
Kailash Nath and Associates Vs New Delhi Municipal Committee

FAO (OS) No. 253 of 1996

Court: Delhi High Court

Date of Decision: April 19, 2002

Acts Referred:

Arbitration Act, 1940 " Section 20, 8#Civil Procedure Code, 1908 (CPC) " Order 2 Rule 2#Contract Act, 1872 " Section 55, 62, 63, 73, 74

Citation: (2002) 3 ARBLR 631 : (2002) 99 DLT 361

Hon'ble Judges: Vikramajit Sen, J; Dalveer Bhandari, J

Bench: Division Bench

Advocate: Rajesh Lakhanpal, for the Appellant; Arvind Shah, for the Respondent

Final Decision: Dismissed

Judgement

Vikramajit Sen, J.

This Appeal is directed against the Judgment of the Learned Single Judge dated 26.2.1996 who has dismissed the

Objections filed by the appellant Contractor and has made the Award passed by Shri P. P. Dharwadkar rule of the Court. Since Objections to an

Award essentially partake of the nature of an appeal against the Award, proceedings before us partake of the character of a Second Appeal,

necessitating the existence of issues of significant importance for justifying further consideration. When it is further kept in mind that even the

proceedings before the Single Judge are akin to revisory and not appellate jurisdiction, it will become palpably obvious that the scope of

interference by the Division Bench is minimal. A miscarriage of justice of some moment should have occurred; in our opinion in the present case it

has not. It will be relevant to mention that Shri Dharwadkar retired as the CMD of NBCC and possessed vast experience specifically relating to

the disputes upon which he was called to arbitrate. He had been appointed by the Administrator of the NDMC by virtue of the powers conferred

on the latter by virtue of Clause 25 of the Agreement No. EE/C-II/AB/15/90-91 which was for an estimated amount of Rs. 2,77,53,295/- for the

work of construction of Sub District Cum Community Centre, DIZ Area, Phase-I, Gole Market , New Delhi.

2. This Reference of the present disputes had been initiated because of the Contractor's letter dated 20.11.1992, which contained the following

List of Claims:

Claim No. 1 The claimant claims enhancement of rates over their agreement rates @ 33.50% on all works to be executed beyond stipulated date

of completion.

Claim No.2 The claimant claims 24% interest on all the amounts from due dates.

Claim No. 3 The claimant claims loss of business and damages suffered during stipulated period due to non handing of full site.
=Rs. 25 lacs

Claim No. 4 The claimant claims the cost of arbitration proceeding =Rs. 40,000/-

All these disputes except for Claim No.3 were referred for Arbitration. It is not in dispute that the Contractor did not take any action on the

Administrator's refusal to refer Claim No.3. This is of some significance.

3. After the completion of the work and the preparation of the Final Bill circa 1996, further disputes were raised by the Contractor. The NDMC

adopted the position that since these later claims were raised by the Petitioner after the acceptance of the payment under the Final Bill, the same

could not be entertained. Another objection was that these later Claims had not been included in the earlier Reference and were Therefore barred

under Order II Rule 2 of the CPC. In these circumstances, the Contractor had approached this Court u/s 8 and 20 of the Arbitration Act, in Suit

No. 1066-A/1996. Anil Dev Singh, J. by Order dated January 21, 1997 referred the later claims for arbitration leaving it to the Arbitrator to

decide these two questions also. The Chairperson of the NDMC, appointed Shri V. K. Sharma, Director, Central Electricity Authority, Seva

Bhawan, New Delhi by Memo dated 4.4.1997. Shri Sharma published his detailed and reasoned Award on 30th September, 1998. He rejected

both the arguments taken by the NDMC before Hon'ble A. D. Singh J. It appears that, subsequent to the passing of the Second Award, the

parties had entered into a settlement whereby the Contractor, in terms of its letter dated 23.11.98, agreed to accept the payment of Rs. 17 Lakhs

in full and final settlement of the claims adjudicated by Shri Sharma. [What impact, if any, the second Award would have on the impugned Award

(the first Award) will be discussed later in this judgment.] This letter is reproduced below in order to highlight that the Contractor did not draw

even the faintest reference to the pendency of the present proceedings, and did not also record that the settlement was without prejudice to the

claims under the first Award. The present Appeal was filed in July 1996, was adjourned on several dates of hearing, and was finally argued by Mr.

Lakhanpal as late as on 25.11.97, when it was Admitted. As notice of the pendency of this Appeal has not been served on the

NDMC/Respondent it would have been unaware of the filing of this Appeal. The position Therefore was that at the time of the compromise the

NDMC may have been labouring under the misconception that the disputes covered by the First Award stood finally closed.

Kailash Nath & Associates

WITHOUT PREJUDICE

November 23, 1998.

Ref. No. KNA/NDMC/98/2075

The Financial Advisor,

New Delhi Municipal Council,

Palika Kendra,

New Delhi - 110001.

Subject : Arbitration Award dated 30.9.98 of Sole Arbitrator, Shri V. K. Sharma with respect to construction of Sub-District-Cum-Community

Centre, Phase I, DiZ Area, Gole Market, New Delhi - 110001.

Dear Sir,

This has reference to the negotiations held in your office on 23.11.1998 in connection with the above mentioned Arbitration Award.

As stated during the said negotiations, we have had a long association with the NDMC, and shared excellent, cordial and harmonious relations.

