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

\+   **Date of Decision: 08.10.2010**

%   **<u>O.M.P. 50/2002</u>**

DELHI JAL BOARD ..... Petitioner
Through: Ms. Kanika Agnihotri, Advocate

versus

V.K. DEWAN & CO. ..... Respondent

Through: Mr. Sandeep Sharma, Advocate

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

1. Whether the Reporters of local papers may be allowed to see the judgment? : No

2. To be referred to Reporter or not? : Yes

3. Whether the judgment should be reported in the Digest? : Yes

VIPIN SANGHI, J. (Oral)

1. The petitioner has preferred the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (the Act) to seek the setting aside of the award made by the learned arbitrator dated 01.11.2001 in relation to the claims preferred by the respondent/contractor arising out of the work order/supply order No.DJB/EE (C)/Dr-IX/99-2000/1877 dated 06.12.1999 at a total cost of Rs.1,93,26,399.75, for which Contract Agreement No.28 (1999-2000) was duly executed between the parties.

2. The works under the contract awarded to the respondent/contractor were not completed. According to the respondent/contractor, the petitioner department was in breach of the agreement and, consequently, the works could not be completed. The respondent/contractor, therefore, invoked the arbitration agreement and laid its claims before the arbitrator, which have partially been awarded by the learned arbitrator.

3. These objections have been preferred in respect of claim nos.4, 5, 6, 7, 8 and the award rejecting the counter claims preferred by the petitioner herein.

The Award

4. A perusal of the award shows that the Executive Engineer (C) DR/IX of the Delhi Jal Board invited percentage rate tenders for the balance work of construction of 12.4 Mad sewage pumping station at Ghonda-I, Shahdara, Delhi on 11.10.1999. On the basic estimate of Rs.1,71,79,022/- based on CPWD DSR 1995, the respondent had quoted 25% above the estimate.

5. **Claim no.4** raised by the contractor was on account of open pumping done by the respondent, which had not been paid. According to the respondent, there was rain on the night of 16.07.2000. The pump operators who were operating the pumps in peripheral drain running along with the work site stopped pumping the drain water and the entire pit/pond got filled due to the overflow of the drain. According to the respondent, on 09.12.2000, the Superintending

Engineer decided that the overflown water shall be pumped out and the same shall be paid as work contract item. The respondent claims that though the said water was pumped out, the payment was not made and even record entries were not made.

6. The defence of the petitioner herein was that under general condition no.1 and special condition no.3.2, the respondent/contractor was solely responsible for combating/disposal of water stagnated due to rain/surface run off during the execution of the work. The case of the petitioner herein was that the work had been completely stopped on 11.07.2000 and remained suspended till 22.09.2000 on account of the rainy season.

7. On the other hand, the stand of the respondent/claimant was that the general conditions were not attracted as the overflow of the peripheral drain was a post tender development, which was not existing at the time of tendering. According to the contractor, special condition no.3.2 was not applicable as the same covers only contractual risks which are of the contractors making. The accumulation of water, due to the failure of the respondent, could not be covered by any contract conditions.

8. According to the respondent/claimant, the department had not rebutted the said claim of the contractor and the defence was raised only during the arbitral proceedings. The claimant also sought to place reliance on a Canadian decision contained in Hudson’s book.

The tribunal, after noticing the aforesaid aspects, made the following award:

> "*Taking all facts and circumstances into account, I am inclined to agree with the contentions of the Claimants and hold this claim to be justified. I, therefore, award an amount of Rs.2,01,832/- under this claim in favour of the Claimants*."

9. **Claim no.5** was made by the respondent/contractor for Rs.99,832/-. This claim was made under clause 10CC. The tribunal records that the said claim had been accepted by the respondent. I may note that there is a typographical error in the award inasmuch, as, instead of recording that the claim had been accepted by the respondent, it is recorded that the claim has been accepted by the claimant. It is, therefore, clear that the award made on claim no.5 was based on an admission of the said claim by the petitioner herein.

10. **Claim no.6** was made for Rs.5 lacs for refund of security deposit made by the respondent/contractor. A sum of Rs.1 lac had been tendered as earnest money and a further sum of Rs.4 lacs had been deducted from the contractor's bills. The contractor had claimed that the contract work was suspended w.e.f. 01.12.2000 and thereafter abrogated for various reasons, due to difficulties experienced during the execution of the works. These were the closing of the only approach road to the site of work - a narrow overcrowded street closed due to laying of sewer line; shortage of supply of cement by Jal Board; flooding of the area of sewage pumping station; site being located in a big pond; stoppage of pumping of sewage and rain water caused by

erratic electric supply; inadequate prechecking of the parts of the substructure to be completed and, delay in payments for work done.

11. According to the respondent, on account of payment not being made and the non-availability of cement and reinforcement steel, the work came to a stop on 01.12.2000 and the contract period expired on 05.12.2000.

12. The claimant further stated that they were left with no other option but to abandon the work and seek redressal through arbitration. The learned arbitrator allowed the claim by observing as follows:-

> "*I have carefully examined the contentions of both the parties. While the stand of the Respondents is undoubtedly correct in normal circumstances, the case of the Claimants lies only if the work was delayed due to circumstances beyond their control and due to the defaults and latches on the part of the Respondents. After examining the contentions of both the parties in their pleadings, documents, arguments, I hold that Claimants could not carry on and complete the work due to circumstances for which they were not responsible. I, therefore, hold that the Claimants could not be held guilty of breach of contract for stopping the work before its completion. As a consequence I hold that refund of security deposit of Rs.5,00,000 /- including Rs.1,00,000/- of earnest money is justified. I, therefore, award an amount of Rs.5,00,000/- in favour of the Claimants under this claim*."

13. **Claim No.7** was made by the claimant for Rs.12,78,504.66. This claim had been made towards anticipated profits on the left out/unexecuted portion of the work at the rate of 10% of the balance work. The basis for this claim made by the claimant was that the

claimant was not able to complete the work due to the defaults of the petitioner department and circumstances beyond their control, without any default on their own part. As per the award, the amount of claim covers infructuous expenditure also incurred for the execution of the entire work including mobilization of tools, plant and machinery and construction of stores, site office, labour camp, steel yard and cement stores etc. and idle maintenance of site staff and site telephone. The balance estimate of work was worked out at Rs.1,02,28,037.30. Since the award of the tender was 25% above the estimate, the said figure was revised to Rs.1,27,85,046.60.

