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

Reserved on: 4th April, 2019

Date of Decision: 29th May, 2019

+ **O.M.P. 212/2011 & I.A. 2870/2019 (for delay)**

BAMCEF CGHS LTD

..... Petitioner

Through: Mr. Jitendra Jain, Mr. Brijesh Yadav
& Mr. Pranay Jain, Advocates (M-
9811160427)

versus

M/S HANUMAN PROMOTERS & ORS Respondents

Through: Mr. Atul Sharma & Mr. Nishank
Tyagi, Advocates (M-9899950072)

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGEMENT

Prathiba M. Singh, J.

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 has been filed challenging the award dated 8th November, 2010 passed by the Ld. Sole Arbitrator.

2. The Delhi Development Authority allotted land to the Petitioner Society- BAMCEF Group Housing Society, Rohini (*hereinafter*, 'Society') for construction of dwelling units for the members of the Society in the year 1984. The Society consists of members of the backward and minority community, belonging to the lower middle salaried class. The purpose of the allotment was to construct economical and affordable dwelling units for the members. With that purpose in mind, the Society engaged a contractor - M/s Moluram and Sons to undertake the construction of the 90 dwelling units in the form of 4 storied flats. For various reasons, the part construction, which was undertaken by the said contractor, was in fact demolished and a tender

was called for allotment of the work to an alternative Contractor. The Respondent – M/s. Hanuman Promoters submitted its bid on 23rd July, 1990. Respondent Nos.2 and 3 are the promoters of Respondent No.1 and are thus, together referred to as the '*Contractor*', for the sake of brevity. Considering the financial status of the members of the Society, various deductions were negotiated with the Contractor, even prior to acceptance and finally on 13th August, 1990, the acceptance letter was issued to the Contractor.

3. The agreement dated 17th September, 1990 was then entered into between the parties. The work was to be executed within a period of 18 months. Construction was commenced and various running bills were submitted by the Contractor from time to time. Some disputes arose amongst the office bearers of the Society as it was felt that some of the members had colluded with the Contractor. The perception was that the Contractor was being overpaid, by the said members. It is the Society's case that a total amount of Rs.1,87,88,044/- was paid upto 31st March, 1997, which included the actual payment of Rs.1,43,20,000/- and the Society's supplies of Rs.42,68,044/-, as also TDS of about Rs.2,00,000/-. However, there was delay in the construction. Vide letter dated 21st April, 1997, time for construction was extended till December, 1997. It is the Society's case that the Contractor did carry out the balance work but only of GICI pipes, etc. and failed to complete the entire work. In a meeting on 11th May, 1997 held by the Society, a decision was taken to terminate the contract as, by then, the Contractor had already left the site and no work was going on. The members of the Society were put to enormous pressure and suffering owing to the non-completion of the project. The Contractor was then called for joint measurements. The same could not be completed as the Contractor left

the site. At that stage, vide direction dated 17th September 1997, the Assistant Registrar (North-West) of Cooperative Societies, under the Cooperative Societies Act barred the Society from holding elections and also from cancelling the contract of the Contractor. Despite this direction, on 21st September, 1997 the General Body of the Society ratified the termination of the contract. Notice was then issued on 24th November, 1997 to the Contractor demanding the excess payments made. At that stage, the Registrar of Cooperative Societies had intervened and stayed the decision of the General Body of the Society. The Society perceived the action by the Registrar as having been prompted due to the interference by the Promoters of the Contractor.

4. An administrator was appointed, to enquire into the functioning of the Society. The Administrator was then replaced and a chartered engineer was appointed for the purpose of joint measurement and inspection of the work done. This engineer's report found that excess payments of Rs.80,86,248/- was made to the Contractor. The Society, therefore, raised claims in respect of excess payment, as also the other expenses incurred due to delay in the project. There were allegations of tampering and interpolation in the documents.

5. Thus, disputes arose between the Society and the Contractor leading to the filing of a suit for declaration by the Society. In the said suit, a Local Commissioner (Mr. Y. D. Nagar) was appointed to carry out the joint measurement and inspection of the site. Report dated 26th June, 2001 was filed and thereafter, disputes were referred to arbitration vide order dated 3rd October, 2002. The said order reads as under:

“The present suit is filed by the plaintiff seeking for a

decree of declaration and also for recovery of an amount as stated in the plaint from the defendant No.1/contractor.

