F-3

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

\+ CS(OS) 2232A/1997

GLOBAL CONTRACT SERVICES ..... Petitioner
Through: Mr. Sandeep Sharma, Advocate.

versus

DELHI DEVELOPMENT AUTHORITY .....Respondent
Through: Ms. Anusuya Salwan with
Ms. Neha Mittal, Advocates

% Date of Decision : JANUARY 28, 2010

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

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

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

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

J U D G M E N T

MANMOHAN, J (ORAL)

I.A. No. 2363/1998

1. By way of the present application, respondent-objector/DDA has filed objections under Sections 30 and 33 of the Arbitration Act, 1940 (hereinafter referred to as "Act 1940") to the Award dated 04th August, 1997 made and published by Mr. A.C. Panchdhari, the sole Arbitrator. The respondent-objector has challenged the said Award to the extent it awards Claims No. 2 to 5, 7 to 13 as well as 16 and 17.

2. Ms. Anusuya Salwan, learned counsel for respondent-objector stated that the Arbitrator had erroneously awarded a sum of Rs. 69,737/- against Claim No. 2 for straightening of steel reinforcement. She submitted that the petitioner-claimant's rationale that cutting and straightening was an additional item, was contrary to the contract/agreement in particular Clause 42(ix) of the Agreement dated 1st October, 1984 which is reproduced hereinbelow:

> *"Clause 42*
>
> *xxxx xxxx xxxx xxxx*
>
> *(ix) M.S. Bars, flats, tees, angles etc. shall be issued in lengths as available in the stores. No claim on this account shall be entertained.*"

3. Ms. Salwan further stated that the petitioner-claimant had not issued any notice during the currency of the contract and, therefore, the said claim on account of cutting and straightening was not maintainable. In this connection, Ms. Salwan relied upon the judgments of this Court in ***M/s. Wee Aar Constructive Builders vs. Delhi Development Authority & Anr.*** reported in ***2001 IV AD (DELHI) 65***; ***Pt. Munshi Ram & Associates (P) Ltd. vs. Delhi Development Authority*** reported in ***2006 (1) Arb. LR 137 (Delhi)*** and ***Anant Raj Agencies vs. D.D.A. & Anr.*** reported in ***2005 (1) Arb. LR 590 (Delhi)***.

4. Ms. Salwan also stated that the Arbitrator had without giving any reasons awarded Claim No. 3. She submitted that extra length of steel reinforcement was already included in the nomenclature of Item No.2

of the Agreement and further Special Condition No. 2.5.4 of the Agreement specifically provided that no extra claim on any account would be payable. The said Item No.2 and Special Condition No. 2.5.4 are reproduced hereinbelow for ready reference:

> *"ITEM NO. 2*
>
> *Providing and installing bored cast-in-situ under reamed reinforced cement concrete piles of nominal mix 1:1 ½ : 3 (1 cement: 1 ½ coarse sand : 3 stone agg. 20 mm nominal size), minimum lengths as indicated against each, reinforced with 12mm dia cold twisted high yield strength deformed bars and 8mm dia meter mild steel rings as per details given under each item with the full reinforcement extending to the entire length of the pile complete as per direction of Engineer-in-Charge (this item covers all operations such as boring for piles and bulbs with bentonites, if so required, in all types of soil, cutting bending, binding/welding and placing in position reinforcing bars, mixing and pouring cement concrete in approved manner. The item includes the cost of concrete and reinforcing bars in the piles and the bars above the piles for embedment into the grade beam/pile cap).*
>
> *xxxx xxxx xxxx xxxx*
>
> *SPECIAL CONDITION NO. 2.5.4.*
>
> *"The cost of reinforcement left above the pile for embedment in grade beam/pile cap is inbuilt in item No. 2 of the schedule of quantities and nothing extra is payable on this account."*

5. Consequently, according to Ms. Salwan, award of the said claim was not only contrary to the contract but was also specifically prohibited by Special Condition No. 2.5.4.

6. Ms. Salwan contended that the Arbitrator erred in awarding Claim No.4, as the same had not been raised contemporaneously and was not a part of the final bill. She further submitted that removal of mud occurring from boring of pile was a part of Item No.2 inasmuch as

"the item includes all operations such as boring of pipes and bulbs with bentonites, if so required, in all types of soil etc."

