IN THE HIGH COURT OF DELHI AT NEW DELHI

CS(OS) 2312/2006 & IA 170/2008

RESERVED ON: July 3, 2008
DECIDED ON : July 16, 2008

M/s Sudhir Brothers ... Plaintiff
THROUGH: Mr. Harish Malhotra, Senior Advocate with Mr.Tanuj Khurana, Advocates.

VERSUS

Delhi Development Authority ... Defendant
THROUGH: Mr. Bhupesh Narula, Advocate

Coram: Mr. Justice S. Ravindra Bhat

1. Whether reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

% 16.07.2008

Mr. Justice S. Ravindra Bhat:

1. M/s Sudhir Brothers (hereafter called "the contractor") entered into a building contract with the Delhi Development Authority (hereafter "DDA") for construction of 720 Lower Income Group Dwelling Units/Flats ("LIG DU's") at Pitam Pura Pocket W Poorvi i/c internal services SH c/o 324 LIG DU's at Pitam Pura Pocket W Poorvi. An Agreement was entered into by the parties for the work for construction of 324 LIG DU's.

The date of start of the work was 16-1-1981 and the work was to be completed within a period of 1 year i.e. by stipulated date of completion of 15.1.1982. As against the tendered amount of Rs.36,38,844/- the contractor's offer at 58.60% above the contract value at Rs.57,71,206/- was accepted by the DDA.

2. The work was rescinded by the DDA through order dated 27.7.1984 after giving opportunities to the contractor. DDA adverts to several notices under clause 3 of the contract, to the contractor claimant; a notice dated 7.6.1984 was written to the claimant. The claimant raised disputes and approached the Engineer Member DDA, by letter dated 5.3.1983 for appointment of arbitrator to decide the matters in dispute between the parties outlined in the said letter. The claimant filed Suit No. 125A/1984 under Section 20 of the Arbitration Act and the claims raised were thorough letter dated 5.3.1983. The Court had by order dated 23.5.1984 directed the Engineer Member to appoint an arbitrator. A sole Arbitrator was therefore appointed.

3. The arbitrator so appointed resigned on 1.6.1987. This led to DDA appointing another arbitrator, whose authority was challenged by the claimant , through OMP 93/1988. An identical situation arose when the second arbitrator resigned and the DDA appointed one Sh. Gangdevan. Eventually, all these interlocutory disputes were resolved and after considering the claims and counter claims, the Arbitrator made and published his award dated 11.11.2006. Nine heads of claim including interest and an additional claim were made and the DDA had counter claimed on seven heads. The award substantially allowed six out of seven claims and directed payment of interest at 14% per annum for the period 1985 to 18.2.2006 and thereafter at 12.% per annum.

4. The DDA has preferred objections to the award, under Sections 30 and 33 of the Arbitration Act, 1940. These challenges are founded on three main grounds. The first concerns the award of Rs.2,12,400/- on the head of illegal seizure of materials by the DDA. The claimant had originally demanded Rs.1,46,000/- and later revised this claim, some time in 1991 to Rs.4,46,000/-. As against this, the Arbitrator awarded Rs.2,12,400/-. The DDA contends that this claim was inadmissible as it was not originally referred by the Court when suit No. 125A/1984 was disposed of. The award is also attacked on the merits by the DDA which contends that no material had in fact been seized from the concerned site. The DDA also claims that there was no evidence or document in support of such a claim. It contends that certain letters i.e. dated 13.11.1982, 16.10.1989, 8.10.1982, 24.1.1983 and 15.4.1983 were written to the contractor. In another letter of 10.3.1983, the DDA had drawn attention to the contractor about shortage of 13 M. Tons 10 M.M. Dia Steel Tubes. It is contended on behalf of the DDA that findings about seizure of material and loss caused to the contractor were therefore conjectural and not based on any evidence.