The plaintiff herein gave a contract of constructions of flats to the defendant No.1/contractor. Pursuant to the aforesaid contract awarded to the defendant No.1, construction of flats were carried out and the said construction is complete. However, in execution of the aforesaid contract, disputes arose between the parties with regard to payment to be made and also with regard to nature of constructions made by the defendant No.1. Since disputes have arisen between the parties in respect of the contract for construction of 90 dwelling units, the said disputes are required to be resolved and decided by appointing an arbitrator.

After hearing the counsel appearing for the parties and having gone through the records I am satisfied that all such disputes, which arise out of or in connection with the aforesaid contract work awarded by the plaintiff in favour of defendant No.1 and executed by the defendant No.1, pursuant to the aforesaid contract, are required to be referred to an arbitrator for his consideration and decision.

Accordingly, I appoint Hon'ble Mr. Justice K. Ramamoorthy, a retired Judge of this Court, as the sole arbitrator to decide all the aforesaid disputes arising between the parties. It shall also be open for the learned arbitrator to obtain guidance and assistance from any technical person of his choice in respect of any of the disputes raised before him. The learned arbitrator appointed by this order may enter into the reference and decide the disputes as early as possible preferably within a period of 90 days from the date of entering into the reference.

It shall also be open to the learned arbitrator to fix his remunerations after discussion with the counsel appearing for the parties. The said remuneration of the arbitrator shall be shared equally by the parties.

Parties shall file all their claims and counter-claims before the learned arbitrator within two weeks from today. The parties shall appear before the learned arbitrator on 11.10.2002 at 4.00 P.M. for obtaining further dates in the arbitration proceedings.

During the pendency of the suit in this court, an interim order was passed on 31.5.2001 to the effect that possession of the flats in question would not be handed over by the society to its members. The said undertaking and the interim order continues till date. However, considering the facts and circumstances of the case, I am of the considered opinion that the members of the society should not be deprived from getting possession of the flats, which have been constructed for their use and occupation particularly when construction of the same is complete and, which according to the counsel appearing for the plaintiff have also been allotted.

Accordingly, I hereby also order that the members of the plaintiff society shall get possession of the flats in question, in terms of the allotment made by the plaintiff, which shall, however, be subject to the following conditions:-

(a) that such possession shall be handed over to the allottees only after such allottees file affidavits giving an undertaking either before the learned arbitrator or before this court that he/she would pay the amount that may be fixed by the learned arbitrator in the award; and

(b) that the said possession would be subject to the final award to be passed by the arbitrator and also shall abide by the award to be passed by the arbitrator; and

(c) possession of the said flats shall be given to the allottees, who shall be treated as the Court Receivers till the award is passed by the arbitrator and they shall not sell, alienate or in any manner create any third party interest in respect of the said

flats till the award is passed by the arbitrator.

(d) that the defendant No.1/contractor shall also file an affidavit either before this court or before the arbitrator giving an undertaking that the contractor/defendant No.1 would pay the amount that may be fixed by the learned arbitrator in the award and that he would also abide by the award to be passed by the arbitrator.

(e) the undertakings referred to above, shall be filed within two weeks from today by the members of the society, who shall be the allottees of the flats and also by the defendant No.1/contractor, which shall be retained in a safe custody.

In terms of the aforesaid order, the suit stands disposed of. A copy of this order be given DASTI to the counsel appearing for the parties”

6. The Ld. Arbitrator entered reference. Before the Ld. Arbitrator, detailed evidence was led by the parties. Vide the impugned award, the claims of the Society were dismissed and the counter claims of the Contractor for a sum of Rs.83,42,971/- was awarded, along with interest. The present petition under Section 34 of the Act challenges the said award.

Summary of the award

7. The impugned award is quite detailed, running into almost 160 pages. It considers the various contentions of the parties, and this Court in a Section 34 petition does not need to completely reappreciate the entire factual basis and the evidence. The Ld. Arbitrator has considered various parts of the cross-examination of the witnesses. The broad findings of the Ld. Arbitrator revolved around two documents i.e. first letter of award dated 20th August, 1990 and second the agreement dated 17th September, 1990. The allegations of the Society were that there were several insertions and interpolations in

these documents, which were done in collusion with the office bearers of the Society. The said interpolations ought not to be considered, while considering the claims of the Contractor. The main issue was whether the Contractor was entitled to escalation and if so, to what amounts. The case of the Contractor was that it was entitled to claim escalation on the total cost of work, which was done, whereas it was the case of the Society that the escalation was not liable to be paid on the material, which was supplied by the Society to the Contractor. In this background, the findings of the Ld. Arbitrator are as under:

- a) That the letter dated 20th August, 1990 was genuine and was an Annexure to the agreement dated 17th September, 1990. The Society's case that the said letter was not annexed to the agreement, was rejected. The Ld. Arbitrator does not accept the stand that the annexure referred to in the agreement were the tender conditions. Thus, the Ld. Arbitrator proceeded on the basis that the letter dated 20th August, 1990 existed and was annexed to the agreement.
- b) On escalation, the Ld. Arbitrator holds that the Contractor is entitled to the escalation claimed in terms of the joint measurement conducted by the Local Commissioner appointed by the High Court. As against the total claim of the Contractor of Rs.2,60,66,645.66/-, the Ld. Arbitrator, going by the measurement carried out by the Local Commissioner, awarded a principal sum of Rs.83,42,871/- along with the contractual rate of interest @ 18% per annum to 30th April, 1999 i.e. Rs.37,53,440/-, i.e. a total of Rs.1,20,96,410.79/-.

- c) The earnest money deposit of Rs.50,000/- was refunded to the Contractor, along with the interest @ 12% per annum from 1st May, 1999.
- d) The claim for loss of profits was rejected.

8. Thus, the final award of the Ld. Arbitrator reads as under:

“Accordingly, an award is passed:

I. Rejecting the claims of the claimant,

II. Directing the claimant to pay the respondent the sum of ₹83,42,971/- with interest at the rate of 12% p.a. from 01.05.1999 till the date of payment,

III. Directing the claimant to pay to the respondent a sum of ₹50,000/- being the earnest money deposited by the respondent with interest at the rate of 12% p.a. from 01.05.1999 till the date of payment,

IV. Directing the claimant to pay the respondent a sum of ₹37,53,440.16 being the interest payable by the claimant to the respondent upto 30.04.1999 without any payment of interest on this amount,

V. Directing the parties to bear the respective costs.”

Contentions of the parties

9. The contention of Id. counsel for the Society is that as per the contract, the material stores was to be supplied by the Society to the builder. The breakup of the contract was 85% materials, 5% overheads and 10% profits. The construction was to be completed within 18 months. The clear agreement between the parties was that even if there is a late payment, the work ought not to be stopped. By the end of 1995, 70% of the work was done and by 1997, 88% of the work was done. According to Ld. counsel for the Society, in the suit filed for recovery, a Ld. Single Judge of this Court appointed the Ld. Arbitrator to adjudicate the disputes. It is his submission

that the letter dated 20th August, 1990 was superseded by the agreement and was, in fact, not annexed to the agreement. He also challenges the calculation of the area for which the award has been given @ 228 per sq. feet. He further submits that a sum of Rs.17,59,600/- was to be reduced as per the agreement, which was not reduced by the Ld. Arbitrator. As per the clause for awarding escalation, a formula was prescribed. However, 'W' in the said formula had to be as per clause 57.2 of the tender conditions. According to Id. Counsel for the Society, the award of escalation on materials, which were supplied, is completely untenable as the Contractor could not get the benefit for supplies made by the Society itself. The appearance of the phrase, "*without any deduction*" in the contract was an interpolation and did not exist originally.

10. On the other hand, Id. Counsel appearing for the Contactor submits that the formula for escalation brooks no ambiguity. 'W' is the whole value of the work done, which includes the material. This being a specific clause in the contract, it had to be honoured. It is his contention that even if the words '*without any deduction*' are ignored, the total value of the work done would include the material. Since the agreement between parties was that if the job is not completed by 31st December, 1997, no material escalation is payable, the clause, as it reads, had to be given effect to. In fact, the Registrar of Societies had directed that all running bills upto 31st December, 1996 ought to be honoured by the Society.

Proceedings in the present OMP

11. Notice was initially issued in this OMP on 16th March, 2011. During the pendency of the petition, the Contractor moved an application being I.A. No.13422/2016. The allegation in this application was that the Society had

violated order dated 31st May, 2001 read with order dated 3rd October, 2002. As per the said two orders, which were passed in CS (OS) 144/2001, certain conditions were imposed upon the Society to comply with, prior to handing over the possession of the flats. It was also directed that the persons, who took possession of the flats, would be treated like receivers until the final award is passed by the Ld. Arbitrator.