7. Ms. Salwan further contended that the Arbitrator had wrongly invoked Clause 10(cc) to award increase in labour costs, wages, transportation, materials, fuels and consumables. Ms. Salwan pointed out that as the date of the Agreement was 09th October, 1984 and the stipulated date of completion was 08th February, 1985, the period of contract was less than six months and accordingly, only Clause 10(c) and not Clause 10(cc) was applicable. Ms. Salwan laid emphasis on the fact that even though Clause 10(cc) specifically provided that it would not apply to contracts where the stipulated period of completion was less than six months, the Arbitrator had held that Clause 10(cc) formed part of the Agreement executed between the parties.

8. According to Ms. Salwan, award of a sum of Rs. 7,98,000/- for testing of piles was contrary to Item No. 2.7.2 of the Agreement. She stated that the said item stipulated that tests had to be carried out in accordance with the directions given by the Engineer-in-Charge and as no specific mode of testing had been provided, it was open to the Engineer-in-Charge to pick and choose any mode of testing. The relevant Item No. 2.7.2 reads as under:

> "*2.7.2.Initial tests shall be carried out to the satisfaction of the Engineer-in-Charge before commencing the installation of working piles, if the initial test results are not satisfactory, the pile length shall be suitably modified to obtain the load bearing capacity of the pile specified in the schedule of*

quantity and fresh initial tests shall be carried out by the contractor."

9. Ms. Salwan submitted that award of claims on account of handing over of site in piecemeal manner and for clearances of vegetation, grass, night soil, business and removable of slashes and dewatering was contrary to Specifications and Conditions No.1. The said condition reads as under:

> *"The contractor must get acquainted with the proposed site for the works and study specifications and conditions carefully before tendering. The work shall be executed as per programme approved by the Engineer-in-Charge. If part of the site is not available for any reason or there is some unavoidable delay in supply of material stipulated by Department, the programme of construction shall be modified accordingly and the contractor shall have no claim for any extras or compensation on this account."*

10. Ms. Salwan also contended that award of Claims No. 10 to 12 and 16 was contrary to the facts of the case. She lastly submitted that the Arbitrator had awarded interest at different rates for three different phases and the awarded interest was much higher than the prevalent rate of interest.

11. On the other hand, Mr. Sandeep Sharma, learned counsel for petitioner-claimant submitted that this Court in ***Anant Raj Agneices***'s case (supra) while interpreting a *para materia* item in the Bill of Quantities (in short "BOQ"), namely, 3.10 had held that the claim for straightening of bent up steel bars was maintainable if the contractor had issued notice during the execution of the contract. In this

connection, Mr. Sharma, referred to the claimant's letter dated 21st September, 1985 (Exhibit C-49) wherein the petitioner-claimant had raised this claim during the execution of the contract. The relevant portion of the said letter reads as under:

> *21.9.85*
>
> *To*
>
> *The Executive Engineer,*
> *OP-D IV, DDA,*
> *Sarita Vihar, New Delhi*
>
> *Sub: C/o SFS Houses at Sarita Vihar, Pocket H & J SH: Pile foundation etc.*
>
> *Dear Sir,*
> *Inspite of several meetings, representations with your kindself and higher officials the following extra items/non-payments have not been released and decisions not taken, viz.*
>
> *The straightening/uncoiling/cutting of the agreement item No. 2 & 5have not been prepared as extra-items. The binding wire has also not been paid……..*

12. Therefore, according to Mr. Sharma, the test stipulated by this Court in ***Anant Raj Agencies***'s case (supra) was satisfied in this case.

13. As far as the award of Claim No.3 was concerned, Mr. Sharma emphasised that it was compensation for extra labour. In this connection, he referred to his claim statement. The relevant portion of Claim Statement reads as under:

> *"The claimants had to leave extra length of steel reinforcement above the pile cap under Agt. Item No. 2. The agt. item No. 5(a) provides for the payment of steel for reinforcement. The claimants had executed the item No. 2 leaving extended bars in the pile cap as required by the respondents. This extra length of steel was again bended, binded and tied along with the*

reinforcement of beams but no payment has been made for these operations. Besides this element the claimants had left extra length than required under the IS Code.

xxxx xxxx xxxx xxxx

As per the agmt. item No. 2 main reinforcing bars of 12 mm dia to be extended in the grade beam. And as per the IS Code 456-1978, 25.2.2 p. 64, anchorage value of reinforcing bars in tension and compression is maximum 16 times the dia of the bar. Further as per same I.S. Code page 68, 25.2.5.1(d) the lap length of bar in compression is 24 time dia of the bars. Whereas the Department has got extended the reinforcing bar 69 times diameter of the bar. After taking into the consideration the lap length 24 time diameter of the bars, about 45 diameter of bar length was extended extra for which no payment was made to the claimants but recovered the same as per the theoretical record entry for the recovery. So the claimants should be paid the amount for the cost of extra 45 diameter of pipe for which recovery had already been made and no payment had been made."