We had also brought to your kind notice certain relevant points and also submitted a brief note, during our said negotiations which, again, were

held in a most cordial atmosphere and mutual understanding of each other. Keeping this spirit of cordiality, we had agreed to accept the lumpsum

amount of Rs. 17,00,000.00 (Rupees Seventeen lakhs only) from you in full and final settlement of the amount of Rs. 19,54,649.20 (Rupees

nineteen lakhs fifty-four thousand six hundred forty-nine and nineteen paise twenty only) awarded to us by the said Sole Arbitrator Shri V. K.

Sharma, subject to your not challenging the award and further making payment to us of the said amount by the date stipulated below; all other

terms and conditions of the said Award remaining unaltered. We had, further agreed not to claim any interest on the amount awarded beyond

23.11.1998, provided the amount along with interest is paid to us by the 18th December, 1998. We confirm th,at on receipt of the said amount

within the stipulated period, as stated above, we shall neither be left with any claim against the aforesaid Award dated 30.09.1998, nor we shall

make any fresh claim in future against NDMC with respect to the aforesaid project, and this chapter shall be treated as closed and all disputes

relating to above stand settled.

You are, Therefore, requested to kindly, arrange to get the payment released to us urgently.

Thanking you,

Yours faithfully,

for Kailash Nath & Associates.

Sd/-

PARTNER

C.C. 1) Chief Engineer, C-1, NDMC, Palika Kendra, New Delhi for information please.

2) The Executive Engineer(Project) NDMC, Shaheed Bhagat Singh Place New Delhi for information.

4. The contention of Mr. Lakhanpal learned Counsel for the Contractor is that there are various concomitants of a Tender of Rates, which would

include, inter alia, (i) cost of material and labour, (ii) establishment costs, (iii) tools and plant (iv) electricity and water etc. Once it is established that

inordinate delay had occurred and occasioned due to defaults ascribable to the NDMC, the Contractor's remedy for claiming damages did not

stand completely circumscribed by Clause 10CC of the Agreement, since this Clause contemplates the grant of escalation only in respect of

material and labour. Accordingly expenses needlessly incurred by the Contractor on establishment, tools and plant, electricity and water etc. do

not fall within the sweep of Clause 10CC. The argument proceeds that all the damages that are suffered by a party due to the default of the other

party must be compensated for unless mutually agreed otherwise. To the contrary, Mr. Shah, learned Counsel appearing for the NDMC has

argued that Clause 10CC covers and exhausts the entire gamut of compensation payable to the Contractor. Compensation/damages not

awardable under Clause 10CC cannot be granted by the Arbitrator; if he does so he would be exceeding the jurisdiction vested in him, just as if he

had travelled beyond the terms of the Reference made to him. He has further submitted that since Claim No. 3, which was for "loss of business

and damages suffered during stipulated period due to non handing of full site", having not been referred, this Claim cannot be resurrected under any

of the other Claims. It is strenuously argued by Mr. Shah that after having received a substantial payment of compensation under the second

Award, the Contractor is attempting to transform his claim of enhancement of rates into the claim for damages which was specifically not referred

for Arbitration as far back as 17th December, 1992.

5. It is trite to state that every contract contains reciprocal promises or obligations, since without them the essential "consideration" would be found

wanting. For example, in a simple contract for the purchase of a chattel or an immovable property, the seller is obligated to transfer possession and

title on receipt of the agreed price. Variations on the handing over of possession and title, and payment of the price may be simultaneous or

staggered. In building contracts, multiplicity of reciprocal promises usually exist. In its rudimentary aspect, the Builder/Contractor undertakes to

complete the work according to time and specification, and the owner correspondingly agrees to make payments. However, usually there are

many other obligations, such supply of material and/or drawings etc. to be performed at different stages of the contract. A default in respect of any

of them would result in delay, giving rise to claims for damages. Let us consider a typical building contract where the work is to be completed

within one year. The owner must make the site available and on his failure to do so within the agreed time, it would be unfair to hold the Contractor

bound to his time of delivery. The Contractor may, however, estimate that despite the delay in handing over the site, he would nonetheless be able

to complete the project within the contracted time. He may succumb to the pressure of the likelihood of his security deposit being forfeited; or the

uncertainty and delay in collecting damages. He may also not want to lose the profits that he had calculated he would earn from the project. He

would thus prefer take over the site on the day on which it is offered to him by the owner rather than treat the contract as having been breached. In

doing so without any recorded reservations, he would be precluded from claiming damages at a later date. It is also conceivable that immediately

prior to expiry of the said one year period he finds himself unable to complete the project. In these circumstances he would approach the owner,

convince him that either the delay is a consequence of the owner's initial default in handing over the site or because of any reason for which neither

party can be faulted. If the parties are both cordial and commercially pragmatic, the owner would extend time. But on the completion of the project

neither party would be entitled to claim compensation for delay, if they had not made it categorically clear that the extension would be subject to a

claim for damages. This is for atleast two reasons, both of which are articulated in Section 55 of the Contract Act, namely, acceptance of the

performance of obligations, and failure to give notice of claim for compensation. Experience has shown that adherence to time schedules in building

contracts, whether time is of the essence or not, is the exception and not the norm. Disputes on this issue are commonplace. It is unfortunate that

despite accepting and/or granting extensions without any reservations, parties nonetheless lodge claims for damages founded on delay. Such claims

are legally untenable on the strength of Section 55 and other provisions of Chapter IV of the Contract Act, and on the grounds of estoppel.