12. On 11th December, 2018, the said application was disposed of. It was recorded in the said order that some of the members of the Society did transfer 49 flats out of the 90 flats. However, some of them were legal heirs of the original allottees. The operative portion of the said order dated 11th December, 2018 is set out hereinbelow:

“3. The operative portion of the order passing interim directions is set out herein above. It is the case of the Respondent that after taking possession by submitting two undertakings in terms of the order above, several of the persons have violated the said undertakings and have also transferred their flats in favour of third parties. According to the Respondents, the same has happened in collusion with the office bearers of the society as also the other authorities. In view of this, the Respondent moved an application being I.A.13422/2016 seeking the following payers: -

- a) direct the Respondent society to furnish names of persons who are current owners of the flats with particulars of those original allottees who had given an undertaking in terms of Para (a) and have transferred flats in violation of the same;*
- b) pursuant to furnishing of the details in terms of Prayer (a), this Hon'ble Court may be pleased to initiate contempt proceedings against the society, its office bearers and other members who have sold their flats in violation of the directions in para (a) and (c) of the order.*

4. In reply, the Petitioner-Society has filed a list of all the current allottees/transferees of approximately 49 flats out of 90 who are different from the original allottees. The said chart shows that the transfers have taken place since 2011 and have continued till 2016. Prima facie, this was in the teeth of the order passed by this Court. The office bearers of the Society ought to have ensured that there was complete compliance of the orders of this Court. Learned counsel for the Petitioner submits that some of the flats were in fact transferred to the legal heirs of the original allottees.

5. Be that as it may, it is directed that list of 49 allottees attached with the reply at pages 9 and 10 which has been filed now, is taken on record. It shall be ensured by the Society that no further transfers shall taken place during the pendency of the present petition. Also, the Petitioner-Society shall file undertakings of these 49 members that they would not transfer the flats during the pendency of the present petition. If any transfers take place, the office bearers of the society, the Secretary, Shri K.S. Jatav and the President, Shri K.R. Pawaria shall be held personally responsible. The office of the Sub-Registrar as also the DDA shall ensure that no transfers are registered in the BAMCEF Cooperative Group Housing Society Ltd., Plot No.3, Sector-15, Rohini, Delhi-110085.

6. At the time of final hearing, this Court will also consider the action, if any, to be taken if it finds that there was deliberate non-compliance of any directions passed by this Court. The affidavits/undertakings of the transferees shall be filed within four weeks. Mr. Jatav and Mr. K.R. Pawaria shall be present in person on the next date.”

13. Thus, the 49 members were directed to file affidavits that they would not transfer the flats during the pendency of the present petition. The said order has been given effect to as these affidavits have been filed.

Clauses in the tender documents/agreement

14. The cost escalation clauses in the tender read as under:

“57.1 If during the process of works the price of any material incorporated in the works (not being a material supplied by the society in accordance with relevant clause 1.25 in tender document hereof) and/or wages of labour increase as a direct result of the coming into any fresh law or statutory rule or order (but not due to changes in sales tax) and the contractor thereupon necessarily and properly pay in respect of the material (incorporated in the works) such increased price and/or in respect of labour engaged on the execution of the work such increased wages then the amount of the contract shall be paid in accordance with the formulae given in 57.9 and 57.10 provided always that any increase so payable is not in opinion of the society (whose decision shall be final and binding) attributing to delay in the execution of the contract within the control of the contractor.

Provided further that any such increase shall not be payable if such increase has become operative after the virtual date of completion of the work in question.

57.2 The cost of work on which escalation will be payable shall be reckoned as 85% of the cost of work as per the bills, running or final and from this amount, the value of materials supplied by Society at issue rates or services rendered at fixed charges and proposed to be recovered at fixed rates in the particular bill shall be deducted before the amount of compensation for escalation is worked out. In the case of materials brought to site for which any secured advance is included in the bill, the full value of such materials as assessed by the Architect (and not the reduced value of such materials for which secured advance has been paid) shall be included in the cost of work done for operation of this clause. Similarly when such

materials are incorporated in the work & secured advance is deducted from the bill the full assessed value of materials originally considered for operation of this clause should be deducted from the cost of the work shown in the bill running or final. Further the cost of work on which escalation is payable shall not include the amount of extra items etc.

57.3 The compensation for escalation for material & labour shall be worked out at quarterly intervals & shall be with respect to the cost of work done during the three calendar months of the said quarter. The first such payment shall be made at the end of three months after the month (excluding) in which tender was accepted & thereafter at 3 months interval. At the time of completion of the work, the last period for payment might become less than 3 months depending on the actual date of Completion.

57.4 If during the process of works the price of any material incorporated in the works (not being a material supplied by the society in accordance with relevant clause 1.25 in tender document hereof) and/or wages of labour decrease as a direct result of the coming into any fresh law or statutory rule or order (but not due to changes in sales tax) and the Society shall in respect of all materials incorporated in the works (not being supplied by the Society as referred to above) and/or labour engaged on the execution of the work after coming into force of such law statutory rule or order be entitled to deduct from the dues of the contractor such amount as shall be worked out in accordance with the formulae given in 57.9 and 57.10.