14. Mr. Sharma repeatedly emphasised that this Claim was not covered by Special Condition 2.5.4 as it was compensation for an additional item.

15. As far as award of Claim No.4 was concerned, Mr. Sharma contended that the same had been raised contemporaneously and in this connection, he relied upon Exhibit C-49.

16. As far as award of Claim No.5 was concerned, Mr. Sharma submitted that though the stipulated contractual period was four months, the contract period had to be extended due to delay and default on the part of the respondent-objector and accordingly, petitioner-claimant was entitled to compensation under Section 73 of the Indian

Contract Act, 1872. Though Mr. Sharma admitted that Clause 10(cc) was inapplicable in view of the specific bar contained in the said Clause, yet he submitted that the formula stipulated in Clause 10(cc) could be relied upon by the Arbitrator for calculation of damages. In this connection, Mr. Sharma relied upon ***M/s. Narain Das R. Israni vs. Delhi Development Authority*** reported in ***1996 (1) Arbitration Law Reporter 602 (Delhi)*** and ***Anurodh Constructions vs. Delhi Development Authority & Anr.*** reported in ***2005 (Suppl.) Arb. LR 258 (Delhi)***.

17. As far as the objection with regard to Claim No.7 was concerned, Mr. Sharma stated that since respondent-objector had recommended a method of testing which was not normal, the Arbitrator was well within his jurisdiction to award compensation for the costs incurred.

18. Mr. Sharma vehemently denied that award of Claims No. 8 and 9 were contrary to Specifications and Conditions No.1 of the Agreement executed between the parties. He submitted that the said condition applied to only unavoidable delays and not to delays which occurred on account of specific instruction given by respondent-objector/DDA. He also pointed out that the Arbitrator had under Claim No.9 only awarded compensation for removal of night soil and dewatering.

19. As far as Claims No. 10 to 12 and 16 were concerned, Mr. Sharma submitted that the objection raised was general in nature

which was not permissible in Sections 30 and 33 proceedings. As far as the rate of interest was concerned, Mr. Sharma, left it to the Court.

20. Having heard the parties at length and having perused the impugned Award, I am of the view that before I deal with the rival contentions, it would be appropriate to first outline the scope of interference by this Court with an arbitral award rendered under Act, 1940. The Supreme Court in ***Arosan Enterprises Ltd. Vs. Union of India & Another*** reported in ***(1999) 9 SCC 449*** has clearly outlined the scope of interference by this Court in petitions filed under Sections 30 and 33 of the Act, 1940. The Supreme Court has held that Arbitrator is the master of facts and law, and the Courts should not interfere with the award of the Arbitrator until and unless there is an error apparent on the face of the record. Moreover, reasonableness of reasons given by the Arbitrator cannot be challenged and even appraisal of evidence is never a matter which the Court questions or considers. When the parties select their own forum to decide the disputes, that forum must be conceded the power to appraise the evidence as well as quality and quantity of the same.

21. Keeping in view the aforesaid parameter, I find that the impugned Award requires no interference except insofar as it awards Claims No. 4 and 5.

22. As far as the objection with regard to award of Claim No. 2 for straightening/uncoiling of steel reinforcement is concerned, I am of the view that Clause 42(ix) of the Agreement is similar to Item No. 3.10 of BOQ as interpreted by this Court in various judgments. I may mention that respondent-objector's counsel had herself relied with regard to this claim upon those judgments wherein item no. 3.10 of BOQ had been interpreted by this Court. In fact, in ***Anant Raj Agencies***'s case (supra), that is, one of the three judgments referred to by Ms. Salwan, this Court has held as under :-

