

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

% *Judgment reserved on: 20th July, 2016*
Judgment pronounced on: 2nd August, 2016

+ **I.A. No.17289/2014 in CS(OS) No.1018/2014**

KOCHHAR CONSTRUCTION WORKS Plaintiff
Through Mr.P.S. Bindra, Adv. with
Ms.Ashmita Yadav, Adv.

versus

DDA & ORS Defendants
Through Ms.Beenashaw N. Soni, Adv. with
Mr.Aakash Yadav, Adv. for DDA.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The plaintiff has filed objections being I.A. No. 17289/2014 under Section 30 & 33 of the Arbitration Act, 1940 (hereinafter referred to as the "Act") to the award dated 12th March, 2014 passed by Arbitrator/defendant No.2 Sh. Gurmukh Singh Bhatia.
2. It is pertinent to mention that the main suit being CS (OS) No. 1018/2014 under Section 14 of the Act was filed by the plaintiff for seeking directions to the defendant No. 2 to file the original Award dated 12th March, 2014 with depositions and the arbitration proceedings in this Court. Directions were issued accordingly to the defendant No.2. The arbitral record along with the original award dated 12th March, 2014 was filed and by order dated 28th July, 2014 the suit was disposed of. Thereafter, the above mentioned objections were filed challenging the impugned award dated 12th March, 2014.

3. The brief facts of the case are that the plaintiff was awarded the contract of construction of 120 LIG and 80 MIG Flats in 'Pocket-D/1/C, Janakpuri', by the defendant No.1/DDA vide Agreement bearing No.93/EE/HD-VII/80-81.

4. As disputes and differences arose between the parties, the plaintiff invoked arbitration and Sh.S.Nagarajan was appointed as sole Arbitrator by the defendant No.1/DDA vide letter dated 16th January, 1991 who heard the parties and published the award on 28th August, 1993.

5. The defendant No.1 filed objections against the aforesaid award which were dismissed and the award was made Rule of Court on 16th December, 1999 by this Court.

6. Aggrieved by the aforesaid dismissal of objections, the defendant No.1/DDA had filed an appeal being FAO(OS)No.61/2000 which was disposed of by Division Bench confirming the award on all claims except claim No.8 which was directed to be re-adjudicated on existing pleadings by freshly appointed Arbitrator on 'item-wise'.

7. Thereafter, vide communication of defendant No.1/DDA dated 11th September, 2009, Sh. J.K.Garg, S.E. (Arbitration) was appointed as Arbitrator to re-adjudicate claim No.8 who passed an award dated 17th March, 2010.

8. Aggrieved by the said award dated 11th September, 2009, the plaintiff challenged the same on the grounds that the award made was contrary to the directions issued by the Division Bench of this Court wherein it was challenged that the deductions made in the award were completely disproportionate to the value of works in question.

9. Ultimately, the said award dated 17th March, 2010 was set aside by this Court by judgment dated 3rd September, 2012 with directions to re-adjudicate Claim No.8 on the basis of the terms listed in the judgment.

10. This time Sh.Gurmukh Singh Bhatia S.E. (Arbitration) was appointed by the defendant as the sole Arbitrator who had passed the impugned award dated 12th March, 2014 which was challenged by the plaintiff.

11. In reply to the objections, it is alleged by the defendant No.1 that the objections filed by the plaintiff are not maintainable under Sections 30 & 33 of the Act and this Court should not interfere with the award as the Arbitrator has not misconducted himself or with the proceedings or there is no error apparent on the face of the award. The said objections does not fall in any of the categories as provided under the said provision, thus, the objections are not maintainable. It is submitted that the Arbitrator had heard the parties at length and recorded item wise observation and dealt with all the 12 hindrances recorded in the order dated 17th March, 2010. It is argued on behalf of the defendant No.1/DDA that the Arbitrator had to freshly adjudicate claim No.8 and he was rightly within his rights to adopt the method of calculations, as the contract provides for cost index method as the said method is more appropriate. It is also submitted that the Arbitrator has calculated the Average Cost Index during 1981 to 1983 and then calculated the escalation. The indices adopted for calculating the escalation in respect of claim No.8 is in order and as per the indices notified/circulated by the Govt. of NCT of Delhi and the percentage of escalation payable as 23.8% cannot be challenged as requisite details for calculating the escalation have

been given in the award published by the Arbitrator Sh.Gurumukh Bhatia. The Arbitrator has correctly calculated the cost index for June, 1985 as 225 and cost index in 1981 as 100 as the same is in order as per the indices notified/circulated by the Govt. of NCT of Delhi.

