

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 804 OF 1999
IN
ARBITRATION PETITION NO.77 OF 1994

MUNICIPAL CORPORATION OF
 GREATER BOMBAY, a Statutory
 Corporation, constituted under
 the provisions of Bombay Municipal
 Corporation Act, 1988 having
 their office at Mahapalika Building,
 Mahapalika Marg, Mumbai 400 001.

**...APPELLANT/
 Orig. Petitioners**

VERSUS

1. Bharat Construction,
 a Registered firm, carrying on
 their business at D/2-92, Bharat
 Nagar, Grant Road,
 Mumbai – 400 007.
2. D.V. Deshpande, Indian Inhabitant
 residing at 11, Vishwak Artek
 apartment, Bandra (East),
 Mumbai – 400 051.
3. Bharat Infrastructure & Engineering
 Pvt. Ltd., a private Limited Company
 having its registered office at 601,
 Shree Amba Shanti Chambers,
 Off. Church Road, Opp. Hotel Leela,
 Andheri-Kurla Road, Andheri (E),
 Mumbai – 400 059.

...RESPONDENTS/

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Mr. Kevic Setalwad, Sr. Adv. a/w. Mr. Ameya Kulkarni i/b.
 Sandeep Patil for Appellant.

Mr. M.M. Vashi, Sr. Adv. a/w. Ms. Panthi Desai, i/b. M.P. Vashi
 & Associates for Respondents.

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**CORAM: ANOOP V. MOHTA AND
P.R. BORA, JJ.**

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**DATE OF RESERVING THE JUDGMENT : 02.02.2017
DATE OF PRONOUNCING THE JUDGMENT : 05.05.2017**

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JUDGMENT: (*Per P.R.Bora, J.*)

1. This is an appeal against the order of the learned Single Judge dismissing the appellants petition under Section 30 of the Arbitration Act, 1940 for setting aside an award dated 22.06.1993 passed by the sole Arbitrator.

2. In May 1989, the appellant-corporation had invited tenders for the work of re-construction of Zakariya Bunder road from Sewree gate no.8 to Cotton Green Station (Part 2) in cement concrete. In response to the tenders so invited, the respondent no.1 submitted its percentage rate tender on 12.05.1989. The appellant-corporation accepted the tender submitted by the respondent no.1 on 23.09.1989 and directed the respondent no.1 to make preliminary arrangements, so as to commence the work in right direction earnest from 11.10.1989, which date was to be taken as the date of commencement of the said work and from which date the contract period of eight months was to be reckoned.

3. Some delay was caused in commencing the tender work. According to the contractor lack of due co-operation

from the officers of Municipal Corporation was the reason that the work could not be commenced on the stipulated date and also did not progress further in the manner and proportion it ought to have been. Differences went on increasing which ultimately resulted in stoppage of work.

4. Since, disputes and differences arose between the appellant-corporation and the respondent no.1, the same were referred to the sole Arbitration of respondent no.2 under Clause-97 of the General Conditions of Contract for Civil Works, which runs as under:

"97. Arbitration:

All disputes or differences whatsoever which shall at any time arise between the parties hereto touching or concerning the works or the execution or maintenance thereof or this contract or the construction, execution, or maintenance thereof or this contract of the construction meaning operation or effect thereof or, to the rights or liabilities of the parties or arising out of or in relation thereto whether during or after completion of the contract or whether before or after determination, foreclosure or breach of the contract (other than those in respect of which, the decision of any person is by the contract expressed to be final and binding) shall after written notice by either party to the contract to the other of them specify the nature of such dispute or difference and call for the point or points at issue to be referred to the arbitration.....

The Arbitrator shall give a separate award in respect of each dispute or difference referred to him.

5. The learned Arbitrator vide award passed on 22.06.1993 determined an aggregate sum of Rs. 30,51,565/- to be paid by the appellant-corporation to respondent no.1.

