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

\+ FAO(OS) (COMM) 286/2018 & CM Appl. 50292-50293/2018

M/S SATISH BUILDERS ..... Appellant
Through: Mr. Sunil K. Mittal, Advocate

versus

DELHI JAL BOARD ..... Respondent
Through: Mr.Naresh Sharma, Advocate

**CORAM:**
**HON'BLE MR. JUSTICE S. RAVINDRA BHAT**
**HON’BLE MR. JUSTICE PRATEEK JALAN**

**<u>O R D E R</u>**

% **03.12.2018**

1. This appeal is directed against a judgment of a learned Single Judge dated 23.08.2018, to the extent that an arbitral award dated 09.09.2011 in favour of the Appellant has been set aside in respect of two of the Appellant's claims.

2. The contract between the parties required the Appellant to construct staff quarters on behalf of the Respondent. It is undisputed that originally, it was the responsibility of the Respondent to supply the cement and steel required for the work. However, during the course of execution, this arrangement was altered and parties agreed that the Appellant would procure these materials. Claims no. 19 and 20 raised by the Appellant before the learned Arbitrator were for payment of an additional 10% of the value of the

cement and steel which it had to procure as result of this altered arrangement.

3. The learned Arbitrator awarded this claim in favour of the Appellant with the following observations:-

> *"51. These claims are based on the fact that cement and steel were to be supplied as per terms of the contract by the respondent. But during the execution of the work, the respondent asked the claimant to purchase at his cost the cement and steel from the open market. In order to execute the work claimant did purchase both the materials by investing his money. Hence, to my mind, claimant is entitled to be compensated for the investment made by him which in fact was the contractual obligation of the respondent. Since the respondent failed to supply the material from its store and asked the claimant to purchase the same from open market with his money, hence for the investment made by the claimant he is entitled to 10% profit on the investment made in the purchase of cement and steel supplied to the respondent 10% against supply of cement to the respondent. 10% against supply of cement comes to Rs. 3,95,490/- (the amount corrected in rejoinder) and against steel it comes to Rs. 62,396/-. Details of which are given in Annexure C-13 and C-14 respectively. Accordingly, I award an amount of Rs. 4,57,886/- in favour of the claimant."*

4. By the impugned order, the learned Single Judge allowed the Respondent's petition Section under 34 of the Arbitration and Conciliation Act, 1996 ("the Act") and set aside the award in respect of these claims, on the finding that there was no contractual provision or other agreement permitting the Appellant's claim of 10% in addition to the actual cost of cement and steel.

5. Mr. Sunil Mittal, learned counsel for the Appellant submitted that the Appellant was entitled to some amount, over and above the cost of the

materials procured, as compensation for taking over the responsibility of the Respondent and for the fact that it had to purchase the materials at its cost and was reimbursed by the Respondent only later. He drew our attention to parts of the cross-examination of the witnesses before the learned Arbitrator to show that parties accepted the position that the responsibility of the Respondent had subsequently been placed on the Appellant. Mr. Mittal finally contended that the Arbitrator having come to a possible conclusion, the learned Single Judge had exceeded the jurisdiction of the Court under Section 34 of the Act in setting aside this part of the Arbitrator's Award.

6. We are unable to agree with these contentions. There was no contractual provision or other document recording the parties' agreement to this effect. The Appellant has not been able to provide any evidence that it had made such a stipulation (of a mark up on the cost of the bought out materials) when it agreed to procure the cement and steel instead of the Respondent. The oral evidence placed before us also does not establish any such agreement, but only reiterates the undisputed facts that the responsibility was originally that of the Respondent and was thereafter shifted to the Appellant. In our view, Mr. Mittal's submission that a term for additional payment of this nature ought to be implied in the agreement is also untenable. In a commercial contract, if the parties intended to provide for any such compensation, it was incumbent upon them to express it in some manner. An entitlement to an additional payment and particularly its quantum (which would also require to be agreed between the parties), cannot be read into the contract as an implied term. While we are conscious of the limited scope of Section 34 of the Act, it is clear *inter alia* from the

judgment of the Supreme Court in *Associated Builders vs. Delhi Development Authority* (2015) 3 SCC 49 (paragraph 31) that a finding which is based on no evidence at all can be set aside by the Court. The award of claims no.19 and 20 in favour of the Appellant, in our view, falls within this narrow ground, and was, therefore, liable to be set aside.

7. In the facts and circumstances aforesaid, we see no reason to interfere with the impugned order. The appeal is accordingly dismissed.

8. Copy of the order be given *dasti* to the learned counsel for the parties.

**S. RAVINDRA BHAT, J**

**PRATEEK JALAN, J**

**DECEMBER 03, 2018**

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