.....
57.9 The compensation for escalation for material shall be worked out as per following formula:-

$$V_m = W \times \frac{X}{100} \times \frac{M - M_o}{100}$$

V_m = Variation in material cost i.e. increase or decrease in the amount to be paid or recovered.

W = Cost of work done worked out as indicated in para 57.2 above

X = Component of material expressed as percent of the value of work (75%).

M = Av. All India whole sale index for all comodities for the period under reckoning as published by the economic advisor to Govt. of India, Ministry of Industry and Commerce.

Mo = Same as above but for the period at the time or receipt of tenders.”

15. After bids were submitted the works were awarded vide letter dated 20th August, 1990. Insofar as the escalation is concerned, the relevant portion of the letter of award reads as under:

“9. Value of the ‘w’ in the formula for working out Labour and Material Escalations due is hereby agreed to be taken including cost of Stores supplied by the Society and the contractor’s profit. That the base Whole sale Price Index has been agreed at 179.3 and the Base minimum Labour wages at Rs.28/85. The calculations shall be done on average index prevailing during the month.”

16. After the work was awarded, a detailed agreement dated 17th September, 1990 was executed. Some of the relevant terms and conditions of the agreement between the Society and the Contractor are set out hereinbelow:

“AND WHEREAS THE Society has already handed over the legal & physical possession of the site i.e. Plot No.3, Sector XV, Rohini, Delhi to carry out the works described in the said Contract Document, Contract Drawings on their quoted rates after negotiations on the terms and conditions mentioned in the said Contract Document as agreed through letter of AWARD OF WORKS given to the Contractor;

NOW THEREFORE IT IS HEREBY AGREED AS FOLLOWS:-

1. The Society has agreed to get all the works connected with the construction of 90 dwelling units done from the Contractor at his quoted rates and on the terms and conditions over and above those stipulated in the tender document duly attached herewith as Annexure – I and forming a part of this agreement.

2. The agreed rates are on per square feet basis and are as under:

*i) Covered area of Stilted portion Rs.182/-
(Rupees One hundred eighty two only)*

*ii) Covered area of Basement Rs.202/-
(Rupees Two hundred two only)*

*iii) Covered area of Flats (all floors)..... Rs.228/-
(Rupees Two hundred twenty eight only)*

iv) Road Area Rs.26/-

v) Foot Path Area Rs.20/-

*vi) Green Area Rs.10/-
(Rupees Ten only)*

PROVIDED that the Contractor shall not be bound to carry out the following items for which a rebate in the above rates of Rs.17,59,600/- (Rupees seventeen lac fifty nine thousand six hundred only) has been accepted as per following details:

<u>S. No</u>	<u>Item of work to be deleted</u>	<u>Rebate Accepted</u>
	<i>Total</i>	<u>Rs.17,59,600/-</u>

The mode of payment and recovery of above rebate will be as per revised Schedule of Rates attached herewith as Annexure-II.

.....

11. The following terms and conditions shall supercede the correspondence meaning of the terms & Conditions provided/specified in the said Contract

Document:

.....
xv) *Subsequent change in Costs & Legislation:*

If after submission of the tender for the above works, there has occurred or may occur in the Country/National/State Statute, Ordinance, Decree or other Law or the introduction of any _____Law/Decree/Ordinance or Statute that may cost additional cost to the Contractor in the execution of the works. Such Additional cost shall be paid by the Society to the Contractor and the Contract Rates/Price shall stand adjusted accordingly:

MATERIAL ESCALATION

$$V_m = W \times 75\% \times \frac{M - MO}{MO}$$

Where

V_m = Variation in material cost;

W = Cost of Gross Work Done; (Without any deduction)

M = All India Wholesale Index for all commodities for the period under reckoning;

MO = All India Wholesale Index for all commodities prevailing at the time of receipt of tenders.

LABOUR ESCALATION

$$V_l = W \times 25\% \times \frac{L - LO}{LO}$$

Where

V_l = Variation in labour cost;

W = Cost of Gross Work Done: (Without any deduction)

L = Minimum daily wages of the unskilled labour as fixed from time to time but for the period under reckoning;

LO = Minimum daily wages of the unskilled labour as prevailing at the time of receipt of the tender.”

Analysis and Findings

17. The first and the foremost issue to be considered in this case is as to whether the letter dated 20th August, 1990 was, in fact, in existence and if so, what is the effect of the same. The three documents, that are to be construed to decide this issue, are the tender documents, letter of award dated 20th August, 1990 and the agreement dated 17th September, 1990. In addition, contemporaneous documents ought to be also taken into consideration along with the oral evidence.