6. The award so passed was challenged by the appellant-corporation by filing Arbitration Petition No. 77 of 1994, before the learned Single Judge. It was the contention of the appellant-corporation before the learned Single Judge that, by virtue of Claus-94 of the General Conditions of the Contract, respondent no.1 was not entitled to claim any amount towards the compensation for losses suffered on account of over head expenses or idle labour and machinery and/or reduced productivity. It was also the contention of the appellant-corporation that, the learned Arbitrator was not having any authority to adjudicate the claims raised by the respondent no.1 as they were beyond the scope of reference. As against it, it was the contention of the respondent no.1 that, Clause-94 of the General Conditions of Contract was not applicable in the case and the disputes were referred to arbitration under Clause-96 and 97 and, as such, the Arbitrator was having every authority to adjudicate the said claims.

7. The learned Single Judge after having considered the submissions advanced before her dismissed the petition

filed by the appellant-corporation and passed a decree in terms of the award with further interest @ 18% per annum from the date of decree till the payment/realisation. Aggrieved by, the appellant-corporation has preferred the present appeal.

8. Shri Kevic Setalwad, the learned senior counsel appearing for the appellant-corporation, assailed the impugned judgment on several grounds. The learned senior counsel submitted that, the learned Single Judge failed to appreciate that, under Clause-94 of the General Conditions of Contract there was a prohibition for making or awarding any claim for profit or compensation. According to the learned senior counsel, claim nos. 1 and 2 were, therefore, not arbitrable. The learned senior counsel further submitted that, the Arbitrator had exceeded his jurisdiction and had travelled beyond the scope of contract by entertaining such claims. The learned senior counsel submitted that, the learned Single Judge failed in appreciating that, claim nos. 1 and 2 were even otherwise overlapping claims and damages could not have been awarded twice under Section 73 of the Contract Act, as held by the Hon'ble Supreme Court in the case of **Union of India V/s. Jain Associates** reported in **1994 (4) SCC 665**. The learned senior counsel further submitted that, the judgment delivered by Justice K.G. Shah in Arbitration Petition No. 151 of 1994 was

not binding, since it was *per incuriam*. The learned senior counsel submitted that, the judgment of the Hon'ble Apex Court in the case of **Union of India V/s. Jain Associates cited (supra)** was not brought to the notice of Justice K.G. Shah. The learned senior counsel further submitted that, the learned Single Judge failed to appreciate that, the Arbitrator was bound to give speaking award, in view of the fact that, a public body like the appellant-corporation was a party to the arbitration proceedings. The learned senior counsel further submitted that, when a specific objection was raised by the appellant-corporation in respect of arbitrability, the Arbitrator was duty bound to decide the said issue, whereas, the Arbitrator without deciding the said issue passed a non-speaking award. The learned senior counsel submitted that, the learned Single Judge on this ground alone ought to have set aside the arbitration award. For the aforesaid reasons, the learned senior counsel, prayed for setting aside the order passed by the learned Single Judge and consequently the award passed by the Arbitrator.

9. Shri M.M. Vashi, the learned senior counsel appearing for respondent no.1 resisted the contentions raised on behalf of the appellant-corporation. The learned senior counsel submitted that, having regard to the facts involved in the present case, Clause-94 of the General Conditions of the

Contract, is not attracted and there was no impediment for passing of an award by the Arbitrator for loss of profit and overhead expenses etc. The learned senior counsel submitted that, the claims raised by the contractor and awarded by the Arbitrator were well within the scope of arbitration clause. The learned senior counsel submitted that, the award which has been passed after considering voluminous documentary evidence, cannot be faulted with. The learned senior counsel further submitted that, the learned Single Judge has rightly dismissed the arbitration petition filed by the appellant-corporation. The learned senior counsel, therefore, prayed for dismissal of the appeal.