6. A perusal of some of the Clauses of the Contract that are relied upon by the parties, may now be considered Clause 2 of the General

Conditions of Contract is captioned - "compensation for delay". It empowers the Chief Engineer to quantify the amount of damages livable on the

Contractor for every day that the work remains uncommenced or unfinished by the Contractor after the proper dates up to a maximum of 10% of

the estimated cost of work as shown in the Tender. This Clause obviously has no application where delay is caused because of failures on the part

of the NDMC or the Authority concerned. Thereafter, Clause 5 of the General Conditions of Contract is captioned - "Extension of time". It

records that if the Contractor desires an extension of time for completion of the work on the ground of his having been unavoidably hindered in its

execution or on any other ground, he shall apply in writing to the Engineer-in-Charge within thirty days of the date of hindrance on account of

which he desires such extension. The concerned officer shall, if in his opinion reasonable grounds be shown, authorise such extension of time.

Some points need to be immediately emphasised. Firstly, that the Contractor must apply in writing for an extension of time specifying the reasons

for the delay on the part of the NDMC. To this extent the compact between the parties incorporates a departure from Section 63 of the Contract

Act, which would otherwise have made parole evidence admissible on the question of the terms, if any, surrounding the grant of extension of time.

Secondly, it would also be expected of the Contractor at this very stage of seeking an extension, to specify his claims, if any, on account of the

delay which he attributes to the NDMC. Indubitably, Clause 5 protects the interests of the NDMC, as has been opined by the Arbitrator also. If

the Contractor fails to reserve his right to claim damages, once the extension is granted and acted upon, no claim for damages would be tenable.

Thirdly and for the same reasons, if the Authority grants an unconditional extension, it would not be entitled to raise any demands for damages on

account of delay up to this stage, on a later date. Fourthly, it is not logical to contend that once an unconditional extension is granted, it amounts to

an admission that the Authority was responsible for the delay. There is no barrier in the way of the Authority to waive its claims for damages.

These Principles should be strictly adhered to, also for the reason that they ensure that no frivolous or unfair claims are raised later on. Parties must

at all times be ad idem and Therefore, the terms and conditions of extensions to the period for the completion of the project should be meticulously

spelt out at the relevant and contemporary time. We are unable to accept the argument of Mr. Lakhanpal that Clause 5 deals only with the

extension of time and does not touch upon the admissibility or quantum of damages as a consequence of delay. Clauses 2 and 5 complement each

other, and should be read conjointly.

7. Thereafter, Clause 10-C permits the Contractor to claim payments where there has been an increase in the price of materials to be supplied by

him or increase in wages of labour. This is provided these have occurred as a consequence of any fresh statutory rule or order (but not due to any

changes of sales tax), and secondly, the increase should exceed 10% of the price/wages prevailing at the time of tendering. These provisions apply

mutates mutants in the event of a decrease in the price/wages in excess of 10% of that prevailing at the time of tendering. It is necessary to

underscore that these claims can be made even during the duration of the contract period of any extension thereto, unless the delay in the execution

of the contract is attributable to the Contractor. Clause 10C does not contemplate the claim of imposition of damages of compensation. The

Contractor is contractually bound to give notice of his claims under this Clause, within a reasonable time. We concur with the Arbitrator's view

that this Clause also protects the interests of the NDMC.

8. The next Clause is of paramount importance, and has been relied upon by the NDMC. The relevant portion reads as follows:

10CC If the prices of materials (not being materials supplied or services rendered at fixed prices by the department in accordance with clause 10

and 34 thereof) 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 contractor 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 is validly 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.....

As has been mentioned above, the contention on behalf of the NDMC is that Clause 10CC prohibits any claims not envisaged and allowable

therein. However, the language employed indicates that claims under this Clause would include not only these statutory increases mentioned in the

preceding Clause, but also all other increases. The words an ""increase as a direct result of the coming into force of any fresh law or statutory rule

or order"" found in the immediately preceding clause, is conspicuous by its absence. Quite obviously, claims predicated under the umbrella of

"statutory increases" would be placed under 10C and not under 10CC although they would be entertainable even under the latter clause because

of its generality. It is also noteworthy that Clause 10CC applies to contracts stretching beyond six months. It is axiomatic that the longer the

duration of a contract the greater is the possibility if not certainty of escalations in prices. Whilst the Contractor may be in a position to anticipate or

take into account any increase in prices in the short duration of six months into the future, expectedly he would not be able to foresee escalations

beyond that period and take them into account with any precession. On a conjoint reading of Clauses 10C and 10CC, while the statutory increase

of price/wages can always be treated as having been factored into the contract, other increases would be claimable only if the contract period

stretches beyond six months. On a reasonable understanding of these Clauses, they permit a claim on account of statutory increases/decreases at

any time of the Contract, and permit claims under all heads, if the contract period spreads beyond six months. Non statutory claims are excluded

where the contract duration is less than six months.

9. In the Special Conditions of Contract, Clause 2A stipulates that in the interpretation of the agreement the order of descending importance for

any ambiguity or discrepancy shall be as follows:

i) Schedule of quantities. ii) Special conditions and additional specifications of contracts and drawings. iii) CPWD specifications of work and

materials with up to date correction slips. iv) General conditions and specifications. v) ISI codes.

10. The intention behind this Clause is to give pre-eminence to the Special Conditions of Contract viz-a-viz the General Conditions and

Specifications. The first Clause of the Special Conditions of Contract contains an exclusion Clause, and also incorporates force majeure. It reads

as under :-

1(a) 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 Architect/Engineer-in-charge. If part of the site is not available for any reason or

there is some unavoidable delay in supply of materials 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.