> *"39. Claim No. 4 in sum of Rs. 5,53,506 was for straightening bent up steel bars issued in coils and bent up bundles and, therefore, contractor claimed to be compensated for said work.*
>
> *40. Learned arbitrator has treated the work of straightening bent up steel bars as an extra work.*
>
> *41. Item 3.10 of the schedule of quantities required the contractor to quote for the following work:-*
>
> > *"3.10 Re-enforcement for RCC work including bending, binding and placing in possession complete."*
>
> *42. Offer submitted by the contractor shows that the contractor had quoted for aforesaid work. Issue which arises for consideration is whether the work of straightening bent up steel bars would be included under specification 3.10 aforesaid.*
>
> *43. Learned arbitrator has relied upon a decision of a learned Single Judge of this court in Suit No. 1985-A/1984 K.C.Chibber v. D.D.A. Said decision which was filed before the learned arbitrator as Ex.C-70 shows that a learned Single Judge of this court, while considering a similar descriptive clause in the schedule of quantities requiring the contractor to execute the work of reinforcement for RCC works included bending, binding and placing in position held that the clause would exclude straightening of bent up steel bars for which extra was payable. Accordingly, learned arbitrator partly allowed Claim No. 4 by treating the claim as an admissible claim.*

> *44. Decision in Wee Aar Constructive Builders (supra) relied upon by counsel for DDA noted decision in K.C.Chibber's case (supra). Decision in K.C. Chibber's case (supra) was distinguished on the ground that in K.C.Chibber's (supra) case, petitioner had notified DDA that straightening of steel was to be treated as an extra item of work and this was not objected to by DDA.*
>
> *45. In Wee Aar Constructive Builder's case (supra), learned Single Judge held that since bending, binding and placing in position steel for RCC works was included in the contract, said work necessarily required the process of straightening before cutting and, therefore it was held that no claim for extra was maintainable on said account.*
>
> *46. Learned counsel for the respondent could not point out any evidence that contractor had written to DDA when work was on that he would be having a claim as an extra item for straightening of bent up steel bars issued in coils.*
>
> *47. I, therefore, go along with the decision in Wee Aar Constructive Builder's case (supra).”*
>
> *(emphasis supplied)*

23. Consequently, in my view, the claim for straightening of bent up steel bars would be payable if the contractor had issued notice during the execution of the contract – which I find, has been done in the present case by virtue of Exhibit C-49. Accordingly, award of Claim No.2 requires no interference by this Court.

24. As far as the objection with regard to Claim No. 3 is concerned, I find that the Arbitrator has given cogent reasons for awarding the same. The relevant portion of the Award reads as under :-

> *“I have gone through agreement and drg. in the agreement made by C.D.O. DDA and I find that what claimant has stated is correct as the DRG indicates bar extension which is as per ISI. Therefore for 45 diameter*

> *extension which is not paid but the cost is recovered by respondent is wrong.*

25. Consequently, I am of the view that award of Claim No. 3 is not prohibited either by Item No. 2 of the Agreement or by Special Condition No. 2.5.4. as the said Claim is only compensation for extra labour for bending of additional forty-five diameter.

26. As far as award of Claim No. 4 is concerned, I am of the view that the same is contrary to the contractual provision as removal of mud was covered by Item No. 2 of Agreement inasmuch as it uses the words *"all operations such as……."*. In my opinion, since the said expression is of wide amplitude, it would even include removal of mud as the same is a consequence of boring.

27. I am further of the opinion that reasoning given by the Arbitrator for award of Claim No. 5 is untenable in law as he has allowed the said Claim on the ground that Clause 10(cc) formed a part of the Agreement. The said conclusion of Arbitrator is contrary to the contract and the specific bar contained in Clause 10(cc) itself. The Arbitrator's reasoning as contained in the Award for allowing the said Claim is reproduced hereinbelow:-

> *"As per Clause 2 the work was to proceed and then for every day that the work remains uncommenced or unfinished after the proper dates the contractor shall pay compensation etc. Then only Superintending Engineer is to decide. However Respondent has not produced any such day wise evidence. I have studied Clause 10C and Clause 10CC, which have attached within agreement. <u>If as stated by respondent that clause 10CC is not applicable then why did it form a part of</u>*

> *agreement. Therefore what Respondent states is incorrect. Claimant had stated that Respondent did not have full copies of Drg.s and did not issue materials like cement, steel etc. Claimant gave C-32, C-32A, C-33 of dates 3/85, 4/85, 5/85. It is clear that it is respondent who has to pay 10CC, due to increased cost of execution.*
>
> *As arbitrator I have seen all papers, agreement and I state that excess time taken to complete work is due to various breaches of respondent. Therefore I state that Respondent has to pay."*
>
> *(emphasis supplied)*