14. The stand of the petitioner department was that the said claim is not maintainable as the contractor had abandoned the site and stopped the work without any rhyme or reason and so he was not entitled to any amount. While allowing the aforesaid claim, the arbitrator observed as follows:

> *"After careful consideration and examination of the contentions of both the parties I am inclined to agree with the contentions of the Claimants to the effect that they could not compete the work due to Respondents' defaults and circumstances beyond their control, without any defaults on their side. In view of all the facts and circumstances of the case I do hold that there was breach of contract on the side of the Respondents in the matter of providing approach to the site, adequate supply of cement for the execution of work, timely instructions and checking of the work of sub-structure, non-payment for the work of pumping out of overflown water, delay in payments. In addition there was flooding of the big pond where the sewage pump was located, due to rains and non-pumping of electric pumps due to erratic electric supply which was beyond the control of the Claimants. The stipulated period*

of contract came to an end on account of the difficulties mentioned above and the Claimants were forced to abandon the work due to the circumstances beyond their control. In the totality of the circumstances I do hold that the claimants are justified to claim loss of anticipated profits. I do not however agree that the quantification given by the Claimants."

15. Though the claimant had claimed 10% profit on the aforesaid amount, the learned arbitrator awarded the said claim @ 7.5% and not 10%. Consequently, the learned arbitrator awarded a sum of Rs.8,71,708/- in favour of the respondent/claimant for loss of anticipated profits of unexecuted part of the work.

16. **Claim no.8** was made by the respondent/claimant towards interest @ 18% p.a. The learned arbitrator awarded interest @ 18% p.a. on the total amount of award under claim nos.3 to 6 w.e.f. 14.05.2001 and on claim no.7 from the date of the award till payment.

17. The learned arbitrator dealt with the **counter claim no.1** made by the petitioner and rejected the same, which was made towards anticipated escalation for the ancillary work amounting to Rs.45,994/- by observing as follows:

"*The Claimants state that there is not an iota of evidence on damages suffered. They added that this tender is three years earlier and the work should have been completed much earlier.*

After considering the facts of the counter claim and the contentions of the Claimants this counter claim is not admissible. My award against this counter claim is therefore Nil."

18. **Counter claim no.2** was made towards anticipatory escalation of ancillary work for Rs.86,264/-. The arbitrator rejected the same by observing as follows:

> "*The Claimants stated that stone masonary wall could be completed as only shifting was involved. The Claimants added that the work could not be done due to local pressures.*
>
> *After considering the facts and weighing the contentions of both the parties I do not hold this claim to be justified. My award against this counter claim is therefore Nil*".

19. **Counter claim no.3** was made towards anticipatory pumping of water flooded in pond due to stoppage/abandoning of work by the contractor to be done at the time of starting of execution of this balance work by the new agency amounting to Rs.2,01,832/- was rejected by observing as follows:

> "*The Claimants stated that this is not rainy water or water, it is sub-soil water for which the Claimants are not responsible.*
>
> *After considering the facts and weighing the contentions of both the parties this claim is not held admissible. My award against this counter-claim is therefore Nil*."

20. **Counter claim no.4** made towards anticipatory additional costs due to increase of tendered rate for the balance work by the new agency amounting to Rs.12,78,505/- was rejected by observing as follows:

> "*After considering the facts and the contentions of the Claimants mentioned earlier I do not hold this claim to be*

admissible. My award against this counter-claim is therefore Nil."

21. **Counter claim no.5** was made towards additional consultancy charges of consultant TCE Limited amounting to Rs.22,374/-. This was also rejected by observing that both parties shall bear their own costs.

Submissions of the Parties

22. The submission of learned counsel for the petitioner, Ms. Agnihotri is that the impugned award is patently illegal. She submits that the learned arbitrator has made the award contrary to the contractual terms and by completely disregarding the same. In relation to the award made under claim no.4, learned counsel for the petitioner has placed reliance on the following contractual clauses:

General Conditions

"1. *The contractor before tendering should visit the site and acquaint himself with the nature of the work, the accessibility of site and all other details connected with the work. The contract document consisting of detailed plans, specifications, schedule of various class of work to be done, can be seen and any other information required in this connection can be had from the office of EE (C) DR- … DWS & SDU, Municipal Corporation of Delhi, Varunalaya PH-I, Jhandewalan, New Delhi-110 005*".

"21. ***The contractor before tendering must satisfy himself as to the natural features of the ground, the quantity of work and material necessary for the entire completion of the contract and the means of access to the work or other accommodation as may be required and no claim on the ground of ignorance of any such***

***detail shall be entertained at any time"*.** (emphasis supplied).

"*41. In the event of any damage occurring of any work included in the contract through settlement of ground, slips, flooding, or any other cause whatever due to negligence on the part of the contractor or not, the contractor will be solely responsible and must re-construct, repair and make good any such damaged work at his own expenses*".

"*43. The cement will be supplied by the department at the rate of Rs.137/- each bag for PPC/OPC inclusive of the cost of bags. The department will be free to supply cement from its own stores or from any store of other department in Delhi or from the railway sidings and the contractor shall make his own arrangement for carting the same to the site of work and store the same properly. No payment on this account shall be made. The recovery of cement shall be made from the running bills of the contractor at the above specified rate. The tentative quantity of cement is 927.40 MT*".

<u>Special Conditions</u>

"*3.1 The Contractor shall keep the works well drained until the Engineer-in-charge certifies that the whole of the works is substantially complete and shall ensure all work is carried out under dry conditions. Excavated areas shall be kept well drained and free from standing water".*

3.2 The Contractor shall construct, operate and maintain all temporary dams, water courses and other works of all kinds including pumping and well-point dewatering that may be necessary to exclude water from the works while they are in progress and till they are handed over to the DWS & SD Undertaking. This refers to surface water that may enter into the excavated construction work. No separate payment will be made for such dewatering works/measures. Percentage rates quoted by Tenderer will be deemed to have covered expenses for such dewatering works/measures. Such temporary works shall not be removed without the approval of the Engineer-in-charge. It shall be further noted that disposal of surface/sub-soil water away from the site into some existing drain/nallah shall be done by Contractor at his own cost. No claim in this regard shall be entertained.

3.3 Notwithstanding any approval by the Engineer-in-charge of the Contractor's arrangements for the exclusion of water, the Contractor shall be responsible for the sufficiency thereof and for keeping the works safe at all times, particularly during any floods and for making good at his own expense any damage to the works including any that may be attributable to floods. Any loss of production or additional costs of any kind that my result from floods shall be at the Contractor's own risk.

4.1 Contractor shall have to arrange electric connection from DESU. EE, DWS & SD Undertaking shall only sign the application for getting electricity connection in his name. Contactor shall bear all the charges to be deposited with DESU for installation of electric connection including energy consumption and other charges as demanded by DESU from time to time, failing which the DWS & SDU shall deduct the amount so demanded by DESU, from the running bills of the contractor. Nothing shall be paid by DWS & SD Undertaking on this account.

4.3 If for any reason of feasibility or whatsoever, DESU is not in a position to sanction the electric connection, the contractor shall make his own arrangements. No claim shall be entertained either on account of delay in sanction of the connection by DESU or refusal of connection by DESU."