18. A perusal of the said documents, firstly, shows that the tender document itself is not in dispute. Insofar as the agreement dated 17th September, 1990 is concerned, a perusal of the last recital and clause No.1 shows that both these clauses contemplated the letter of award of works being given sufficient prominence. The contents of the letter of award of works dated 20th August, 1990 are itself not in dispute. What is disputed by the Society is that the said letter did not form part of the agreement and the agreement superseded the said letter. A perusal of the last recital and clause 1 of the agreement shows that the terms and conditions, which form the basis of the agreement was the letter of the award of works. Clause no.1, clearly, uses the phrase that *‘the said letter contained the terms and conditions over and above those stipulated in the tender document’*. This letter, by a clear reading of clause 1, was Annexure 1 to the agreement. The Society disputes this fact and claims that the tender document was Annexure 1. A plain reading of clause 1, clearly, shows that there was a document, which had terms and conditions over and above those in the tender document. The said document is not the agreement and hence it had to be the letter dated 20th August, 1990. The Society’s contention, that the letter is

not an Annexure to the agreement and that it was superseded by agreement, therefore appears to be incorrect. The Ld. Arbitrator has, held in paras 317 and 318 of the award as under:

“317. Before I answer the issues, the only point raised by the claimant society in support of its claim is that there was no letter of award dated 20.08.1990 (R6) and the members of the society themselves had tampered with the agreement dated 17.09.1990 at the instance of the respondent company. A perusal of the documents placed on record would show that the contention is absolutely untenable, not supported by any evidence. The respondent contractor had been doing the work and had been submitting bills certified by the site engineer and paid by the claimant society and at the time when the respondent contractor was about the complete the work and wanted payment, the members of the society with a view to avoid payment had invented a story just to defeat what is legitimately to be paid to the contractor by the society. A substantial complex has been put up and the members of the society admittedly are in occupation of the flats. The member of the society have filed affidavits of undertaking as per the direction of the High Court.

318. The document filed by the claimant itself viz. Ex.P15-letter dated 21.5.1999 (Vol. 1 Pg.128) would disprove the case of the claimant and would prove the case of the respondent. I have perused and also referred to the evidence of PW1 to PW4. I recorded the evidence of these witnesses. I watched their demeanor also. From their evidence, it is obvious that they are not prepared to the truth. They have been uttering falsehood just to escape payment to the contractor. It is laid down by the Supreme Court that in order to consider the conduct of the parties the correspondence that passed between the parties could be considered. A reading of the documents would show that PWs 1 to 4 are not at all telling the truth. Their only aim is to

show that there have been interpolations in the agreement dated 07.09.1990. There has been no material produced by the claimant society to substantiate this case. It has miserably failed to establish the case. If according to the claimant society the members of the society themselves had been privy to such a thing, there should have been some proceedings by the society as against those members who has allegedly acted against the interest of the member of the society. The claimant society is rest content with the plea that its own members has been party to tampering of the record – a very serious allegation – without being aware of its import, the claimant sought to make such an allegation without making any attempt to prove the same. That only shows the anxiety on part of the present members to peg their case on a false plea to get around their obligations to pay the contractor. The documents also show that the claimant society had agreed to pay interest at the rate of 18%. There is an agreement by the society itself that it had no funds and the contractor had to still go on with the construction. That is why I had referred to the correspondence in detail supra. Therefore, the only conclusion that is possible on the facts and circumstances is that the claimant society has issues the letter of work done on 20.08.1990 and in consonance with the same the terms are incorporated in the agreement dated 17.09.1990 and till 1999 claimant society has been making the payments admitting the escalation part of it and also admitted the quantum of interest also.”

19. Thus, the Ld. Arbitrator concludes that throughout the currency of the contract, the Contractor was periodically submitting its bills, payment against which was duly being made. All the said bills were duly certified by the architect/site engineer. The Ld. Arbitrator notes that only at the

culmination of the contract, when a considerable amount of the work was completed, did the Society raise objections for making payment, and concocted the story that the letter of award was not part of the agreement. Further, going by the evidence led, the Ld. Arbitrator concluded that all the witnesses appear to be hiding something, and did not appear to have been candid. Thus, the Ld. Arbitrator came to the conclusion that the letter of award dated 20th August, 1990 was indeed a part of the agreement dated 17th September, 1990, in consonance with which, the Society had throughout made the payments to the Contractor, admitting both the calculation of escalation, as also the rate of interest.