28. However, Clause 10(cc) specifically stipulates as under :-

> *"Clause 10(cc): If the prices of materials (Not being materials supplied or services rendered at fixed prices by the department in accordance with clause 10 & 34 hereof) and/or wages of labour required for execution of the work increase, the contractor shall be compensated for such increase as per provisions detailed below and the amount of the contract shall accordingly be varied, subject to the condition that such compensation for escalation in prices shall be available only for the work done during the stipulated period of the contract including such period for which the contract validity is extended under the provisions of Clause 5 of the contract without any action under clause 2 and also subject to the condition that no such compensation shall be payable for a work for which the stipulated period of completion is 6 months or less. Such compensation for escalation in the prices of materials and labour when due, shall be worked out based on the following provisions……."*
>
> *(emphasis supplied)*

29. Accordingly, clause 10(cc) specifically provides that it would not apply to contracts where the stipulated period for completion is six months or less – which was the case in the present Agreement. Consequently, the reasoning given by Arbitrator is based on a wrong proposition of law. Accordingly, the award with regard to Claim No. 5 is set aside. However, it is clarified that the petitioner-claimant would

be entitled to agitate this Claim as it has been set aside only because of the reasoning given by the Arbitrator. Therefore, petitioner-claimant is given liberty to seek fresh adjudication of Claim No. 5.

30. As far as award of Claim No. 7 is concerned, I am of the opinion that as the Arbitrator was an expert in execution of such contracts and as he has concluded that the test prescribed by respondent-objector was special and unique, the said finding does not call for interference by this Court in Sections 30 and 33 proceedings.

31. As far as award of Claims No. 8 and 9 is concerned, I am of the view that the Arbitrator has given cogent reasons for award of the same. Since in my opinion, the Arbitrator's view is a plausible one, it requires no interference. I may mention that as far as Claim No. 9 is concerned, the Arbitrator has not awarded any compensation on account of clearance of vegetation, grass, bushes, and removable of slashes, but has awarded compensation only for removal of night soil and dewatering.

32. The objection with regard to Claims No. 10 to 12 and 16 amounts to challenging findings of fact arrived at by the Arbitrator which the respondent-objector is certainly not entitled to do in the present proceedings. Accordingly, the said objections are devoid of merit.

33. As far as the award of interest is concerned, I deem it appropriate to reduce the rate of interest for all the phases to 9% per annum simple interest. In this connection, I may refer to observations of the Supreme Court in ***State of Rajasthan & Anr. Vs. M/s. Ferro Concrete Construction Pvt. Ltd.*** reported in ***2009 (8) SCALE 753*** wherein it has been held as under :-

> *"36. In regard to the rate of interest, we are of the view that the award of interest at 18% per annum, in an award governed by the old Act (Arbitration Act, 1940), was an error apparent on the face of the award. In regard to award of interest governed by the Interest Act, 1978, the rate of interest could not exceed the current rate of interest which means the highest of the maximum rates at which interest may be paid on different classes of deposits by different classes of scheduled banks in accordance with the directions given or issued to banking companies generally by the Reserve Bank of India under the Banking Regulation Act. Therefore, we are of the view that pre-reference interest should be only at the rate of 9% per annum. It is appropriate to award the same rate of interest even by way of pendent lite interest and future interest upto date of payment."*

34. Consequently, keeping in view the aforesaid judgment and the current rate of interest, the impugned Award is modified to the extent that Claims No. 4 and 5 are disallowed and the rate of interest for all periods as awarded by the Arbitrator is reduced to 9% per annum simple interest. However, it is made clear that in case the aforesaid payment under the Award is not made by respondent-objector within a period of 90 days from today, the post-decretal rate of interest would stand increased to 11% per annum simple interest. With the aforesaid modifications, Award is made rule of the Court and Registry is directed to prepare a decree sheet in terms thereof. Accordingly, present

application and petition stand disposed of.

35. Since, Claim No.5 requires fresh adjudication, both the parties suggest that the Superintendent Engineer (Arbitration), Delhi Development Authority be appointed as the sole Arbitrator. Ordered accordingly. Registry is directed to hand over the original arbitral record to learned counsel for respondent-objector for onward transmission of the same to the newly appointed Arbitrator.

MANMOHAN,J

JANUARY 28, 2010
js/rn