12. Admittedly, Sh.S.Nagarajan, Ex-Arbitrator had compared two methods for computing compensation in his award dated 28th August, 1993 in para 8.3.3, being the "Trend of Tenders Method" and the "Cost Index Method" and awarded the amount on Claim No.8 for a sum of Rs.12,58,000/- against Rs.15,00,000/- as claimed by the plaintiff. In the impugned award against claim No.8, Rs.9,86,675/- was awarded by the third Arbitrator.

13. It is also a matter of fact that Sh. J.K.Garg, the second Ex-Arbitrator also relied upon the same methods. In these comparisons, both the Ex-Arbitrators chose to rely upon the "Trend of Tenders Method" to be the best way of approving compensation. Apart from being lower of the two methods, this method was also closest to reality, as it was on the basis of future tenders awarded very close to the Arbitral site between the same defendant-plaintiff. On the basis of this method both the Ex-Arbitrators had calculated the escalation payable to be 28.37%. The said percentage escalation was neither challenged by the parties nor was in the reference terms as set in the judgement dated 3rd September, 2012 for re-adjudicating Claim No.8. Without assigning any valid reasons, the present Arbitrator has used the other method being the "Cost Index Method" as against the earlier "Trend of Tenders Method" to recalculate the percentage escalation payable. The plaintiff states

that he has gone beyond his terms of reference as set in the judgment dated 3rd September, 2012.

14. It is a matter of fact that in initial award dated 28th August, 1993 Ex. Arbitrator Sh S.Nagarajan had already compared both these methods and calculated the escalation payable by each which comes to:

Para 8.3.4 (a) "Trend of Tenders Method" to be 28.37%

Para 8.3.5 (b) "Cost Index Method" to be 33.82%

He had thereafter affirmed that the escalation by the "Cost Index Method" comes to be higher than the "Trend of Tenders Method" and as such lower of the two is to be considered. In para 8.3.5 (b) calculated the Cost Index for June, 1985 to be 363.80 whereas the present Arbitrator has considered the same to be 225 and as such had arrived at much lower escalation and awarded a sum of Rs.9,86,675/- as against the amount awarded Rs.12,58,000/-.

In the impugned award, the Arbitrator has not used the data available in the existing pleadings instead has inputted fresh data from his own self, which is contrary to the order of Division Bench on 16th July, 2009 and judgment rendered by the Single Bench on 3rd September, 2012 of this Court wherein claim no.8 was to be re-adjudicated on the basis of existing pleadings.

15. In normal cases, where there are no such types of directions passed, the submission in those circumstances made on behalf of the defendant No.1 may have force. No doubt in such situation, the Arbitrator has within his rights to adopt the method of calculations or

any other method if the Arbitral Tribunal feels that any of the method is more appropriate in terms of the contract.

However, the situation in the present case is different as the two benches of this Court has specifically passed the direction to the effect that the:-

"Claim no.8 is remitted to the learned Arbitrator for adjudication in the above terms, but on the basis of existing pleadings."

Para 13, Judgement dated 3rd September, 2012

"The Arbitrator, on existing pleadings, shall decide claim no. 8 as per the order of this court"

Para 6, Order in FAO(OS)61/2000 dated 16th July, 2009

16. The Arbitrator had held that absolutely no work, other than brick edging along road berms had happened between July, 1983 till October, 1985 wherein the plaintiff was forced to stay on and hand over the flats to the respective allottees since during this period the plaintiff was required to do the finishing works; being various coats of paints, polish, whitewash, external snocem, floor/skirting and vertical marble grinding, fixing of glass panes, shutters, locks and various other items which though were already measured in the measurement books but their payment was released only as a "part rate", to ensure that balance work was done as and when the flats were allotted and these items were progressed.

17. It is rightly pleaded by the plaintiff that as per the nomenclature of these items in the agreement and specifications, all the finishing items required three or more coats for the final finishing including grinding. Since only proportionate payments were released to the plaintiff, he was compelled to maintain his labour and staff for

the required works. Both the Ex. Arbitrators had duly considered all these factors while considering an average between January, 1982 (256 LIG @84.25% over DSR 77) and January, 1984 (144 LIG @39.90% over DSR 81) to be the fair cut off dates for the calculation of escalation. Though the completion was recorded on 25th October, 1985 both the Ex. Arbitrators had only considered the date for calculating escalation up to January, 1984 instead of October, 1985 thereby not considering any escalation for the last 21 months. As the earlier Ex. Arbitrators had correctly considered the percentage escalation payable as 28.37% which was not challenged by either party, there was no reason for the present Arbitrator to recalculate the same by another method. The present Arbitrator has in fact erred in doing so as he has gone beyond the existing pleadings by using his own wrong data, which is contrary to the existing pleadings and has also erred in calculating the escalation by another method since the earlier escalation was not challenged by either party and also was not in his terms of reference, as per the judgment dated 3rd September, 2012 of this Court.