We shall now apply all these terms of the engagement between the parties to the facts of the case. In order to appreciate the argument of counsel

for the parties, it would be convenient and proper to reproduce the Award in its entirety.

Mr. B. M. Lal Mr. O. P. Tripathi,

Project Manager Executive Engineer

Kailash Nath & Associates (Projects),

1006, Kanchanjunga, N. D. M. C

18, Barakhamba Road, Palika Kendra

New Delhi - 110001. (16th Floor),

Sansad Marg,

New Delhi - 110001.

(Claimants) (Respondents)

Sub: In the matter of arbitration between M/s. Kailash Nath & Associates, New Delhi (KNA) and New Delhi Municipal Corporation, New Delhi

(NDMC) for the work of construction of Sub-District-cum-Community Centre in D. I. Z. Area, Gole Market Phase II - Agreement No. EE/C-

II/AB/15/90-91.

Whereas I, P. P. Dharwadkar, retired C. M. D. of N. B. C. C., H-501, Palam Vihar, Dist. Gurgaon, Haryana -122001, was appointed as Sole

Arbitrator by Mr. Ramesh Chandra, Administrator, NDMC, by virtue of powers conferred on him under Clause 25 of the above referred

Agreement, vide his letter dated 17th December, 1992, to decide and make my reasoned Award regarding three claims/disputes of the Claimants

KNA and counter-claims of Respondents NDMC which were to follow in due course, subject to certain conditions therein, and which was

accepted by me vide my letter dated 21.12.1992; and Whereas I entered into reference vide my letter dated 8.1.93 and the time for making and

publishing the Award was extended from time to time up to 7-11-93 with the consent of the parties.

And Whereas the parties submitted respective claims and counter-claims and produced cases, through their executives/counsel/law officer in 11

hearings held till 18.8.93, when they completed their respective submissions in the case, and agreed that they have been given adequate time for

arguments and were afforded full opportunity to represent their respective cases before the Arbitrator, and stated that they have nothing further to

add/adduce in evidence, etc. before the Arbitrator and requested the Arbitrator to make and publish his Award.

And Whereas the parties further submitted summaries of arguments in writing from their side - the Claimants vide their letter dated 9.9.93 and the

Respondents vide their letter dated 22.9.93;

Now I, P. P. Dharwadker, Sole Arbitrator in the case, after having gone through all the relevant papers submitted to me, various statements and

counter-statements of facts made, rejoinder and other documents as filed by the parties, pleadings of the parties, their other documentary/oral

evidence, precedents in the Court cases, etc. as submitted, their written/oral arguments as advanced in various hearings and having studied all the

papers and documents submitted to me by both the sides in connection with their claims/counter claims, give my Award with reasoning as follows:

As per the contract agreement, the date of the start of the work was 10th January 1991 and was to be completed within 21 months, i.e. by 9th

October 1992, but the work could not proceed smoothly right from the beginning and the Claimants could establish that the site for the various

blocks was handed over in piecemeal from January '91 to September '92 only a month before the actual scheduled date of completion of work

which did come, at least in part in the way of smooth execution of work contracted. It has also been evident that there was contributory delay on

account of delay in supply of architectural /structural drawings, non-availability of adequate quantity of steel reinforcement and delay in fixing

electrical conduits by a third agency, which in turn also contributed to further inevitable delay in the execution of the work by the Claimants.

The Respondents NDMC did not agree that the delay was entirely, due to non-fulfillment of obligations from their side, though there were minor

hindrances which, according to them, were inconsequential, but it was mainly due to slow progress of work by the Claimants, which they could

establish in part. Though they went so far as not even to take responsibility for delayed supply of drawings by the Architects which is a "third

party" , the Architects could not be made a party to this dispute, as the agreement is bi-partite between the Claimants and the Respondents only

and the Respondents must share the blame for inadequate coordination from their side on this account. There was, however, no worthwhile plan of

action by the Respondents which they could enforce on the Claimants because of inadequacies from their own side.

The Claimants were asked to give detailed justification for the basis of enhancement of 33.5% above the agreement rates as claimed by them for

the works executed beyond the originally contracted period, based on actual rate analysis, etc. of the items of work in the contract agreement for

which enhancement has been sought. However, they have not done so and have tried to justify the enhancement based on increase in cost index

over the 21 months period for other jobs allotted by NDMC. This may not strictly hold good in this case as the nature of the work could make a

difference in actual enhancement of the rates of individual items and the total quantities of work as submitted by the Claimants are also disputed by

the Respondents.

On the other hand the Respondents could not sustain that no loss has been suffered by the Claimants due to established hindrances which impeded

the progress of work atleast in part, and the Claimants were entitled under the normal rules of business for enhancement of rates in the escalating

economy, for no fault of theirs.

Notwithstanding the above, the Respondents had raised preliminary objections with regard to avoid ability of contract and whether time is essence

of the contract, and the jurisdiction of the Arbitrator, as also maintainability of the claim petition. The Arbitrator having been appointed by the

competent authority as per the contract agreement to specifically settle the dispute arisen on the three claims made by the Claimants, subject to the

admissibility under clause 25 of the said agreement, has to make his Award on the merits of the case and the contract agreement entered into

between the parties. Though the contract work of the type should normally be based on mutual obligations and responsibilities and though the

Claimant had given due notice and after the stipulated date of completion, they had reserved the right for claiming enhancement, they had failed to

get any written commitment before proceeding with the work from the side of the Respondents, who preferred the dispute to be settled by the

Arbitrator appointed by them, in terms of the Contract Agreement.