"15.0. <u>Sub Soil Water</u>

15.1 Where sub-soil water is met during execution, in to electric pump sets of adequate capacity the contractor shall also arrange at his cost Diesel Generator Sets/Diesel pumps as a sufficient standby arrangement in good running condition. Pumping of subsoil water shall be continued upto the safe stage of work as directed by Engineer-in-charge so as to avoid floatation of the structure and working under dry conditions.

15.2 Payment of the items of work carried out under subsoil water shall be made as per the actual execution only for the excavation concreting, RCC and brick masonry as per the items in the schedule of quantities. Level of ground water table shall be jointly recorded and the level so ascertained shall be taken for execution of works during that particular period. Tenderer shall note that nothing extra on account of execution of any other

> item under subsoilwater conditions or for dewatering required for safety of structure against floatation shall be payable. The Contractor shall carry out the works under dry conditions."

23. By reference to the aforesaid clauses, it is argued that it was the sole obligation of the contractor to acquaint himself with the conditions prevailing at the work site before bidding in the tender process, and therefore, the contractor could not subsequently raise grievances founded upon his ignorance or difficulties faced at the work site due to the peculiar geographical conditions of the work site.

24. It is, therefore, submitted by learned counsel for the petitioner that in the face of the aforesaid specific clauses of the contract agreement, the award of the learned arbitrator on claim no.4 cannot be sustained.

25. In response, Mr. Sharma, learned counsel for the respondent submits that claim no.4 had been made only for an amount of Rs.2,01,832/-. This was the expenditure incurred by the contractor for pumping out the flood water which had entered into the work site on account of the overflow of the peripheral drain due to rain on the night of 16.07.2000. Mr. Sharma submits that from the peripheral drain, the water had to be pumped into the storm water drain. However, the pumping stations which were being operated by the petitioners were non-functional, inter alia, due to erratic supply of electricity. Due to the said pumps not being operated, in the peripheral drain there was

built up of water and this resulted in back flow of water into the contractors work site.

26. He submits that this situation was not contemplated under the contract agreement and, therefore, it was agreed by the Superintending Engineer on 09.12.2000 that the water which had come into the work site may be pumped out by the contractor and that the payment for the same would be made to the contractor. In this respect, he refers to the pleadings made in the statement of claim and also to the correspondences addressed by the claimant/contractor to the respondent. In particular, reference is made to letters dated 10.08.2000 and 15.09.2000 sent by the claimant to the department.

27. Mr. Sharma further submits that the contractor had been made payment for dewatering of the water which had overflown and this is reflected in the first running bill. He submits that there was no justification for making payment of the said item, if the respondent did nto consider the claim of the petitioner legitimate. It is not explained by the petitioner as to why the said payment had been made.

28. In her rejoinder, learned counsel for the petitioner has pointed out that, firstly, there was no obligation under the contract undertaken by the petitioner to maintain the peripheral drain. It was not the obligation of the petitioner to ensure that the water level in the said drain did not rise, such that it does not overflow back into the work site. Secondly, she submits that a perusal of the contract document

shows that the maintenance of the peripheral drain itself was also within the scope of work allotted to the respondent/contractor.

29. In this respect, she relies on page 46 of the tender document, wherein the "background and work involved in the scheme" has been set out. She submits that earlier the work of construction of 12.4 MGD SPS was awarded to U.P. Jal Nigam at a total cost of Rs.186.81 lacs in the year 1996. At that time, the site was unapproachable. For making the said site approachable, the U.P. Jal Nigam had decided to construct a peripheral drain along the periphery of the pond and a storm water sump was installed to take care of discharge coming into the pond. The work of construction of peripheral drain, RCC sump, coffer dam and disilting of pond etc. were not envisaged in the original estimate. To provide for the said ancillary works and extra items, an estimate of Rs.60 lacs was fixed.

30. The U.P. Jal Nigam completed the ancillary work upto 26.12.1997 and thereafter the main work under the contract, i.e. construction of 12.4 MGD SPS was started. It appears that thereafter some disputes arose between the petitioner and the U.P. Jal Nigam. Consequently, the work in question was awarded at the risk and cost of U.P. Jal Nigam to complete the balance work. The revised estimate had been worked out to Rs.2,78,87,064/-, out of which the work of Rs.1,07,08,041/- had already been completed by U.P. Jal Nigam. The balance work of Rs.1,71,79,022/- was left to be completed. The reason for the revision of estimate was primarily due to ancillary work of

peripheral drain, sump, desilting of pond, revision of structural design/drawings as per soil bearing capacity. The work involved in the contract between the parties herein was to complete the balance work of construction of wet sump, dry sump annexed DG set room etc.

31. On this basis, it is argued that the maintenance of the peripheral drain was also an aspect covered under the scope of the contract and the contractor was obliged to do the same. She further submits that even in its statement of claim, the contractor admits that the work involved construction of a "*sewage pumping station about 8.50 metres below ground and about 6.00 metres below water table, sitted in a big pond, which needed round the clock pumping and, at the time of tender, a peripherial U-Type RCC open drain was running around the site of work which was the only out-let to drainout pumped water. This existing drain was also taking the discharge of sewage and rain water of the adjoining colony. At the down stream end of the drain, a sump was existing along with a temporary pump room fitted with non-clog electric pumps with a stand-by generating set and was manned by the conservancy wing of Delhi Jal Board*."

32. She submits that the obligation to supply electricity to the pumps fitted in the peripheral drain and to operate the same was not that of the petitioner. She further points that in para-E of the statement of claim, the averment of the respondent as, that on the night of 16.07.2000 there was a light rain. The pump operators stopped pumping the drain water. As a result, the entire pit/pond filled up due

to overflow of the drain and continued to be so. It is, therefore, argued that the petitioner could not be attributed with any breach of the contract on account of the aforesaid development, even if the same accepted to have taken place. She further submits that though it has been averred by the petitioner that the Superintending Engineer had agreed that the respondent/contractor would be paid for pumping out the water which had collected at the work site in his decision taken on 12.09.2000, apart from the said averment and communication issued by the respondent, there is nothing on record to support the decision allegedly taken by the Superintending Engineer. She submits that such a decision would have been contrary to the contractual terms, whereunder the contractor was obliged to maintain the work site free from all sub-soil and overflown water. She submits that in its communication dated 10.08.2000, the respondent/contractor had recorded the fact that the only outlet of water was the peripheral drain, which was taking the discharge of sewage of the colony and the rain water.

33. In response to the aforesaid submission, learned counsel for the respondent has submitted that none of these submissions were raised before the arbitral tribunal, and therefore cannot be raised at this stage.