18. Admittedly, earlier awards passed by Arbitrators had adopted "Trend of Tenders Method" which was not challenged by any of the party. The only area of dispute to be adjudicated upon by the Arbitrator was regarding segregation of claim No.8 to identify items which were barred by restraining clause. The Arbitrator could not have adopted the Cost Index Method and that too on basis of the wrong data which is different from existing data without any basis, since the first Arbitrator had calculated escalation on basis of both the methods and found that escalation as per the correct data on basis of Cost Index Method was 33.82%. Since the same was higher

than "Trend of Tenders Method", the Arbitrator adopted the latter method.

19. The Arbitrator has also gone beyond the existing pleadings relying on new data from his own self to do a fresh calculation to derive the escalation by this method. As can be seen on page No. 9 of the award the Arbitrator has from his own self used wrong indices for the years 1981 and 1985 as 100% and 225% (provided neither by the parties nor as per the existing pleadings). Thereafter, on the basis of these indices (according to the plaintiff, the same are wrong) he has arrived at the percentage escalation payable as 23.80% instead of the earlier 28.37% which was neither challenged by the parties nor was in the terms of reference as set in the judgment dated 3rd September, 2012. There were no findings given by the Division Bench that the Ex-Arbitrator in his award dated 28th May, 1993 ought not to have applied the Trend of Tenders Method nor the defendant No.1 had specifically challenged the said formula in its appeal that the Cost of Index Method was more appropriate. In a nutshell, the view taken by the two Ex-Arbitrators was not challenged. No doubt, the claim No.8 was to be re-adjusted but the same was ought to be as per the terms and directions of the two orders passed earlier. This Court is not giving its finding that the 'Trend of Tenders Method' is only appropriate in such cases, rather in normal cases, the Arbitrator is free and have the rights to adopt the method of calculation on the basis of cost index. However, in the present case, the facts are different for the reasons already explained.

20. The Arbitrator in the present case was just required to segregate claim No.8 on the basis of the restraining clauses on the

terms listed in order dated 3rd September, 2012 passed by this Court. The Arbitrator in the present case, under the garb of segregation has recalculated the escalation by a new method and that too by using wrong input data on his own which is also contrary to the existing data.

21. As regards the issue of limitation raised by the defendant No.1, it is the case of the plaintiff that it had received the award dated 12th March, 2014 under the cover of the letter of even date. Immediately, on receipt of the said award, the plaintiff filed a suit bearing CS (OS) No. 1018/2014 seeking direction to the Arbitrator to file the original award dated 12th March, 2014 along with the proceedings. The said suit was listed before this Court on 15th April, 2014 when notice was issued to the Arbitrator returnable on 28th July, 2014 for filing the award along with the record. Thereafter, the matter was adjourned to 28th July, 2014. On 28th July, 2014 when the matter was listed before this Court, the counsel for the plaintiff was informed that the original arbitral award along with entire record had been filed. As such, the said suit was disposed of. Since the plaintiff had received the notice through this Court of filing of the award by the Arbitrator on 28th July, 2014, the present objections are being filed within the stipulated period of 30 days. Under these circumstances explained, the objections of the defendant No.1 on limitation are rejected.

22. After having considered the entire gamut of the matter, it appears to the Court that there is a force in the submission of the plaintiff that the Arbitrator has erred in restricting the escalation up to July, 1983 wherein the other two Ex. Arbitrators had allowed escalation up to January, 1984, which has neither been challenged

by the parties nor is in the terms of the reference, as per the judgment of this Court dated 3rd September, 2012. The Arbitrator ought to have used the earlier undisputed escalation of 28.37% on the items segregated by him in this award and the correct calculation of escalation should be:

- $49,92,028.25 \times 28.37\% = \text{Rs } 14,16,238 - \text{Rs } 2,17,902$
(payment under clause 10C) =Rs 11,98,336/-.
- Escalation payable up to July 1983 = $11,98,336 \times 623/614$
=Rs 12,15,901/- (A)
- Escalation for brick edging along road berms beyond July 1983 up to 25th October, 1985 equals $9472.15 \times 28.37\% =$
Rs 2,687/- (B)

The total escalation (A) +(B) =Rs 12,18,588/- as against Rs 9,86,675/- awarded by the Arbitrator.

23. In view of such reasons mentioned above, the impugned award is set aside. The objections filed by the plaintiff are allowed.

24. The award against claim No.8 dated 28th August, 1993 should have been for Rs. 12,18,588/- against the initial award of Rs. 12,58,000/- which had been deposited by the defendant No.1 in this Court. Out of the amount deposited, Rs. 50,000/- has already been released back to the defendant No.1 /DDA by the order of this court dated 5th January, 2012. Thus, the plaintiff is entitled to receive the remaining amount of a sum of Rs.10,588/-.

25. No costs.

(MANMOHAN SINGH)
JUDGE

AUGUST 02, 2016