20. The findings of the Ld. Arbitrator, being based on the pleadings and evidence on record and even from a plain reading of the clauses in the agreement, are clearly not liable to be interfered with, as the existence of the letter of award dated 20th August, 1990 cannot be disputed.

21. The question then arises as to whether if there are conditions as contained in the tender, in the agreement and in the letter dated 20th August, 1990 and if any particular clause contradicts the other, which of the documents would prevail.

22. The existence of these three documents is not disputed. However, the first document in chronology would be the tender document, then the letter of award and then the agreement. The award letter is an annexure to the agreement and has to be read with the agreement and not in contradiction to the same. Under clause 57.2 of the tender document, the manner in which the cost of the work has to be determined, has been prescribed. As per the said clause, from every bill, 85% would be considered to be the cost of the work and the value of the materials, which are supplied at the agreed rates,

would be deducted from the same. The escalation would be payable on the remaining amount. This clause 57.2 is, thereafter, referred to in clause 57.9 where the definition of 'W' is set out reads as under:

“W = Cost of work done worked out as indicated in para 57.2 above”

Thus, 'W' had to be cost of work done as indicated in clause 57.2, i.e. that the value of the materials supplied by the Society was liable to be deducted from the total cost.

23. In the agreement dated 17th September, 1990, the escalation clause is contained in clause 11(xv). However, in the agreement, 'W' has been defined as under:

“W = Cost of Gross Work Done (Without any deduction)”

24. There is a dispute as to whether the words in brackets are contained in the agreement or not or if they were inserted or were a result of interpolation. Counsel for the Contractor has, however, argued on a demurer that even if the words '*without any deduction*' are not there, the cost of gross work done would include the stores supplied by the Society. The clause in the award letter annexed to the agreement reads as under:

“9. Value of the 'w' in the formula for working out Labour and Material Escalations due is hereby agreed to be taken including cost of Stores supplied by the Society and the contractor's profit. That the base Whole sale Price Index has been agreed at 179.3 and the Base minimum Labour wages at Rs.28/85. The calculations shall be done on average index prevailing during the month.”

25. This clause is in the teeth of the clause in the tender document, which

was, clearly agreed to and signed by the parties. This letter is not a disputed letter and has been relied upon contemporaneously by the Society. In fact, it was even sent by the Society to the architect with its letter dated 1st October, 1990. The submission of the Ld. Counsel for the Society is that the giving of escalation on materials, which were supplied and the profits is totally contrary to the letter and spirit of the tender itself. An examination of the documents reveals that the initial intention was to exclude the value of stores supplied, as the clause in the tender stipulated that escalation is payable on the '*cost of work done*' but in the agreement and in the award letter, 'W' is '*cost of the gross work done*'. These two terminologies are, different and distinct. The same is not an accidental act or insertion but a deliberate departure from the conditions in the tender. The reasons why the said changes were effected may not be clear, but the change itself is unchallengeable. Thus, when '*gross work*' is to be considered, clause 57.2 cannot be applied. Further, a perusal of all the running bills, which the Contractor has raised, shows that the Contractor, since inception, has been calculating the gross work done, applying the index and charging material and labour escalation on the gross work, and thereafter, the actual value of the stores received, has been deducted from this sum. Thus, the contractor has been raising the bills on the basis of the gross work done and the Society never objected to the same.

26. While as per the tender, the material escalation ought to have been done after deducting the value of the stores supplied before applying the index, the agreement and the award letter are to the contrary. The argument that the words '*without any deduction*' were added in a clandestine manner, is something that this Court cannot go into in a petition under Section 34.

27. The Court has examined all the running bills and the manner in which it has been claimed. Each of the said bills is duly certified by the architect, who was appointed by the Society. The parties for whatever reasons had decided to change the escalation clause in the agreement and in the award letter and, accordingly, the Contractor has sought payment on the said basis. The Society's submission, that in respect of stores supplied by it, it is illogical for the Society to pay escalation, may sound appealing, however, in an arbitration the Ld. Arbitrator is bound by the terms of the contract. The definition of 'W' being what it is i.e., cost of gross work done, it obviously means that there cannot be any deductions in respect thereof.

28. This interpretation i.e., that material escalation is payable on the gross work done, is also lent credence in view of the subsequent letter dated 2nd April, 1997 which was issued, after disputes had arisen. The said letter reads as under:

"Dated 2.4.97

To,

M/s Hanuman Promoters & Buildings (P) Ltd.

Shalimar Bagh, Delhi – 52

Dear Sir,

Sub: Const. of 90 DUs at Rohini, Delhi – Completion of balance works.