34. So far as claim no.5 is concerned, the submission of learned counsel for the petitioner is that before the arbitral tribunal, the petitioner had merely stated that the computation of the claim under

clause 10CC was underway. The said statement could not be taken as an admission by the learned arbitrator. On the other hand, learned counsel for the respondent submits that the said claim was never specifically denied and during the arbitral proceedings, the petitioner did not came forward to state, at any stage, that the computation made by the contractor was incorrect. Moreover, the learned arbitrator had recorded that the said claim was accepted before him. This position has not been controverted in the objections preferred before this Court.

35. In relation to claim no.6, learned counsel for the petitioner submits that the arbitral tribunal while granting refund of the security amount of Rs.5 lacs, has gone against the contractual terms. In this respect, she has drawn my attention to clause 53 of the General Conditions, which provides that the refund of security deposit shall be made after satisfactory completion of defect liability period of six months or commissioning of pumping station, whichever is later. In this case, the work had been abandoned by the respondent/contractor. Consequently, there was no question of the defect liability period of six months getting completed as there was no commissioning of the pumping station.

36. She further submits that while allowing the said claim, the arbitral tribunal had accepted, as correct, the averments of the respondent/contractor without any basis or evidence whatsoever. The respondent/claimant had contended that earlier the work was

suspended w.e.f. 01.12.2000 and thereafter it was abrogated for various reasons. The reasons were based on difficulties experienced during execution of the work. The contractor had claimed that the only approach road to the work site had been closed; a narrow overcrowded street closed due to laying of sewer line; there was shortage of supply of cement by Jal Board; there was flooding of the area of sewage pumping station; the site was located in a big pond; stoppage of pumping of sewage and rain water was caused by erratic electric supply; there was inadequate prechecking of the parts of the substructure to be completed and, there was delay in payments for work done.

37. By referring to the extract from the award contained in the award on claim no.6, which I have already set out herein above, it is argued that the learned arbitrator has merely held that the contractor could not carry on, or complete the work due to circumstances for which the contractor was not responsible. She submits that the finding of the arbitral tribunal is in the teeth of the various contractual clauses which have been referred to earlier, namely, clause no.1, which require the contractor to visit and acquaint himself with the site conditions before tendering. The contractor could not have later on raised a grievance that the approach to the site was not clear. It was not the obligation of the petitioner to provide a clear access to the contractor. Moreover, she has submitted that before the arbitral tribunal, the petitioner had placed a site plan of the work site which clearly showed that there were four different approach roads available to access the

work site. The finding of the arbitral tribunal, that there was only one approach road to the work site, and that too was closed is unfounded, as there was no material placed on record to support the same. She also refers to clause 21 of the General Conditions which states that:

> "*The contractor before tendering must satisfy himself as to the natural features of the ground, the quantity of work and material necessary for the entire completion of the contract and the means of access to the work or other accommodation as may be required and no claim on the ground of ignorance of any such detail shall be entertained at any time*".

38. She refers to clause 1 of the Special Conditions of contract, which states that the contractor should visit the site and get acquainted himself about the site conditions and nature of soil likely to be met during excavation, position of ground water etc. and the contractor is deemed to have satisfied himself with regard to the conditions likely to be encountered during excavation. She submits that in its reply before the arbitral tribunal, the petitioner had stated in para 9(a) that there was no difficulty for passage/approach road to the site, as alternative route/approach were available.

39. Reference had also been made to the General Conditions of contract which obliged the contractor to acquaint himself with the nature of work, accessibility of site and all details connected to the work before tendering. She submits that the learned arbitrator has not even taken into account the submissions of the petitioner before making the award with respect to claim no.6.

40. In relation to the finding that there was shortage of supply of cement by the petitioner, learned counsel for the petitioner has referred to clauses 30 and 43 of the General Conditions, which read as follows:

> "*30. Any delay in supply of materials stipulated to be issued by the department will be no excuse for enhancing or affecting the rates once tendered. The contractor should in such cases apply in time for extension of time and such applications will be disposed off on their merits*".
>
> "*43. The cement will be supplied by the department at the rate of Rs.137/- each bag for PPC/OPC inclusive of the cost of bags. The department will be free to supply cement from its own stores or from any store of other department in Delhi or from the railway sidings and the contractor shall make his own arrangement for carting the same to the site of work and store the same properly. No payment on this account shall be made. The recovery of cement shall be made from the running bills of the contractor at the above specified rate. The tentative quantity of cement is 927.40 MT*".

41. On the basis of the aforesaid clauses, she states that delay in supply of materials by Delhi Jal Board did not given an excuse to the contractor to default in its obligation and only entitled the contractor to grant of extension of time for completion of the work. She submits that in para 9(b) of its reply, the petitioner had stated that except for a short period from 01.12.2000 to 16.02.2001, there was shortage of supply of cement. However, the respondent/contractor stopped the work on 01.12.2000, i.e. within the period of contract and did not resume the same. The contractor also failed to carry out various other works which could be done without the use of cement.

42. In this respect, she places reliance on Exhibit R-6, the letter dated 10.01.2001 issued by Delhi Jal Board; Exhibit R-7, the letter dated 23.02.2001 issued by the petitioner to Delhi Jal Board informing the respondent that cement was available and the work should be expedited and completed; Exhibit R-8, the letter dated 26.03.2001 issued by the petitioner to Delhi Jal Board informing that the work had not been resumed and that the same should be expedited and completed.

43. She submits that so far as the excuse given by the contractor with regard to the flooding of the work site is concerned, the said aspect has already been dealt with while challenging the award made on claim no.4. She submits that it was the liability of the contractor to dewater the work site at his own costs. It was his obligation to keep the work site well during floods and make good any damage caused to the work.

44. She submits that the purpose of providing for the security deposit was to enable the Delhi Jal Board to deduct all sums or compensation payable by the contractor due for delay (clause 2 of the contract conditions, which provides for compensation of delay) and under clause 3 of the contract conditions, which provides for various contingencies, and the security deposit could be completely forfeited. Similarly, the security deposit was liable to be forfeited under clauses 14, 17 and 33, which deal with compensation payable by the contractor in case of deficiency/bad work; liability for damages

suffered due to imperfect work done within three months after the issuance of certificate; and for any defective work during defect liability period of six months. She submits that under clause 53, the refund of security deposit could be granted only after satisfactory completion of defect liability period.

45. In reply, Mr. Sharma, learned counsel for the respondent submits that the arbitral tribunal is the sole judge of all facts and it is not within the scope and jurisdiction of this Court, while hearing objections to the award to re-appreciate the facts, as this Court is not hearing an appeal from the said decision. Mr. Sharma submits that the arbitral tribunal has returned a finding while dealing with claim no.7 that the breach was on the part of the petitioner. Since the breach was on the part of the petitioner, the logical conclusion was that the respondent/contractor was entitled to refund of the security deposit.