10. We have carefully considered the submissions made on behalf of the learned senior counsel appearing for the respective parties. We have also perused the award passed by the Arbitrator and the order passed by the learned Single Judge in the arbitration petition. The award passed by the Arbitrator is mainly challenged on the ground that, when the appellant-corporation had foreclosed the subject work under Clause-94 of the General Conditions of Contract for Civil Works, the Arbitrator could not have entertained the claims raised by the Contractor not falling within the scope of the said clause. Since the controversy revolves around Clause-94. We deem it

appropriate to re-produce the said cause which reads thus:

94. Foreclosure of contract in full or in part.

If at any time after acceptance of the tender the Commissioner shall decide to abandon or reduce the scope of the works for any reasons whatsoever and hence not require the whole or any part of the works to be carried out, he shall inform the contractor in writing to that effect and the contractor shall have no claim to any payment or compensation or otherwise whatsoever, on account of any profit or advantage which he might have derived from the execution of the works in full but which he did not derive in consequence of the foreclosure of the whole or part of the works.

The contractor shall be paid at the contract rates full amount for works executed at site, and in addition, reasonable amount as certified by the Engineer for the value of such material (which material thereupon become the property of the Corporation) and also such further allowances as the Engineer may think reasonable and fair in respect of (a) any expenditure incurred by the contractor towards preliminary works etc. and (b) other reasonable and proper engagement the contractor may have entered into for carrying out the work. (c) such compensation as considered equitable under the circumstances.

11. Now it has to be seen, as to who has foreclosed the work, whether the Commissioner of the appellant-corporation or respondent no.1. As has been argued by the learned senior counsel appearing for the appellant-corporation, the corporation foreclosed the work. Respondent No.1 has disputed this fact. It is the contention of respondent no.1 that, because of the adamant and non co-operative approach adopted by the

appellant-corporation the contract work stood foreclosed.

12. The record of the case shows that vide order passed on 19.07.2007, the present appeal was dismissed by the Division Bench, as in its opinion the controversy was covered by an earlier decision of this Court in Appeal No. 1148 of 1997 given on 27.01.2005 (**Municipal Corporation of Greater Bombay V/s. Atul Raj Builders Pvt. Ltd.**). The appellant-corporation filed an appeal before the Hon'ble Apex Court against the aforesaid judgment and the Hon'ble Apex Court has set aside the said order in Civil Appeal No. 5168 of 2009 arising out of (SLP (C) No. 16133 of 2007) decided on 07.08.2009. Perusal of the order passed by the Hon'ble Apex Court in the aforesaid appeal reveals that, a submission was made before the Hon'ble Apex Court by the appellant-corporation that, it foreclosed the contract and contractor was accordingly intimated that, the corporation will not make any payment for any loss suffered on account of inability on the part of the contractor to complete the contract within the stipulated time. In view of the submission so made on behalf of the appellant Corporation, the Honourable Supreme Court held that the matter needs to be re-examined by the Division Bench afresh. The Honourable Apex Court has, therefore, remitted the matter back by keeping all the contentions of the parties open, to be

agitated before this Court. Accordingly, the matter was heard afresh.

13. After having considered the submissions made on behalf of the learned Counsel appearing for the respective parties and on perusal of the material on record, we find it difficult to accept the contention raised by the appellant corporation that it foreclosed the subject work by invoking clause 94 of the General Conditions of Contract for Civil Works.

14. In the proceedings before the Arbitrator appellant Corporation had submitted its written statement. In paragraph nos.5 (b) and 5 (c) of the said written statement, the appellant Corporation has averred thus:

"5 (b) Under the terms and conditions of the contract incorporated in the above documents, the Claimants contractor were required to carry out the work in a phased manner including completion of certain pre-limineties as required under the Special Directions / Special Conditions of the Contract before commencement of the work. The sequential work was not carried out by the Claimants, as a result of which there has been delay in completing the work within the stipulated period of time. The Claimants were thereafter given an option to complete the work after the monsoon of 1990 on the same terms and conditions of foreclose the contract and the CLAIMANTS HAVE OPTED TO foreclose the contract as they refused to complete the work on the same terms and conditions and therefore, asked for 30% rise in the contract amount which is clearly impermissible as the contract postulates no escalation whatsoever.