The Court cases cited by both the sides have been considered to the extent they are relevant to the case. In this case, though it could be

established by the Claimants that atleast part of the delay was attributable to the Respondents, it could not also be ruled out that part of the delay is

attributable to the Claimants themselves. I, Therefore, in the absence of information on the exact contribution by the two sides, hold them both

equally responsible for the delay and the consequent award/damages. However, as the contract agreement protects the interest of the Respondents

(Clauses 2,5,10-CC & Special Condition 1(A) refers), the enhancement claimed by the Claimants is not maintainable (both main claim and interest

thereon).

As regards the counter-claims made by Respondents NDMC, the same have proved to be hypothetical and could not be sustained by them in

terms of the agreement or based on facts.

Taking all factors into account, I give my Award as follows:

AWARD

S. No. Description of Claim Claim Award Remarks

Amount

.....

Claims by the

Claimants(KNA) Claim

1. on account of

enhanced rates over

the agreement rates @

33.5% on all works to

be executed beyond

stipulated date of

completion. N.A. Nil Please see

the

reasoning.

2. Claim for 24%

interest on all due

amounts from due

dates. N.A. Nil

3. Cost of arbitration

proceedings. 40,000 Nil

Total N.A. Nil

Note: Each party will bear its own cost on this

arbitration.

Counter-Claims by

Respondents (NDMC)

1. Loss by way of rent. 32,70,379 Nil

Total. 32,70,379

Sd/- P. P. Dharwadker

Sole Arbitrator

11. Predicated on the Award itself, Mr Lakhanpal has submitted that once the Arbitrator had arrived at the conclusion that there was no

worthwhile plan of action by the NDMC which could be implemented by the Contractor, the inevitable consequence that would ensue is that the

latter should have been found to be entitled for compensation for the delay. What must be kept in mind is that penalty clauses are not legally

enforceable in India and damages must be proved. If damages have been liquidated or reassessed in the contract itself, so long as they are

realistically close to actual damages sustained, they can be given effect to. In India liquidated damages are indicative of the maximum damages

awardable. In the present case the Arbitrator was not satisfied that this exercise had been completed by either of the parties. Therefore, regardless

of whether Clauses 10C or 10CC or 1(a) of the Special Conditions of Contract envisage the damages claimed by the Contractor, they have been

rejected by the Arbitrator as having not been proved. These are findings of fact which the Court would not interfere with. We feel that the

Arbitrator has the experience and knowledge to record a finding on this complex issue, requiring not only engineering know how but also familiarity

with prevailing prices. The Court would be ill-equipped and Therefore sanguine to enter upon such technical issues; consequently jural interference

is to be deprecated. The following observation in *Mediterranean & Eastern Export Co. Ltd. v. Fortress Fabrics Limited* (1948) 2 ALL ER 186

tested and followed for over fifty years immediately come to mind :-

A man in the trade who is selected for his experience would be likely to know and indeed to be expected to know the fluctuations of the market

and would have plenty of means of informing himself or refreshing his memory on any point on which he might find it necessary so to do. In this

case according to the affidavit of sellers they did take the point before the Arbitrator that the Southern African market has slumped. Whether the

buyers contested that statement does not appear but an experienced Arbitrator would know or have the means of knowing whether that was so or

not and to what extent and I see no reason why in principle he should be required to have evidence on this point any more than on any other

question relating to a particular trade. It must be taken I think that in fixing the amount that he has, he has acted on his own knowledge and

experience. The day has long gone by when the Courts looked with jealousy on the jurisdiction of the Arbitrators. The modern tendency is in my

opinion more especially in commercial arbitrations, to endeavor to uphold awards of the skilled persons that the parties themselves have selected

to decide the questions at issue between them. If an arbitrator has acted within the terms of his submission and has not violated any rules of what is

so often called natural justice the Courts should be slow indeed to set aside his award.

12. Apart from this ground, by the application of Section 55 of the Contract Act and Clause 5 of the General Conditions of Contract the claim for

damages cannot be entertained also for the reason that the parties ought to have put each other to caution/notice that the contract would be

performed subject to claims for damages. The stipulated date of completion of the project was 9-10-1992. The contract envisaged the

construction of three blocks but the possession of the site was given in piecemeal from January 1991 till as late as September 1992. Obviously, the

construction could not possibly have been completed within one month atleast in respect of one block. The Contractor should have, but did not,

lodge a caveat or protest that the contract would be continued with subject to his claim for damages. The NDMC should have similarly recorded

that whilst agreeing to grant an extension of time, it had reserved its rights to claim damages for delay which in its opinion was attributable to the

Contractor. Notification of claims contemporaneously is salutary for very practical reasons, foremost amongst which is the certainty that at that

point of time the parties would have come to an understanding on all controversial issues. Commercial pragmatism would prevail upon either side

to adopt a realistic stance. Section 55 of the Contract Act, 1872 incorporates that "if, in case of a contract avoidable on account of the promisor's

failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than agreed, the promisee

cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of acceptance,

he gives notice to the promisor of his intention to do so." Moreover, extension of time for completion of a project is essentially a novation in the

contract, and by application of Section 62 and 63 of the Contract Act, relieves the opposite party from performing the obligations pertaining to

time as contained in the original contract. Where the extension of time is unconditional, the original date is substituted by the extended date sans

any liability.