46. In relation to the award on claim no.7, the submission of learned counsel for the petitioner is that the said claim has been allowed on an unfounded finding that the breach of the contract was on the part of the petitioner "*in the matter of providing approach to the site, adequate supply of cement for the execution of work, timely instructions and checking of the work of sub-structure, non-payment for the work of pumping out of overflown water, delay in payments. In addition there was flooding of the big pond where the sewage pump was located, due to rains and non-pumping of electric pumps due to erratic electric supply which was beyond the control of the Claimants*".

47. She submits that while dealing with claim no.4, the petitioner has already demonstrated that there was no basis or foundation for returning a finding that the approach had not been provided to the work site or that there was inadequate supply of cement for execution of the work or that timely instructions and checking of work sub structure was not being done. She submits that the petitioner has demonstrated that the petitioner was not obliged to make any payment for pumping out of overflown water. She further submits that there is no basis for the learned arbitrator enhancing the value of the balance outstanding work from Rs.1,02,28,037.30 to Rs.1,27,85,046.60 by marking up the value by 25%. She further submits that the arbitrator has not given any justification for computing the rate of profit at 7.5% of the marked up balance value of the work, which had not been carried out by the respondent/contractor.

48. She submits that since the respondent had itself abandoned the work, there was no question of the arbitrator making the award under claim no.7 towards anticipated profits on the left out/unexecuted portions of the work. She also submits that a perusal of the impugned award shows that under claim no.7, the respondent/contractor had claimed, apart from anticipated profits, infructuous expenditure also done for the execution of the entire work including mobilization of tools, plant and machinery and construction of stores, site office, labour camp, steel yard and cement stores etc. and idle maintenance of site staff and site telephone. However, no material or evidence in respect of the so-called infructuous expenditure allegedly already

incurred by the contractor had been furnished before the arbitral tribunal. She submits that, therefore, the award on claim no.7 is founded on no evidence at all. By reference to the extract from the award made on claim no.7, which I have already quoted, she submits that the learned arbitrator has merely accepted the assertion of the claimant and that itself forms the basis of the award. She submits that the same constitutes misconduct on the part of the arbitrator, and in this respect, she places reliance on the decision of the Supreme Court in ***State of Rajasthan vs. Ferro Concrete Construction Pvt. Ltd***., 2009 (12) SCC 1, and in particular, paras 54 and 55 of the said decision.

49. In his response, Mr. Sharma has reiterated the submissions made in respect of the earlier claims. Mr. Sharma further submits that the contractual clauses relied upon by the petitioner have to be interpreted in a reasonable manner, else they would fall foul of section 23 of the Contract Act. In this respect, he places reliance on the judgment of this Court in ***Delhi Jal Board v. Rajora Builders & Anr***. in OMP No.540/2007 decided on 10.10.2007; ***Paragon Constructions (India) Ltd. v. Union of India & Anr***., 2008 (1) ARB LR 358 Del; and ***Simplex Concrete Piles (India) Ltd. v. Union of India*** in C.S. (OS) No.614A/2002 decided on 23.02.2010.

50. Mr. Sharma further submits that the justification for marking up cost of the balance work by 25% is given in the award itself. Under the heading, brief background of the case, the learned arbitrator has

noted that on the basic estimate of Rs.1,71,79,022/- based on CPWD-DSR-1995, the quotation of the respondent/contractor which was 25% above the estimate had been accepted. It is for this reason that the mark up of 25% had been made in the cost of the balance work. He further submits that the arbitrator being an expert, it was not required of the respondent to lead any evidence, when the claim was for anticipated loss of profit. In this respect, he relies on the decision in ***Dwarkadass v. State of Madhya Pradesh***, 1999 (3) SCC 500, which has been followed by this Court in ***Delhi Development Authority vs. Polo Singh***, 101 (2002) DLT 401 DB (paras 18 to 21).

51. So far as the claim No.8 is concerned, the submission of learned counsel for the petitioner is that the award of interest @ 18% is high, considering the prevalent rates of interest. On the other hand, learned counsel for the respondent has left it to the Court to determine the reasonable rate of interest that should be awarded to the respondent.

52. In relation to the rejection of the counter claims, learned counsel for the petitioner submits that the same had been rejected by adopting a completely different yardstick by the arbitrator, namely, that no evidence has been produced by the petitioner. However, while considering claim No.7, which was towards loss of anticipatory profits the need for leading any evidence was completely dispensed with. She submits that since the said counter claims had been made towards the anticipatory escalation and additional costs that the petitioner would

suffer on account of the abandonment of the work by the contractor midway, no evidence could possibly have been led. She submits that there is no reasoning to be found in the arbitral award in relation to the discussion on the counter claims.

53. On the other hand, Mr. Sharma submits that once the arbitral tribunal had come to the conclusion that the breach of the contract was on the part of the petitioner which led to the respondent contractor abandoning the works, there was no question of any of the counter claims of the petitioner being allowed.

54. Learned counsel for the petitioner submits that the decision of this Court in ***Polo Singh*** (supra) is not applicable in the facts of this case, inasmuch, as the challenge in that case was not on the ground of patent illegality of the award.

55. Mr. Sharma submits that no ground has been raised by the petitioner to challenge the award on the ground of lack of reasons.

Discussion

Having considered the rival submissions of the parties and perused the impugned award, I am of the view that the impugned award made on claim nos. 4, 6, 7 and 8 and the counter claims preferred by the petitioner is patently illegal, contrary to the terms of the contract between the parties and wholly unreasoned and, therefore, without jurisdiction and is, therefore, liable to be set aside. The Supreme Court has repeatedly held that an arbitrator who acts in manifest disregard

of the contract acts without jurisdiction. A deliberate departure from the contract amounts to not only manifest disregard of his authority or a misconduct on his part, but it may tantamount to a malafide action. A conscious disregard of the law or the provisions of the contract from which he has derived his authority vitiates the award [see ***Associated Engg. Co. v. Govt. of A.P.*** (1991) 4 SCC 93; ***Steel Authority of India Ltd. v. J.C. Budharaja, Government and Mining Contractor*** (1999) 8 SCC 122; ***Rajasthan State Mines & Minerals Limited v. Eastern Engineering Enterprises & Anr.*** (1999) 9 SCC 283, ***Bharat Coking Coal Ltd. v. Annapurna Construction*** (2003) 8 SCC 154, ***Food Corporation of India v. Chandu Construction*** (2007) 4 SCC 697 & ***M.D. Army Welfare Housing Organisation v. Sumangal Services Pvt. Ltd*****.** AIR 2004 SC 1344.