(c) In these circumstances, the contract stood foreclosed under the terms and conditions of the contract. In view of the provisions of Clause 94 of the General Conditions of Contract it is clear that for any reason whatsoever if the work is abandoned or foreclosed, the contractor shall have no claim whatsoever to any payment or compensation or otherwise on account of any profit or advantage which he might have derived from the exclusion of the work in full but which he did not derive in consequence of the foreclosure of the whole or part of the work. From the above clause 94 of the General Conditions of Contract it is clear that the Claimants' claim is clearly impermissible. "

15. The contentions raised by the appellant corporation in paragraph Nos. 50, 52 and 57 also have some bearing on the plea raised by the appellant Corporation as about application of clause 94. We, therefore, deem it appropriate to reproduce hereinbelow the said portion in the written statement of the Corporation:

"50. With reference to paragraph 45 these respondents state that the respondents offered an opportunity to all the agencies working, including claimants to show their willingness to continue the work after monsoon on same rates, terms and conditions or foreclose the same. Many agencies opted to work on the same rates, terms and conditions and other, opted foreclosure. However, the Claimant opted to demand the increased rates (30%), which were not acceptable to Respondent and, therefore, that request was rejected.

52. With reference to paragraph 47 these respondents state that the claimants refused to work with the same terms and conditions after monsoon and therefore contract stood foreclosed.

57. With reference to paragraph 52 these respondents state that the claimant's statement is not correct. The work, left incomplete by the claimant, was awarded to the other contractors by following the regular procedure of inviting tenders. Further, if the work would have been completed by the Claimants, within the contract period, the question of granting the incomplete work to other agency would not have arisen at all. In fact, due to fault on part of the claimants, the Respondent is put to loss and the claimant do not deserve any compensation and, instead, are liable for penalty and make up the loss to the Respondents. "

16. Considering the contentions raised and the plea taken by the appellant Corporation in its written statement as reproduced herein-above, we are unable to accept the contention raised on behalf of the appellant Corporation that it abandoned the subject work or foreclosed the said work by invoking clause 94. What transpired from the pleadings of the appellant Corporation is the fact that the circumstances so arose that the subject work stood foreclosed. From the averments in paragraph No.5(b) of the written statement, reproduced herein above, it is quite evident that it was the case pleaded by the appellant Corporation before the Arbitrator that the contractor opted to foreclose the contract by refusing to complete the work on the same terms and conditions. Neither in paragraph No.5(b) nor in paragraph No.5(c) any such unambiguous and concrete case is made out by the Corporation that the Commissioner of the Corporation abandoned or

foreclosed the subject work by invoking clause 94. It is nowhere asserted by the appellant Corporation that the Commissioner of the appellant corporation took conscious decision to foreclose the subject work and communicated the said decision to the contractor i.e. respondent no.1.

17. The averments in paragraph no.57 of the written statement leave no doubt that there was no abandonment of the subject work by the appellant Corporation as contemplated under clause 94 of the General Conditions of Contract and Civil Works. On the contrary, in the Arbitration Petition No.77/1994, in paragraph no.9(g), it is the contention of the appellant Corporation that the contractor abandoned the work. We deem it appropriate to reproduce hereinbelow the contention so raised in the said paragraph No.9(g) which reads thus:

" In fact, it has been established beyond a shadow of doubt that because of shortfall of labour and machinery, the work was not completed on time and respondent no.1 abandoned the work. "

18. It is further significant to note that in the present appeal also it is the case put forth by the appellant Corporation that both the parties i.e. the Corporation and the contractor agreed to foreclose the contract under clause 94 of the General

Conditions of Contract. Ground 'I' in the memo of appeal in that regard reads thus:

"(I) The learned Single Judge ought to have appreciated that since there was no progress on the part of respondent No.1 in completing the work both the parties agreed to foreclose the contract under Clause 94 of the General Conditions of Contract. The appellants thereafter invited a fresh tender and awarded the work to a new contractor. The proposal of the respondent No.1 was conditional and was not acceptable to the appellants."