5. The Arbitrator had, under Claim No.7 awarded the sum of Rs.3,54,396/- towards increase in construction costs for the extended period over and above the escalation permitted under clause 10-C in respect of cost of labour and materials. The claimant had demanded a sum equal to 35% of the original contract amount i.e. Rs.21,36,403/- on this head. The Arbitrator, however, held that the claimant was entitled to rate revision on 14.17.84 at 25 per cent. It is contended on behalf of DDA that the award of such an amount was not justified as not being based on any evidence. It was contended that in the

absence of proof of payment, or loss, the Arbitrator should not have calculated such escalation or increased construction cost on some arbitrary method. Reliance was placed upon a decision of this Court in *Kocher Construction Vs. Union of India* 1994 (1) Arb Law Report ARB. LR as well as decision in *Hindustan Construction Company Vs. Delhi Development Authority* 2002 (3) ARB LR 235.

6. The award of interest at differential rates by the Arbitrator is also attacked as illegal. The DDA contends that the claimants conduct in stalling the arbitration proceedings on at least two occasions resulted in delay and it cannot be allowed to profit from its culpability. Counsel also contended that award of such high interest, for 20 year period is even otherwise not justified. He relied upon a judgment of Supreme Court reported as *State of Rajasthan Vs. Navbharat Construction Company* AIR 2002 SC 258.

7. Learned counsel lastly contended that the award is clearly in error of law since the arbitrator rendered findings in respect of counter claim No.2 and held that the levy of compensation was improper. This was beyond the scope of arbitration, being an excepted matter. It was contended by learned Senior Counsel for the respondent/claimant that no exception can be taken to the award as the arbitrator considered and rendered his findings on the basis of materials. Learned counsel submitted that the court should not exercise its supervisory jurisdiction under Section 30 and 33 of the Arbitration Act, 1940 as an appellate court. He relied upon the rulings of the Supreme Court reported as *Vishwanath Sood –vs- Union of India* 1989 (1) SCC 657.

8. Learned counsel submitted that the claimants had to construct the units within fifteen months. The indifference of DDA led to prolongation of the contract. The

DDA created hindrance in the performance of the job in spite of that the claimant continued to work, accepted extension and agreed to work during the extended period unilaterally. The DDA rescinded the contract on 27.7.1984. Almost a year later it sought to levy compensation. Having regard to the materials adduced, the findings of the Arbitrator could not be faulted as amounting to legal misconduct or unfounded on facts.

9. Learned counsel submitted that the DDA's objection as to claim No.5 is irrational and unsustainable. He relied upon the letters addressed by the claimant to the DDA, which are part of the record i.e. C-64, C-50, C-64, C-65 and Annexure-D of Book "B", all of which were written at the time of termination of the contract. The DDA was even asked to verify the details of materials seized, not returned to the claimant. In these circumstances the findings on claim No.5 could not be termed illegal.

10. Learned counsel contended that the objection to findings on claim No.7 are without any basis. He relied on Ex. P-1, P-8, C-25, C-46 and C-35, C-46. According to him these establish that at the relevant time the claimant kept demanding escalation in costs of construction. Counsel submitted that admittedly the time for completion had been extended; as against the original date i.e. 15.1.1982, the parties mutually agreed to extend the period. The Arbitrator, it was submitted, had noticed that DDA itself, during this period, was awarding contracts at rates which were in excess of 45% of the claimant's quoted rates. The Arbitration also took note of the continuous price rise and the CPWD cost index, while awarding the sum of Rs.3,54,396/-. He further submitted that the Arbitrator took note of other materials such as Ex. P-1, P-8, C-25, C-35, C-46, C-72 and C-74 in this regard.

11. Counsel submitted that the award of interest cannot be challenged as excessive or illegal in this case and was perfectly reasonable having regard to the facts. It was further stated that the court should be slow in exercising its power to reduce the rate of interest.