56. An arbitrator cannot go beyond the terms of the contract between the parties. In the guise of doing justice he cannot award contrary to the terms of the contract. If he does so, he will have misconducted himself. Of course if an interpretation of a term of the contract is involved then the interpretation of the arbitrator must be accepted unless it is one which could not be reasonably possible. However, where the term of the contract is clear and unambiguous the arbitrator cannot ignore it (see ***State of Rajasthan v. M/s Nav Bharat Construction Co****.* AIR 2005 SC 4430).

57. A perusal of the impugned award shows that the learned arbitrator has not only ignored, but has gone completely contrary to

the express contractual terms between the parties. The contractor was obliged to satisfy himself as to the nature of the work, the accessibility of the site and all details connected with the work. He had to satisfy himself as to the natural features on the ground, the quantity of work and material necessary for the entire completion of the work, and the means and access to the work or other accommodation as may be required. The petitioner had made it clear that "*no claim on the ground of ignorance of such details shall be entertained at any time*. (see clause 1 and 21 of General Conditions).

58. Under clause 41 of the general conditions, it was clearly provided that in the event of any damage occurring to any work included in the contract, inter alia, through flooding, or any other cause whatever, due to negligence on the part of the contractor, or even otherwise, the contractor would be solely responsible "*and must reconstruct, repair and make good any such damaged work at his own expenses."*

59. Under clause 3.1 of the special conditions, it was the obligation of the contractor to keep the works well drained until the Engineer in Charge certifies that the whole of the works is substantially complete and shall ensure all work is carried out under dry conditions. Excavated areas were required to be kept well drained and free from standing water.

60. Clause 3.2 of the special conditions is very pertinent. Under this clause, it was the obligation of the contractor to construct and

operate and maintain "*all temporary dams, water courses and other works of all kinds including pumping and well point dewatering that were necessary to exclude water from the works while they are in progress and till they are handed over to the DWS and SD Undertaking.* ***This refers to surface water that may enter into the excavated construction work***." It was stated that no separate payment would be made for such dewatering works/measures. The percentage rates quoted by the tenderer were deemed to cover expenses for such dewatering works/measures. It was further provided that disposal of surface/sub soil water away from the site into some existing drain/nallah was to be done by the contractor at his own costs. No claim in this regard could be entertained.

61. Clause 3.3 of the special conditions provides that notwithstanding any approval by the Engineer in charge of the contractors arrangement for the exclusion of water, the contractor was responsible for the sufficiency thereof and for keeping the works safe at all times, particularly during any floods and for making good, at his own expense, any damage to the work including that may be attributable to floods. Any loss of production or additional costs of any kind that may result from floods were at the contractors own risk.

62. Under clause 15 of Special Conditions, it was the obligation of the contractor to remove the sub soil water and nothing extra was payable to the contractor for carrying out the operation of dewatering.

It was the obligation of the contractor to maintain safety of the structure against floatation.

63. In the face of the aforesaid clauses of the contract between the parties It cannot be appreciated as to how the learned arbitrator came to the conclusion that the general conditions were not attracted merely because the flooding of the work site due to rain/surface run was a post tender development. The tender/contract conditions show that the parties were well aware of the possibility that such like developments may arise. It is for this reason that the contract specifically provided that in the event of any damage occurring to any work included in the contract, inter alia, due to flooding or due to negligence on the part of the contract, or otherwise, the contractor shall be solely responsible and must reconstruct, repair and make good any such damage to the work at his own expense. The logic advanced by the respondent and accepted by the learned arbitrator defies common sense. Obviously, the contract was not awarded after the event of flooding had already taken place. It was a post tender/post contract development. However, the parties had expressly agreed that if such an eventuality arises, it shall be the obligation of the contractor to deal with the same and that no extra amount shall be payable by the petitioner for dealing with the situation or remedying the damage that may result to the work in question. This aspect was repeatedly emphasized in more ways than one as is evident from the contractual clauses, presumably for the reason that the work was to be done at a subsoil level.

64. The award made by the learned arbitrator on claim No.4 is unreasoned. While observing that "*accumulation of water caused by the failure of the respondents cannot be covered by any contract conditions*", the learned arbitrator has not pointed out even a single clause in the contract which obliged the petitioner herein to keep the work site clear of flooding due to rain or from the peripheral drain. On the contrary, the clauses of the agreement extracted above clearly fix the responsibility to keep the work site free from flooding upon the respondent/contractor. Even before me learned counsel for the respondent/contractor has not pointed out a single clause of the contract which put the obligation to keep the storm water or the peripheral drain water out of work site upon the petitioner.

65. When the contract is entered into, all contingencies are not existing. However, the parties foresee the same and delineate their respective rights and obligations to deal with the contingencies as they arise. In this case, the parties clearly provided that in case of flooding, it shall be the responsibility of the respondent/contractor to deal with the situation and that no extra amount shall be payable on that account.

66. I do not find any force in the submission of Mr. Sharma that merely because the respondent/contractor had made payment for dewatering the water, which had flown into the work site, in the running bills that, by itself, created a vested right in the

respondent/contractor to seek compensation for dewatering the work site upon its flooding.

67. The rights of the parties are governed by the contractual terms. Even if it were to be assumed that some payment had been made while clearing the running bills of the respondent/contractor, that by itself cannot provide a justification for a further claim made by the contractor. Two wrongs do not make a right. Reliance placed on the letters dated 10.08.2000 and 15.09.2000 to fasten liability on the petitioner department is also of no avail. These are self-serving letters issued by the respondent/contractor and cannot override the contractual terms between the parties. The respondent/contractor did not produce any evidence to even remotely suggest that the petitioner had consciously agreed to reimburse the amount claimed by the respondent/contractor for dewatering the work site after its flooding. Even if such a decision were to be taken by the petitioner, the same would have had to be supported by the relevant contractual clauses, which is not the case.

68. The respondent has also not been able to controvert the submission of the petitioner that the work of maintenance of the peripheral drain also fell within the scope of the work awarded to the respondent/contractor. To include the said work the estimate of the work had been upwardly revised to ₹ 2,78,87,064/-, out of which the earlier contractor, namely, U.P. Jal Nigam had done the work amounting to ₹ 1,07,08,041/-. The reason for the revision of the

estimate was primarily due to the ancillary work of peripheral drain, sump, desilting of pond, revision of structuring design and drawings as per soil bearing capacity.