13. The decision of the Privy Council in AIR 1922 178 (Privy Council) , is topically illustrative. The parties had entered into a contract for the

supply of 4000 sleepers of a special pattern at any station on the Bengal-Nagpur Railway by May 31, 1913. Only 1746 sleepers were delivered

and passed inspection. The time for delivery was extended, but no more deliveries were made. The supplier raised an action for (1) the return of

deposit and (2) damages in respect of his profit on the balance of sleepers not supplied. The Respondents counterclaimed for damages in respect

of sleepers not delivered. Sections 55 and 63 of the Contract Act were considered and applied by the Privy Council. It opined that the promisee

was not entitled to claim damages for non-performance at the original agreed time, but was not precluded from claiming damages for non-

performance at the extended time. The Court further held that the effect of Section 55 is, ""where the party having the option elects not to avoid, to

put agreement after the original date on the same footing as an agreement just before the original date."" A somewhat similar question arose in

Chalisgaon Shri Laxmi Narayan Mills Co. Ltd. Vs. Armitlal Kalidas Kanji, , in which Section 55 of the Contract Act was applied. The following

passage is self instructive:

19... As the contract between the parties was for sale of goods, the time for delivery must be held to be essence of the contract. The time for

delivery in this case expired on July 31, 1951. The plaintiff accordingly was entitled to avoid the contract altogether and not accept delivery at any

time subsequently in the correspondence the plaintiff stated that he would charge the defendants the expenses incurred towards export duty as also

damages that would ensue if late delivery was effected. The defendants refused to give delivery to the plaintiff if he insisted upon the above

conditions. In fact the export duty was imposed in April 1951. Even so and in spite of the defendants having informed the plaintiff that the

defendants would not pay any amount of the export duty, the time for performance was by consent of parties extended to July 31, 1951. By

agreeing to the above extension, the plaintiff, must be held to have given up and waived any right to payment of the export duty as damages. Upon

extension of the due date to July 31, 1951, the parties proceeded on the footing that for all purposes the plaintiff would have to pay and bear the

export duty for himself. The plaintiff cannot, Therefore, be entitled to recovery the sum of Rs. 10,649-4-0 which he expended in connection with

the export duty for consignment of the 49,693 yards that were delivered to the plaintiff in July 1952.

14. Ordinarily, the Court should assume that the correspondence between the parties has been perused by the Arbitrator. Letters emanating from

the Respondents such as those dated 23.4.99, 6.5.1991, 10.3.1991, 19.6.1991, 14.6.1991 etc. are indicative of the position that the NDMC had

partially performed its obligations and that some delay was also attributable to the Contractor. On 9.10.1992, i.e. the stipulated date of

completion, the NDMC had the necessary cause of action to make a claim for damages on account of alleged delay by the Contractor. In

permitting an extension of time it must be held to have waived its right to make any claim, since notice as contemplated by Section 55, had not

been given. Conversely, the contractor also had the necessary cause of action to claim damages if the delay could rightly be placed at the door of

the NDMC. A notional breach of contract had Therefore occurred. However, both the parties had unconditionally agreed to continue to perform

their respective obligations. On the Contractor's part, this was to complete the project on the terms contained in the principal document. On the

part of the NDMC, it was to make the payments as envisaged in this document. Having solicited and invited each other to perform their respective

contractual obligations, even under the principle of estoppel, (which have in essence been articulated in Chapter IV of the Contract Act), the

respective performances had been accepted. Section 62 of the Contract Act enunciates that ""if the parties to a contract agree to substitute a new

contract need not be performed."" In the present scenario, the parties had agreed to set time at large by altering or rescinding the initially stipulated

date of completion of 9.10.1992. Since this must be held, in the circumstances of the case, to have been by mutual consent, a new contract had

come into effect making the original contract redundant in respect of the stipulated date of completion. Section 63 of the Contract Act states ""that

every promise may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such

performance, or may accept instead of it any satisfaction which he thinks fit."" On a combined reading of these Sections, owing to the absence of

any contemporaneous writing or evidence neither party would be entitled to claim damages on account of delay. In order to elucidate that this was

the situation prevailing at the relevant time, reference to paragraph 4 of the Appeal would be of relevance. In this paragraph the Contractor has

stated that the ""work got spilled over the stipulated contract period and the appellants/claimants were made to incur additional expense on account

of abnormal rise in price with reference to the quantum of work executed between the period 9/10/1992 till actual completion. Besides this, the

appellants were subjected to additional expense on account of establishment during the prolonged period of execution of work beyond the

stipulated contract period. The Appellants claimed the said additional expense by way of compensation which the Respondents did not agree to

pay. Accordingly the disputes arose and the reference was made to the Arbitrator in terms of arbitration agreement."" However, as has been

discussed above, no claim was lodged by either party at the crucial and critical time, i.e. on 9.10.1992 when parties mutually agreed to enlarge the

time for completion of the project. Therefore, the Arbitrator was justified in rejection the claims of both the parties.