19. The contractor i.e. respondent no.1 has denied that he had agreed to foreclose the contract under clause 94 as has been canvassed by the appellant Corporation.

20. It was sought to be canvassed by the learned counsel appearing for the appellant Corporation that the contractor has not disputed the fact that the appellant Corporation foreclosed the contract. Our attention was invited by the learned Senior Counsel to paragraph No.47 of the statement of claim submitted by the contractor and more particularly to the first sentence of the said paragraph to the effect that, "The respondent finally foreclosed the contract". To establish that the foreclosure of the subject work falls within the purview of clause 94, the primary burden was on the appellant Corporation to prove the said fact with reasonable certainty. However, as noted by us herein-above, the

Corporation has not come out with any such concrete case or it is nowhere asserted by the appellant Corporation that the work was foreclosed or abandoned by the decision of the Commissioner of the appellant Corporation. As is revealing from the material on record, an offer was given by the appellant Corporation to respondent no.1 contractor to complete the work on the same terms and conditions after the period of Monsoon expires or to foreclose the contract. From the offer so given also it is clear that the option to foreclose the contract was given to the contractor. The material on record further reveals that the contractor did not accept the said offer and as has been contended by the appellant Corporation in paragraph No.5(b) of its written statement reproduced herein-above, "the claimants i.e. respondent no.1 contractor opted to foreclose the contract".

21. From the facts as aforesaid, it is quite clear that the option to foreclose the contract was not exercised by the appellant Corporation. For invoking clause 94 mere abandonment or foreclosure of the work is not enough; it has to be further established that the abandonment or foreclosure of the work was by the appellant Corporation. Though an attempt has been made to suggest that respondent no.1 had agreed to foreclose the contract under clause 94 of the General Conditions

of the Contract, respondent no.1 has flatly denied the said fact.

22. The appellant Corporation has thus failed in establishing that it had abandoned or foreclosed the subject work by invoking clause 94. As noted earlier, clause 94 would come into operation only if the foreclosure of the work is by the Commissioner of Municipal Corporation.

23. Thus, though before the Honourable Apex Court a case was put forth by the appellant Corporation that it foreclosed the contract and the contractor was intimated that the Corporation will not make any payment towards loss suffered by the contractor on account of the inability on the part of the contractor to complete the contract within the stipulated time, the Appellant corporation has utterly failed in substantiating the said fact. In the circumstances, obviously, clause 94 of the General Conditions of the Contract would not have any application. The learned Single Judge has rightly rejected such contention raised by the appellant Corporation. We do not see any reason to cause any interference in the finding so recorded by the learned Single Judge.

24. In view of the finding recorded by us that clause 94 would not be applicable in the present case, the other objection pressed on behalf of the appellant Corporation that the

Arbitrator did not decide arbitrability of the claim as set up by the contractor and disputed by the appellant Corporation loses its significance.

25. Another objection raised by the appellant Corporation is that the learned Single Judge has failed in appreciating that though the amount claimed by respondent no.1 vide claim no.2 is, in fact, covered in claim no.1, the Arbitrator has awarded the claim under both the heads and, thus, for one claim, amount has been awarded twice. Learned Counsel submitted that in view of the provisions under Section 73 of the Contract Act, such course is impermissible. The submission so made, of course, has been denied by respondent no.1.

26. In the statement of claim filed before the Arbitrator respondent no.1 has claimed an amount of Rs.60,87,435/- towards compensation for losses on account of overheads and profits. As per the particulars provided in paragraph no.61 of the statement of claim, the contract sum is shown as Rs.2,89,83,931/-. Respondent no.1 has calculated his profit at 25 per cent which comes to Rs.72,45,995/-. The value of the work executed during the stipulated period, is shown to the tune of Rs.46,34,160/-. The profit, which could have been

derived from the value of the works so executed is shown as Rs.11,58,540/-. It is calculated at the rate of 25 per cent of the work executed. Deducting the said amount from the total estimated profit, the total loss on account of overheads and profits is shown to be Rs.60,87,435/- (Rs.72,45,995/- (minus) Rs.11,58,540/- = 60,87,435/-). Towards claim no.1, the Arbitrator has awarded the amount of Rs.17,10,903/-.