12. The scope of a civil court's power interfere with an arbitration award, under the Act is well settled. From a long line of decisions, starting with *Union of India –vs- A.L. Ralia Ram* AIR 1963 SC 1685 down to the recent decision in *Food Corporation of India –vs- Chandu Construction* 2007 (4) SCC 697, it has been consistently declared that misconduct does not point to moral lapse or perversity in findings, in an award, but to something unreasonable which would fall outside the jurisdiction of the arbitrator. It has also been held that the standard to be applied is irrationality, caprice, arbitrariness or the adjudicator-arbitrator acting beyond the terms of the agreement, while arriving at a finding that the award is vitiated due to misconduct of the arbitrator (See *Bhagwati Oxygen Ltd. –vs- Hindustan Copper Ltd*. 2005(6) SCC 462; *Rajasthan State Mines and Minerals Ltd. v. Eastern Engineering Enterprises and Another,* (1999) 9 SCC 283). It has been further held (*U.P. State Electricity Board v. Searsole Chemcials Ltd.* (2001) 3 SCC 397), that where the arbitrator had applied his mind to the pleadings, considered the evidence adduced before him and passed an award, the Court cannot interfere by reappraising the matter as if it were an appeal.

13. Another test indicated by the Supreme Court - *Chandu Construction(supra) and Bharat Coking Coal Ltd. v. M/s. Annapurna Construction,* (2003) 8 SCC 154,) is that where the arbitrator travels beyond the contract he acts in excess of jurisdiction in which case, the award passed by him becomes vulnerable and can be questioned in an appropriate Court.

14. From the preceding factual discussion it is evident that DDA is mainly objecting to the award of amounts on four heads. The first is in respect of claim No.5, which pertains to cost of materials seized by the DDA or not allowed to be taken away by the claimant. Although serious exception was taken by the DDA to the reference itself, this court is unpersuaded by the submission that the arbitrator lacked jurisdiction to examine the claim. Clause 25 of the contract expressly stipulates that all disputes which are not excepted, and arise out of the contract/agreement, have to be referred to the Arbitrator. In this case the excepted matters have been spelt out in the preceding part of the agreement. A dispute with regard to withholding of materials does not fall within any of the excepted matters. Further the claim of the contractor was about unjustified and wrongful withholdings of its material by the DDA, when the latter rescinded the contract. In these circumstances the court is satisfied that the objection as to arbitrability of this head of dispute is without basis.

15. As far as the merits of this claim are concerned, the Arbitrator examined contemporaneous evidence in the form of a series of letters. These are C-50 (Telegram dated 21.7.1984), C-64 (dated 22.10.1984) and C-65 (dated 3.12.1984). C-64 also encloses a list of items set out by the claimant. The documents upon which DDA has relied upon in this context, however, all pertain to a previous period when the contract was operative and binding between the parties. The case so far as the claim No.5 is concerned is that after rescinding the contract, DDA did not permit the contractor to take back sundry items from the site.

16. Besides Ex. C-50, C-64 and C-65 which have been described above and have also

been independently considered by the Court, the contractor also relied upon Annexure-D in book "B" which set out the cost or value of these items. Nothing was shown to the court during the hearing in this case disputing these documents. No contemporaneous letter by the DDA or even any other document to the contrary or either oral or documentary evidence was shown to the court. In the circumstances, the court can hardly take exception to the findings rendered by the arbitrator which are purely factual. The DDA's objections *vis-à-vis* the award on claim No. 5 are, therefore, held to be without foundation.

17. So far as Claim No.7 is concerned, the contractor had demanded 35% of the total value of the original contract as escalated construction costs over and above the cost of materials and labour admissible to it under clause 10-C. The Arbitrator relied upon a decision of this court reported as *Metro Industries Electrical Vs. DDA* AIR 1980 Delhi 266. The DDA's contentions, on the other hand, were that in the absence of any proper evidence of higher cost of construction, the Arbitrator could not have followed or adopted same cost analysis and awarded 25% escalation. It relies upon the Division Bench's judgment of this court in *Kochar Construction* and a subsequent decision in *Hindustan Construction Corporation.*

18. In *Kocher Construction,* the question was whether a claim for escalation of costs allowed by the Arbitrator was justified. The Arbitrator had accepted a cost analysis submitted to him by the claimant. The Court held that mere reliance on a cost analysis would be insufficient to establish that such cost had in fact been incurred. The decision in *Hindustan Construction,* on the other hand, turned upon on the tenability of the contractor's claim for escalation of costs under clause 10-C.

