judge upheld the distinction drawn by the arbitrator in the facts of the present case with that of the judgments relied

upon the appellant/objector inasmuch as the cited cases did not contain a specific clause prohibiting or placing a maximum cap on award of escalation in costs of material and labour, as in the present case.

9. Aggrieved by the aforesaid order, the appellants herein have preferred the present appeal.

10. Mr. Sameer Parekh, learned counsel for the appellant, has argued that in view of the extraordinary increase in the minimum wages payable to the workers, it would not be reasonable to apply the ceiling clause of 5% in the present case. Placing reliance on the judgment of the Supreme Court in ***Tarapore & Co.*** (supra), it is submitted that the ground position with regards to execution of the contract had changed drastically beyond anybody's contemplation and as such there was an implied term for reimbursement for any extraordinary changes under the contract. Reference is made to Clause 12 of the Contract which entitles the Contractor to seek variation in the contract price.

11. It is argued that payment of the statutory increase in minimum wages cannot be barred under the contract. The appellant would be entitled to the said increase *de hors* the contract. Relying upon the judgment of the Andhra Pradesh High Court in ***T. A. Choudhary v. State of A.P. & Ors.***, 2004 (3) ALD 357, he submits that such a ceiling clause is against public policy and, as such, is bad in law.

12. Placing reliance on the Judgment of the Supreme Court in ***Food Corporation of India v. A.M. Ahmed & Co.***, (2006) 13 SCC 779, it is further argued that even where there is a specific clause barring payments

other than the rates agreed to between the parties under the contract, the contractor would be entitled to payment for escalation charges.

13. It is further submitted that the term ‘items’ occurring in clause 3 of the contract does not include the word ‘labour’ and as such the escalation for labour component would not be subject to the ceiling limit of 5 %, which was in relation to the escalation for the materials procured by the appellant/contractor. Mr. Parekh further contends that the appellant/contractor, as per Article 34 of the contract, is obligated to comply with the statutory obligations, which includes statutory increase in the minimum wages payable to the workers and, as such, would be entitled for the escalation of labour component in case of statutory increase in minimum wages. To fortify his submission he places reliance on the judgment of this Court in *Krishna Kumar Madhok v. Union of India & Ors.*, (1980) ILR NULL 164.

14. On the hand, Mr. Sethi, Learned Senior counsel for the Respondent, while putting forth and relying upon the aforementioned reasoning given by the Arbitral tribunal and Learned Single Judge in rejecting the claim of the appellant herein, submits that a perusal of the tender submitted by the appellant on 15.05.1985 clearly suggested that the appellant had gone through each and every term of the tender/contract. It is submitted that after going through the same, the appellant had suggested certain changes in the contract vide letters dated 15.05.1985 and 16.05.1985, which, thereafter, came to be formalised, awarded to and accepted by- the appellant on 20.07.1985. Thus, the appellant entered into the contract with open eyes, being well aware of the 5% ceiling clause in escalation of costs.

15. It is further submitted that the value of the contract had been revised to Rs. 3.5 Crores and the date of completion of the work was also extended to 30.04.1987. Yet the appellant contractor did not raise any objection. It is submitted that the argument about Clause 12 of the Contract was not raised at any stage, i.e. either during the pendency of the contract; during the arbitration, or, even before the Ld. Single Judge. The appellant cannot be heard, at this juncture to claim that the change in the terms was fundamental or the ceiling was illegal or against public policy. It is also submitted that Clause 12 has no application in the facts of the case.

16. Mr. Sethi submits that, even otherwise, in view of the express stipulation/ceiling with regards to the claim of the contractor for escalation charges, the appellant contractor cannot claim any amount *de hors* the contract. To bolster his submission, Mr Sethi has sought to place reliance on the judgment of the Supreme Court in the cases of ***Continental Construction Co. Ltd. v. State of Madhya Pradesh***, AIR 1988 SC 1166, and ***New India Civil Erectors (P.) Ltd. v. Oil and Natural Gas Corporation***, AIR 1997 SC 1980.

17. Having perused the award and the impugned judgment of the Ld. Single Judge and considered the rival submissions, we are of the view that there is no merit in the present appeal and the same is liable to be dismissed. It is clear from a bare perusal of the impugned award that the learned Arbitrator has, in depth, examined the contractual terms and given his interpretation to the same. The interpretation given by the learned Arbitrator cannot be said to be perverse or contrary to the terms of the contract. It is a plausible interpretation. The Court while hearing objections

to the Award does not sit in appeal over the Award and would not interfere with an Award if it is founded upon a plausible interpretation of the contractual terms. The reasoning adopted by the learned Arbitrator which has found favour with the learned Single Judge as well, cannot be said to be misdirected or to constitute a patent illegality in the award. \

18. The judgment of the Supreme Court in ***Tarapore & Co.*** (supra) relied upon by the appellant has been distinguished by the learned Arbitrator by observing that in that case, there was no express clause providing for a ceiling on the escalation or compensation payable to the contractor on account of increase in prices during the continuation of the contract, whereas, in the present case the contract expressly limits the right of contractor to claim escalation to 5% of the contract value. In fact, the respondents have relied upon ***Continental Construction Co. Ltd.*** (supra) wherein the Supreme Court had the occasion to distinguish the judgment in ***Tarapore & Co.*** (supra), in the aforesaid terms. Para 10 of the judgment in ***Continental Construction Co. Ltd.*** (supra) reads as follows:

“10. The question about specific reference on a question of law was examined by this Court recently in the case of Tarapore and Company v. Cochin Shipyard Ltd., Cochin [(1984) 2 SCC 680]. There it was observed that if the agreed fact situation, on the basis of which agreement was entered into, ceases to exist, the agreement to that extent would become otiose. If rate initially quoted by the contractor became irrelevant due to subsequent price escalation, it was held in that case that contractor's claim for compensation for the excess expenditure incurred due to the price rise could not be turned down on ground of absence of price escalation clause in that regard in the contract. Agreement as a whole has to be read. Reliance was placed very heavily on this decision on behalf of the

appellant before us. It has to be borne in mind that in the instant case there are specific clauses referred to hereinbefore which barred consideration of extra claims in the event of price escalation. That was not so in Tarapore and Company case [(1984) 2 SCC 680]. That made all the difference. The basis of bargain between the parties in both these two cases were entirely different.” (emphasis supplied)

19. For the same reason, the judgments in *Food Corporation of India* (supra) and *Arvind Khanna* (supra) have no application in the facts and circumstances of the present case.

20. Reliance placed on *Krishan Kumar Madhok* (supra) also appears to be misplaced. In that case, the term of the contract stated that the Contractor shall have no claim whatsoever, if on account of any “*local regulations or otherwise*”, he is required to pay wages in excess of the fair wages shown in the schedule of fair wages. The increase in the fair wages in that case was not affected by any “*local regulation*”, but by the notification issued by the Central Government. In these circumstances, the claim of the Contractor was allowed as the fair wages were effected not by a local regulation. The word, “*otherwise*” employed in the tender condition was interpreted *ejusdem generis* with the words, “*local regulation*”, to mean increase in wages due to local causes. The said case, therefore, has no application in the facts of the present case.

21. The appellant has lastly relied upon the judgment of the Andhra Pradesh High Court in *T.A.Chaudhary* (supra). It was the case of the Contractor that on account of the delay on the part of the department, in

handing over the site completely, the work was held up and consequently the time for completion of the work was extended from time to time on account of which the contractor was made to pay escalated rates. The Department, on the other hand, resisted the claim for compensation by placing reliance upon Clause 59 of the Contract which, in effect, provided that no claim for compensation on account of delays or hindrances to the work from any acts whatsoever shall lie, except as defined in the contract. Reasonable extension of time was to be allowed by the Executive Engineer/office competent to sanction extension for unavoidable delays which may result from causes beyond the control of the Contractor. The Andhra Pradesh High Court after taking into account the provisions of the Contract Act and in particular Sections 23 and 73 thereof opined that no agreement can overwrite the statutory provisions and such an agreement could be *void ab initio*. The Court further observed that in the instant case, the contractor was expected to commence the work only after the site was handed over to it by the Department. Referring to Section 54 of the Contract Act, it was held that the Department would be liable to compensate the contractor for any loss sustained by the latter on account of non-performance of the contract. In such circumstances, it was held that clause 59 cannot come in the way, which would apply only for delays which were beyond the control of the contractor – which did not include delays on the part of the Department. It was held that escalation of prices is not covered by clause 59 and what is contemplated under clause 59 is only compensation for the delays committed and it never prohibited the contractor from claiming the escalation charges.

22. In our view, the aforesaid decision has no application in the facts of the present case. Firstly, the present is not a case which prohibits the grant of compensation to the appellant for any wrong doing, act or omission of the respondent. Secondly, the contract does provide for escalation to the extent of 5% of the contract value. What it does is to prevent any further escalation. The imposition of limitation on the amount of escalation that the Contractor may claim by a contractual term cannot be said to be a term which offends public policy or to be forbidden by law. In contractual matters, the promisee may desire that the promisor should make a definite promise with regard to the costs to be incurred by the promisee for getting the work done. Such kind of contracts are not unknown to law. Fixed price or lump sum contracts are commonplace. It is for the promisor to make his own estimation and evaluation on the basis of his experience and to make his offer on that basis, keeping in view the contractual terms. As observed by the Ld. Arbitrator, it is not that the Contractor must make profit in every contract. In business, a party may make profit in some contracts while incur losses in others. These are business risks and hazards which every businessman has to face. Moreover, the appellant, as observed by the Ld. Arbitrator failed to show that it had actually incurred an overall loss on account of escalation in labour prices. This decision was rendered on the interpretation of the contractual clause 59 in that case, which is not the same as clause 3 in the present contract.

23. The ceiling of 5% increase in the wages as provided for in the contract does not mandate that the appellant shall not make payment of wages beyond the increase of 5%. It only limits the right of the appellant to

recover from the respondent any increase in wages statutorily made beyond the extent of 5%. The contractual clause in question, therefore, cannot be said to be contrary to any statutory provision or void on that account.

24. For all the aforesaid reasons, we find no merit in the present appeal and dismiss the same leaving, the parties to bear their own costs.

(VIPIN SANGHI)
JUDGE

(SANJAY KISHAN KAUL)
JUDGE

DECEMBER 05, 2012
bsr/sl