27. In paragraph no.62 of the statement of claim submitted by respondent no.1 before the arbitrator, he has provided the particulars in regard to claim no.2 towards the losses suffered on account of the labour and machinery and / or reduced productivity. In the particulars so provided, cost of the work put up to tender is the same i.e. Rs.2,89,83,981/-. Below the said amount, the sum of Rs.40,00,000/- is shown by way of provision made for machinery and equipment. Value of the work done during the stipulated period is again the same i.e. Rs.46,34,160/-. Then the pro rate payment received is shown to the tune of Rs.6,48,776.80 and the net loss suffered on account of the labour and machinery and reduced productivity is shown to the tune of Rs.33,51,224/-. The Arbitrator has awarded a sum of Rs.10,35,166/- towards the said claim.

28. Though neither in the statement of claim nor in the award passed by the Arbitrator it is clarified as to in what manner the loss was assessed for claim no.2, it appears that respondent no.1 had made the provision of Rs.40,00,000/- for machinery and equipments and from out of the work executed by him in the stipulated period to the extent of Rs.46,34,120/-, the proportionate profit or return was shown by respondent no.1 to the tune of Rs.6,48,776.80 and thus, the net loss for the labour, machinery and reduced productivity was claimed to the tune of Rs. 33,51,224/-. In fact, some explanation and some more particulars must have been provided by the learned Arbitrator while allowing the respective claims and passing the award in that regard. Admittedly, no such reasons are assigned and the award passed is a non speaking award. No doubt, this Court has certain limitations while examining a non speaking award, however, as held by the Honourable Apex Court in the case of **State of J & K and another Vs. Devdatta Pandit ((1999) 7 SCC 339)**, there is no complete bar in examining whether the award is in terms of the Reference or in terms of the contract.

29. As is revealing from the material on record, respondent no.1 contractor was supposed to keep engaged the required number of labours and machinery exclusively for the

contract work. In the circumstances, even if the contract was not allowed to be performed fully, and respondent no.1 had to keep his machinery and labour idle in the relevant period, the losses suffered on account of the idle labour and machinery which are claimed under claim no.2 could not have been awarded separately for the reason that all these claims are obviously covered by claim no.1. It appears to us that when the estimated loss in profit was claimed by respondent no.1 vide claim no.1, it was not open for respondent no.1 to again claim the losses suffered on account of the idle labour and machinery separately under claim no.2. Even otherwise, had the work been not abandoned, the respondent contractor must have utilized the said labour as well as machinery since according to his own case, the same was earmarked specifically for the subject work. In the circumstances, the claim awarded towards claim no.2 by the Arbitrator cannot be sustained. Learned Single Judge has failed in appreciating this aspect and has wrongly held that claim no.1 and claim no.2 were independent of each other. We set aside the finding recorded by the learned Single Judge.

30. One more objection has been raised by the appellant Corporation which relates to grant of interest as awarded by the Arbitrator at the rate of 18 per cent per annum

which has been confirmed by the learned Single Judge. We find substance in the objection so raised. Having regard to the fact that the award is passed against a local body and the project which was the subject matter of the contract was not a profit making project, we deem it appropriate to award the interest at the rate of 10 per cent per annum instead of Rs.18 per cent per annum as awarded by the learned Single Judge. We are, therefore, inclined to partly allow the present appeal. Hence, the following order:

ORDER

- i) The Appeal is partly allowed.
- ii) The Award dated 22nd June, 1993, so far as it relates to claim no.2, stands quashed and set aside.
- iii) We hold respondent no.1 entitled to receive the amount awarded by the learned Arbitrator towards claim nos. 1, 4 and 6 with interest thereon at the rate of 10 per cent per annum from the date of award till its realization.
- iv) The Appeal stands allowed in the aforesaid terms.

**(P.R.BORA)
JUDGE**

**(ANOOP V.MOHTA)
JUDGE**