19. In the present case, no doubt the Contractor/claimant wrote certain letters which have been adverted to in the previous part of this judgment. Yet , this court is of the opinion that the findings of the arbitrator on this head cannot be sustained. What the Contractor really claiming is a head of compensation or damages even though styling it as escalation. One cannot be unmindful of the fact that the contract negotiated between the parties factored the eventually of extension of contract and the consideration payable. If the contractor had intended that extension was acceptable only on the condition of payment of stipulated additional compensation, he should have made such reservation in terms of Section 55 of the Contract Act. The second and more substantial aspect here is that the contractor - claimant made no attempt to prove such damages and merely relied upon letters addressed to the DDA. A mere demand cannot be justified for grant of escalation particularly when the claim for such additional consideration is disputed. If the Contractor wanted to establish its entitlement to such additional amounts, the mode of proving it could not have been any different than in respect of other claims. Therefore, the methodology and approach adopted by the arbitrator in awarding such 25% amount working to Rs.3,54,396/- is unsustainable; it is also contrary to the Division Bench ruling in *Kochar Construction*. This part of the award, therefore, cannot be sustained.

20. The last objection is to the counter claim. Here too the DDA's contention appears to be well founded. Right from the decision of the Supreme Court in *Vishwanath Sood Vs. UOI AIR 1989 SC 952* to the judgment reported as *General Manager Northern Railways Vs. Sarvesh Chopra* 2002 (4) SCC 45 and even in one of the judgments to which the claimant/contractor itself was a party (*Delhi Development Authority Vs. M/s Sudhir Brother*s

1995 57 DLT 474 DB) it has been consistently ruled that where the decision of an executive authority is final, not arbitrable and not subject to reference, the Arbitrator cannot assume jurisdiction over such matters. In this case too clause 25 opens with the expression "save as otherwise providedt". Now the question of compensatioin payable and levy, fell within the exclusive domain of the administrative authority specified in the contract. The exclusivity was provided for by use of the expression "his decision shall be final". In the circumstances the question as to whether the compensation was levied correctly or otherwise could not have been subject matter of reference. On a proper application of the law therefore it has to be held that adjudication of any claim beyond the scope of reference and the award to that extent is, therefore, liable to be set aside.

21. On the issue of interest, this court is of the opinion that the mere circumstance that arbitration was pending for 20 years should not have been the predominant or the sole determining factor, in the award of 14 per cent interest. The court has considered the materials on record. The petitioner had approached the court at no less than two intervening occasions. It needs no imagination to discern that such interlocutory attempts would inevitably stall adjudication in the arbitration proceedings. Therefore, the petitioner had to share to a certain extent the blame for the delay in conclusion of such proceedings. In these circumstances the award of interest at 14% for 21 year period was not justified.

22. For the above reasons this court is of the opinion that the award, cannot be sustained so far as it relates to claim No.7 and counter claim No.2. The findings and the award to the said extent are, therefore, set aside. In view of the preceding discussion on interest, the direction to pay 14% interest is modified. Instead the DDA is directed to pay

the interest in the following manner:-

i. For the period 1.1.1985 to 31.12.1993 @ 14% per annum;

ii. For the period 1.1.1994 to 17.2.2006 @ 10% per annum; and

iii. Interest for the post award, post decree period till realization on the above amounts shall be @ 10% per annum.

3. The award is made rule of the court subject to above modifications.

IA No. 170/2008 and suit No. 2312/2006 are decreed in the above terms.

July 16, 2008

S. RAVINDRA BHAT
(JUDGE)