Please refer to the correspondence resting with your letter dated 26.03.97 on the above subject. By now society has reviewed all the issues pertaining to balance works alongwith their cost as submitted by you on 14.3.97 as per contract. As discussed, you were asked to start the sewer works at site and the same has been started by you from 17.3.97 with the commitment to complete sewer works alongwith external water supply by the end of April, 1997 and also hope that the

under ground water tank works shall also be started simultaneously.

In the light of the discussions held with you, the society has decided to carry out the balance works through you with the following modifications:

- 1. That you shall not be paid Material Escalations on the amount of Society Stores supplied to you at fixed rates after 1.04.1996.*
- 2. That you shall be bound to do the following rebated items against the rebate provided in the contract.*
 - a. Provide all or one door shutters at the discretion of the society.*
 - b. Do tile work in all the bathrooms upto 5' feet height.*
 - c. Make fire hydrants provision alongwith 3" dia pipeline as per latest working drawing issued by the society of architect.*
 - d. The scope of other rebated items shall be decided by the society in due course.*

The whole project is to be completed by end of December, 1997 and the society ensures prompt and timely payments.

That no material escalation and interest shall be paid to you after 31.12.1997, if you fail to complete the balance job by 31.12.1997, inspite of prompt payments by the society.

Now we hope that there shall be no going back from either side, as the project has already got very much delayed. You are requested to speed up the job of completing the balance work of the project wholeheartedly. Society assures you that it shall take back the possession of flats from you, only after clearing your all due payments as per contract after early completion of the flats."

29. A perusal of the above letter shows that even after so many years since execution of the agreement, the Society in this letter states that no

material escalation shall be paid in respect of the stores supplied by the Society 'after 1st April, 1996'. This, itself, proves that the Society was well-aware that it had to pay and further again agreed to pay, the material escalation for the period prior to 1st April, 1997.

30. In ***New Delhi Apartment Group Housing Society v. Jyoti Swarup Mittal 2008 (100) DRJ 439***, which is a judgement by the Ld.Division Bench, the formula which was considered, was identical to the formula in the present tender. The agreement in the present case, however, made a departure from this clause and defined 'W' in a different manner than what was defined in the CPWD manual. Thus, if only the clause in the tender documents was applicable, the escalation would not have been payable on the stores supplied by the Society. However, since the clause is worded differently in the agreement and in the award letter, the said judgment would not be applicable.

31. On a conjoint reading of the agreement, award letter and letter dated 2nd April, 1997, it is held that the material escalation is payable on the gross work done, which includes stores supplied by the Society. However, insofar as the rebate of Rs.17,59,600/- is concerned, which the Ld. Arbitrator appears to have missed in giving the benefit to the Society, as per clause 2 the same is liable to be granted. Thus, from the Principal sum awarded, the rebate of Rs.17,59,600/- is liable to be reduced. The principal sum awarded would, therefore, be Rs.83,42,971/- - Rs.17,59,600/- = Rs.65,83,371.

32. On the principal of Rs.83,42,971/-, the Ld. Arbitrator had awarded contractual rate of interest @ 18% per annum till 30th April, 1999. The matter of award of escalation was a hotly contested one, and the right of the Contractor to claim escalation, even on the society stores supplied, was

challenged by the Society on the ground that the letter of award dated 20th August, 1990 was not a part of the agreement. Further, the clause relating to interest for delayed payment is only contained in the letter of award dated 20th August, 1990.

33. The Society was under a *bonafide* impression that no escalation is payable, in terms of the tender document. This issue attained finality only in the award passed by the Ld. Arbitrator, wherein it was held that the letter of award was part of the agreement, and that the Society was bound by the terms of the letter of award dated 20th August, 1990, though the same are contrary to the tender. In view of the above, this Court feels that no interest is payable by the Society on the awarded amount of Rs.83,42,971/-, which has been modified by this Court to Rs.65,83,371/-. Future interest at the rate of 12% p.a. is payable on the sum of Rs.65,83,371/-, from the date of award i.e. 8th November, 2010 till date of payment.

34. The Ld. Arbitrator has further awarded refund of Rs.50,000/- as earnest money to the Contractor with 12% per annum interest from 1st May, 1999, which is a reasonable rate of interest and does not warrant any interference. Since the Petitioner is a Society, three months time is granted to make the payment to the Contractor, after which on the entire awarded amount, simple interest @ 8% per annum shall be liable to be paid till the date of payment.

35. With these modifications, the OMP is disposed of. All pending applications also stand disposed of.

PRATHIBA M. SINGH
JUDGE

MAY 29, 2019/dk