69. The arbitrator has given no clue whatsoever to justify the award of a sum of ₹ 2,01,832/- in favour of the respondent/contractor under clause No.4. A Division Bench of this Court to which I was a party in ***DDA v. Sunder Lal Khatri & Sons*** 157 (2009) DLT 555 (DB) while dealing with a similar situation set aside an award of damages by observing as follows:

> "37. The reason given by the Arbitrator that the delay was attributable to the appellant and not to the respondent would undoubtedly give the Arbitrator the justification to examine claim No. 4 on its merits. However, in our view, that cannot be said to be a sufficient reason to arrive at the computation of the amount awarded as damages. **The obligation to make a reasoned award, in our view, would also include the obligation to give at least some reason in the award for arriving at the awarded amount. It should be discernible from a speaking award as to on what basis the Arbitrator has arrived at the quantification of the amount. No doubt, the Arbitrator is not expected to give detailed reasons or disclose the mathematical calculations in the award to demonstrate how the exact amount awarded has been worked out. Nevertheless, that would not relieve the Arbitrator of his obligation to, at least, indicate in the award the aspects, evidence and material taken by him into consideration while awarding any particular amount against any claim. It is not disclosed as to how the arbitrator has travelled the last mile-from the point he came to the conclusion that the respondent/ claimant was entitled to**

> **claim damages on account of the delays and defaults of the appellant/DDA, to the point he arrived at the awarded amount of Rs. 12.50 lakh**." (emphasis supplied)

70. The submission of the respondent that the petitioner had not raised these aspects before the arbitral tribunal and that, therefore, they cannot be raised before this Court, in my view, would not save the award which, on the face of it, is patently laconic. The arbitral tribunal is obliged to acquaint himself with the contractual terms between the parties before making the award. He cannot ignore the contractual terms, which he is bound to enforce. The arbitral tribunal cannot ignore the contractual terms and go contrary thereto. Moreover, the tribunal cannot shirk its responsibility of making a reasoned award to justify the award made by it. Accordingly, the award made on claim No.4 is set aside.

71. So far as claim No.5 is concerned, the said claim was made under clause 10CC of the contract. The stand of the petitioner before the arbitral tribunal was that it was in the process of computing the amount due under Clause 10CC to the respondent/contractor. Pertinently, the petitioner did not come forward with any other computation to controvert the claim made by the respondent/contractor under this head. Moreover, the learned arbitrator has recorded that the petitioner consented to its liability under Clause 10CC as claimed by the respondent/contractor. The petitioner in its objections had not specifically taken the plea that its

consent before the arbitral tribunal has wrongly been recorded. In view of the aforesaid position, in my view, the award made on claim No.5 cannot be assailed and there is no illegality, much less a patent illegality, in the award made on claim No.5. The objections to claim No.5 is, accordingly, rejected.

72. Claim no.6 has been allowed by the learned Arbitrator towards refund of security deposit of Rs. five lakhs made by the respondent-contractor. I have set out in paragraph 12 above, the basis for allowing this claim of the respondent-contractor. In my view the learned Arbitrator has given no reasons for directing refund of the security deposit of Rs. five lakhs to the respondent-contractor. It is observed in the award that the stand of the petitioner herein "*is undoubtedly correct in normal circumstances....*", however, it is not explained as to what was the abnormal circumstances in the facts of this case. It is further observed that "*the case of the claimant lies only if the work was delayed due to circumstances beyond their control and due to the defaults and laches on the part of the respondents*". It is neither stated as to which circumstance was beyond the control of the respondent-contractor, nor is it stated as to what were the defaults and laches on the part of the petitioner herein. No doubt, the allegation of the respondent-contractor is recorded that:-

(i) The only approach road to the work site was closed;

a narrow over crowded street was closed due to laying of sewer line;

(ii) there was shortage of supply of cement by Jal Board;

(iii) there was flooding of the area of sewage pumping station;

(iv) the site was located in a big pond;

(v) there was stoppage of pumping of sewerage and rain water caused by erratic electric supply;

(vi) there was inadequate pre-checking and parts of substructure to be completed;

(vii) there was delay in payment for work done.

However, there is no specific finding with regard to the correctness or otherwise of the allegations. As to how these allegations, or any of them, have been assumed to be correct, and on what basis, is not stated in the award. The only basis for allowing this claim is that the "*claimants could not carry on and complete the work due to circumstances for which they were not responsible. I, therefore, hold that the claimants could not be held guilty of breach of contract for stopping the work before its completion*."

73. Learned counsel for the petitioner has taken great pains to demonstrate that none of these allegations were made out and there was evidence placed on record to rebut each of them. However the said evidence has been completely ignored and not considered by the learned Arbitrator. For instance, it is pointed out that the respondent had placed on record Ex. E-9 i.e. a map depicting that there were three different approach roads to the site from Wazirabad-Mauzpur, Brahmapuri and Pushta. The learned Arbitrator has ignored the said plan and the fact that there were three approaches available to the site. He has even considered the submission of the petitioner and the document Ex.E-9 relied upon by the petitioner. Reference may also be

made to para 9(a) of the reply filed by the petitioner before the learned Arbitrator wherein it had specifically been pleaded that there were different approach roads to the site and as per the terms of the contract, the contractor was presumed to have acquainted himself with the site.

74. I have already set out hereinabove clauses 1 and 21 of the General Conditions and clause 1 of the Special Conditions.

75. The learned Arbitrator has also ignored clause 53 of the General Conditions of Contract which stipulated that the refund of security deposit shall be made after satisfactory completion of the defect liability period of six months or on commissioning of pumping station, whichever is later. Admittedly, the work was never completed and abandoned mid-way.

76. Clause 30 of the General Conditions stipulates that any delay in supply of materials stipulated to be issued by the department will be no excuse for enhancing or affecting the rates once tendered. The contractor, in such cases, should apply in time for extension of time and such an application will be disposed of on merits. It is, therefore argued that even if there were some delay in supply of cement, that did not provide an excuse to the respondent-contractor to abandon the work. At best, it entitled the Contractor for extension of time for completion of the work.

77. Clause 43 of the General Conditions is also relied upon by the petitioner to suggest that the supply of cement was at the discretion of the department. However, on a reading of clause 43, I do not agree with the submission of learned for the petitioner. The petitioner had also denied the shortage of cement for the period from 01.12.2000 to 16.02.2001 in para 9(b) of its reply before the Arbitrator. It is, therefore, seen that the non-availability of cement was within the contractual period for a period of about 2-1/2 months.

78. The respondent-contractor had stopped the work on 01.12.2000 and did not resume the same thereafter. The learned arbitrator has not even considered the aforesaid aspects in the impugned award. The annexures of the petitioner, Ex. R-6, R-7 and R-8 dated 10.01.2001, 23.02.2001 and 26.03.2001, respectively, which are relevant on the issue of non-supply of cement during the aforesaid period and the availability thereof after 16.02.2001 have not been dealt with. In Ex.R-6, the petitioner DJB had informed the respondent-contractor that he had stopped the work due to non-availability of cement but other works could still be carried on by him. In Ex.R-7, the respondent was informed about the availability of cement and he was asked to expedite and complete the work. Reminder was sent by way of Ex.R-8.