15. Considerable argument has been generated before us on the interesting question of whether the sundry clauses of the Contract between the

parties excluded the claim of Rs. 25 lakhs on account of loss of business and damages allegedly suffered by the Contractor for work executed

during and beyond the stipulated date of completion. The stand of the NDMC is that such a claim is barred by the terms of the Contract. Reliance

had been placed by Mr. Shah on the decision of a Division Bench of this Court in Delhi Development Authority v. U. Kashyap, 1999 (1) Arb LR

88. In that case the net value of work done after the stipulated date of completion, after deducting the cost of materials supplied by the DDA, was

Rs. 52,86,520/-. It was alleged that an effective increase of 18.3% over cost of construction during the stipulated period of completion had

occurred. The Claimant claimed compensation of Rs. 4,82,010, after adjusting the amount allowed to him under Clause 10CC from the total

damages computed as Rs. 9,67,433/-. The Award for the said sum of Rs. 4,82,010 was set aside. The Bench had considered the previous

decisions of this Court in Metro Electric Co. Vs. Delhi Development Authority etc., , Rawla Construction Co. v. Union of India, 1982 RLR 20,

Hyderabad Municipal Corporation Vs. M. Krishnaswami Mudaliar and Mudaliar and Another, , P.M. Puri v. Union of India 1989 (2) Arb LR

215, Uttam Singh Duggal and Co. v. Union of India, 1988 (2) Arb LR 225, Villayati Ram Mittal v. Union of India 1986 (1) Arb. LR 328,

Himachal Pradesh Nagar Vikas Pradhikaran v. Aggarwal and Co. 1997 (1) Arb. LR 275, Suresh Chander v. DDA. 1997 (1) Arb. LR 536 and

also an unreported decision in M/s. Express Engineering & Construction Co. v. Delhi Development Authority, Suit No. 843/91, 2613/91, dated

4.10.1994. It was ultimately poignantly pointed out that ""since Clause 10CC extracted above of the agreement provides for the escalation in the

price of material and labour during the extended period of work as per the formula set out therein, none of the aforementioned decisions have any

applicability."" In Kashyap"s case (supra) the Bench was primarily concerned with the propriety of the Arbitrator formulating his own formulae for

computing damages, and not following the method and manner laid down in Clause 10CC. For this reason Kashyap"s case (supra) is not an

authority for the proposition that Clause 10CC covers each and every claim that may result from a delay in the completion of the project.

16. Kashyap"s case (supra) came up for consideration by another Division Bench of this Court in Delhi Development Authority v. S.S. Jetley

2001 (1) Arb. LR 289 (Del) in which the Bench observed that ""the respondent had preferred separate claim namely, Claim No. 19 under Clause

10CC of the agreement and there is no dispute that the said claim was entertained and adjudicated upon, keeping in view the provisions of Clause

10CC of the agreement between the parties. The Claim No. 17 is in fact founded on different premise altogether. It was the case of the respondent

that because of prolongation of the Contract due to the fault on the part of the appellant, the respondent was made to incur the expenditure on idle

labour, staff, machinery centring, shuttering and other ancillary requirements like electricity, water, petroleum, etc. It was the case of the respondent

that it was necessary for the respondent to keep regular establishment including graduate engineer at site till the work is completed as required

under Clause 36 of the agreement. The Arbitrator found that the respondent had in fact incurred expenditure on the aforesaid grounds and

awarded the claim @ 5,000 per month for the period of delay which was 44 months and on this basis a sum of Rs. 2,20,000 was awarded. It was

clear, Therefore, that Claim No. 17 was for damages on account of prolongation of Contract inasmuch as respondent was made to incur

unnecessary expenditure due to the fault of the appellant in prolonging the contract. This claim is, Therefore, maintainable as per Sections 73 and

74 of the Contract Act which gave entitlement to the respondent to claim damages/loss suffered due to breach of contract by the appellant. The

award of Claim No. 17 was, Therefore, justified and we see no merit in the aforesaid contention raised by the appellant."" We are in respectful

agreement with the views of the Division Bench in Both Kashyap"s case as well as Jetley"s case (supra).

17. It is now firmly entrenched in arbitral jurisprudence that standard form agreement, and in particular exclusion clauses contained therein, must be

strictly construed against the party responsible for its drafting. This is the principle of contra preferentem, and has been given statutory recognition

by the Unfair Contract Terms Act 1977 in the U.K. In Schroeder Publishing Co. Ltd. v. Macaulay (1974) 1 W.L.R. 1308 it has been opined thus -

The terms of this kind of standard form contract have not been the subject of negotiation between the parties to it, or approved by any

organisation representing the interests of the weaker party. They have been dictated by that party whose bargaining power, either exercised alone

or in conjunction with others providing similar goods or services, enables him to say: "If you want these goods or services at all, these are the only

terms on which they are obtainable. Take it or leave it." To be in a position to adopt this attitude towards a party desirous of entering into a

contract to obtain goods or services provides a classic instance of superior bargaining power..... The fact that the appellants" bargaining power vis-

a-vis the respondent was strong enough to enable them to adopt this take-it-or-leave-it attitude raises no presumption that they used it to drive an

unconscionable bargain with him, but in the field of restraint of trade it calls for vigilance on the part of the court to see that they did not."" If the

intention of the NDMC was that no claim whatsoever could be allowed on account of the delay attributable to it, it should have clearly stated so.

Clause 10CC only deals with the eventuality of increase of "prices of materials and wages of labour". It cannot be stretched to such an extremity

as to exhaust all claims, irrespective whether they are confined to increase in prices of material or wages of labour, or beyond them. However,

even this view does not advance the case of the Contractor before us, for the reason that there is a clear finding of fact by the Arbitrator that

damages had not been proved. It is so also because notice for a claim for damages had not been reserved at the time when the completion period

was agreed to be enlarged.