79. In ***Simplex Concrete Piles*** (supra), this Court has observed that parties cannot contract out of sections 55 and 73 of the Contract Act by providing that a party in breach would not be liable to pay damages. Therefore, the non supply of cement during the contractual

period would make the petitioner liable for the resulting damages and to that extent the clause of the contract which provides that the respondent/contractor would not claim damages for the said breach would not protect the petitioner from the claim of damages. However, in view of the contractual clauses, the respondent/contractor was not entitled to abandon the contractual work.

80. The issue before me is not as to what rights and obligations arose due to non-availability of cement during the aforesaid period. The only issue is whether the arbitral tribunal has even applied his mind to the relevant contractual clauses and the materials/evidence brought on record by the parties. On a plain reading of the award, it cannot be said that he has even remotely applied his mind either to the contractual clauses or to the documents/evidence placed on record.

81. The aspect of flooding of the area of the sewage pumping station and of it being located in a big pond as also the aspect of stoppage of sewage and rain water have been dealt with while dealing with the award made on claim no.4 and need not be repeated once again. I am, therefore, of the view that the award on claim no.6 for refund of security deposit had been made in ignorance of the contractual terms and the evidence/materials placed on record, and therefore cannot be sustained as it is patently illegal.

82. Claim no.7 had been made on account of, inter alia, anticipated profits that the respondent/contractor could not earn on

the left out/unexecuted portion of work @ 10% of the balance work. Here again, I find that the learned arbitrator has returned his findings without any basis or reason. I have set out hereinabove, in para-14, the reasoning given by learned arbitrator for allowing the said claim to the extent of Rs.8,71,708/-. While arriving at the finding that the respondent/contractor could not complete the works due to the defaults of the petitioner herein and for circumstances beyond their control, and also the finding that the breach of the contract was on the side of the petitioner herein, there is no basis given in the impugned award for the said finding. The finding returned is that there was breach of the contract on the side of the petitioner due to:

i) non provision of approach to the site,

ii) failure to make adequate supply of cement for execution of the work,

iii) failure to issue timely instructions and checking of the work of substructure,

iv) non payment for the work of pumping out of overflown water, delay in payments.

83. These findings appear to be contrary to the contractual terms inasmuch, as, there was no obligation cast on the petitioner to provide approach to the site as aforesaid. The site had three different access and the respondent/contractor was obliged to examine and acquaint himself with the site conditions including the approaches before

tendering for the work. The arbitrator has ignored Exhibit E-9 and the averments made by the petitioner in its reply in para-9A.

84. It has already been discussed hereinabove that there was shortage in supply of cement for a period of 2 ½ months and it appears from Exhibit R-6, R-7 and R-8 that this shortage was overcome by the middle of February 2001. The respondent, however, did not resume the work despite being required to do so.

85. The arbitrator does not give any basis for concluding that the petitioner did not give timely instructions and did not do checking of the work of sub structure. The non payment for the work of pumping out overflown water has been taken to be a breach by the learned arbitrator. I have already discussed hereinabove that the petitioner was not obliged under the contractual terms to pay to the respondent/contractor any amount for pumping out the overflown water. Consequently, it cannot be said that there was breach of the contract on the part of the petitioner due to non payment for the work of pumping of overflown water, and this finding is patently contrary to the contractual terms. The award does not disclose as to on what basis the arbitrator has concluded that there was delay in payments. The finding that the flooding of the big pond was beyond the control of the respondent also does not appear to be in accord with the contract which provides that it shall be the complete responsibility of the contractor to ensure that there is no flooding of the work site from any source. It was the obligation of the contractor to maintain the

peripheral drain. The learned arbitrator has also awarded amounts towards infructuous expenditure including mobilization of tools, plant and machinery and construction stores, site office, labour camp, steel yard, cement stores etc. and idle maintenance of site staff and site telephone. However, it appears that no evidence was led on these aspects and no basis for awarding any amount on these accounts has been disclosed in the award. The award is completely unreasoned in this respect, and is based on no evidence. In ***State of Rajasthan v. Ferro Concrete Construction Pvt. Ltd.*** (2009) 12 SCC 1 the Supreme Court has held:

> "55. While the quantum of evidence required to accept a claim may be a matter within the exclusive jurisdiction of the arbitrator to decide, if there was no evidence at all and if the arbitrator makes an award of the amount claimed in the claim statement, merely on the basis of the claim statement without anything more, it has to be held that the award on that account would be invalid. Suffice it to say that the entire award under this head is wholly illegal and beyond the jurisdiction of the arbitrator, and wholly unsustainable."

86. No doubt, an arbitrator who is an expert in the relevant field may resort to some amount of guess work on the aspect of computation of damages. This is so held in ***Polo Singh*** (supra). However, this decision does not come to the aid of the respondent because the very foundation for concluding that the respondent was entitled to damages appears to be non-existent and the finding of the learned arbitrator is contrary to the contractual terms and the

evidence brought on record. For the same reason, the decision in ***Paragon Construction*** (supra) is of no relevance in the facts of this case.

87. From the facts and events, it is seen that the flooding of the work site had taken place on 16.07.2000. The petitioner thereafter did not take steps to dewater the work site. The non availability of cement arose only on 01.12.2000, when the contractual period was about to expire. It would appear that the non availability of cement was used as an excuse by the respondent/contractor to abandon the work. Without dewatering of the work site, it is difficult to even appreciate as to how the respondent could have carried out any work at the site even if there was no shortage of cement from 01.12.2000 onwards.

88. I, therefore, set aside the award made on claim no.7.

89. So far as rate of interest is concerned, I am of the view that considering the fall in the inflationary rates and rate of interest, the award of interest @ 18% p.a. from the date of the award till date of actual payment is on the higher side. The same is accordingly reduced to 12% p.a. on the principal liability, if any, of the petitioner.

90. A perusal of the award made on the counter claims shows that the same is totally without any reason or justification, particularly in relation to the award made on counter claim nos.2 to 5. It is for this reason that I have set out hereinabove in paragraphs 18 to 21 the award made on these counter claims.

91. So far as the award made on counter claim no.1 is concerned, the learned arbitrator records the submission of the claimants that no evidence has been furnished on the damages suffered. However, the learned arbitrator does not, in terms, accept that submission, and merely states that after considering the facts of the counter claim and contentions of the claimant, this counter claim is not admissible.

92. As the learned arbitrator returned a finding that breach was on the part of the petitioner, which finding appears to be contrary to the contractual terms and the evidence brought on record, in my view, the award made on the counter claims cannot be sustained. This is so because no counter claim could have been made by party which has itself been in breach. As the said finding with regard to the breach of the petitioner has been set aside, the award made on counter claims also deserves to be set aside. Accordingly, the award made on counter claims is set aside.

93. Accordingly, this petition is allowed and the objections of the petitioner succeeded in respect of claim nos.4, 6, 7 and 8 as also in respect of the counter claims made before the arbitral tribunal.

VIPIN SANGHI, J.

OCTOBER 08, 2010
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