18. Before venturing to the next point, we would like to observe that foreign judgments and authorities cannot be extrapolated upon every case

which falls to be decided in this country. Mr. Lakhanpal has relied on the following observation in Hudson"s 492 9th Edition that - ""where the

cause of delay is due to breach of contract by the employer, and there is also an applicable power to extend the time, the exercise of that power

will not, in the absence of the clearest possible language, deprive the Contractor of his right to damages for his breach."" Since this exposition of law

runs counter to the provisions of the Section 55 of Indian Contract Act dealt with above, we are of the view that it is too widely stated for

ubiquitous application.

19. Clause I of the Special Conditions of Contract came up for interpretation before a Single Bench in Shri Sunder Lal Khatri v. Delhi

Development Authority, 1994 (2) Arb. LR 479. The learned Single Judge had found no impropriety with the grant of damages on account of

overhead expenses incurred on establishment for the execution of the award during the prolonging period. The provisions of the Contract Act

however, were not placed before the learned Single Judge.

20. The controversy cannot be allowed to rest only on the above discussion. Between the period March 1991 and the preparation of the Final Bill

in March 1995 a total sum of Rs. 2,64,98,812/- was paid in the running account against the work done and the sum of Rs. 34,07,302.50 paise

was paid under Clause 10CC. Not satisfied with these payments the Contractor had raised a demand for arbitration which was referred to Shri

V.K. Sharma, as already detailed above. By this time the first Arbitration had come to its culmination in terms of the Award of Shri Dharwadker

dated 5.11.1993 which had also been approved and the Learned Single Judge by his impugned judgment dated 25.2.1996. The Award passed by

Shri Sharma compromised between the parties for the sum of Rs. 17 lakhs. Mr. Shah, learned Counsel for the respondent has contended that with

this payment, all the Contractor's claims were extinguished/satisfied, including those which had been turned down by Shri Dharwadker in the first

Award. Mr. Lakhanpal, however, contends that the two claims are totally distinct and for this reason, while offering the compromise for a

settlement at Rs. 17 lakhs, no reference was made to the first Claim/Award. In order to ascertain whether there is any difference between the

Claims in the two Arbitrations, it would be necessary to compare the wordings of Claim 19 in the second Reference with the first and third Claims

raised in the Contractor's first demand for arbitration. It should also be recalled that the Administrator had declined to include Claim No. 3 in the

Reference made to Shri Dharwadker. Claim No. 19, before Shri V.K. Sharma, reads as follows:

Claim No. 19 On account of loss of profit.

The Claimants could state that the aforesaid work was awarded to them with stipulated date of commencement as 11/01/1991 and contract

period being 21 months, the stipulated date of completion was 10/10/1992. The contract value for the work awarded was Rs. 2,77,53,295/-. The

work was actually recorded to be completed on 30/10/1993. The execution of work was got delayed on account of miserable failures on the part

of the respondents in fulfilling their obligations at the relevant time in such a manner so that claimants could execute the work smoothly and speedily

so as to achieve completion within the stipulated contract period. The said failures on the part of the Respondents in not making available complete

site free of hindrances, handing over the required design/drawings and releasing payments etc. at the relevant time is borne out from the documents

placed on record.

0.2 Taking into consideration the contract value and the contract period, the quantum of work which was expected to be executed per month was

Rs. 13,21,585/-. The claimants on its part on award of contract had made all the arrangements immediately so as to take up the execution of work

in right earnest and proceed with the execution of the same smoothly, speedily with a view to complete the work within the stipulated contract

period. The claimants on their part while tendering had taken into consideration the element of profit to be 10% of the value according to the norms

prevailing in the trade. It is pertinent to put in on record that even the Respondents while preparing the estimate for the invitation of tenders had

taken the element of contractors' profit to be 10%.

0.3. Since the execution of work got prolonged beyond the stipulated contract period because of respondents having committed breach of

contract, the claimants were made to stay at site of work for a period of 12.53 months longer than the stipulated contract period.

For the prolonged period the claimants have been deprived of the expected profit they would have earned on execution of work. The respondents

are liable to and the claimants are entitled to compensation towards deprivation of profit i.e. loss to which they have been subjected to during the

period of prolonged stay at site. However, the respondents failed to appreciate the complete facts and circumstances in its true perspective which

made them liable to compensate the claimants according to settled principles in the trade and that of law.

It is Therefore, most respectfully prayed that considering the complete facts and circumstances in its true perspective, the learned Arbitrator be

pleased to allow the amount found due and payable on the basis of settled principles as per details enclosed in annexure "I".

21. We are unable to find any distinguishing feature between the above claim and Claim No. 3 for a sum of Rs. 25,00,000/- which had not been

referred for arbitration to Shri Dharwadkar by the Administrator, NDMC. That Claim was in the following words - "the Claimant claims loss of

business and damages suffered during stipulated period due to non-handing of full site." It is remarkable that although Claim No. 3 had not been

referred to arbitration vide the letter dated 17th December, 1992 of the Administrator, NDMC, the same claim was subsequently referred to

arbitration before Shri V.K. Sharma in 1998. We can only speculate that this was because of oversight. The principle of res judicata prohibits a

fresh consideration of the same claim since the refusal to refer the aforementioned Claim No. 3 had not been assailed by the Contractor in 1992.

The subject matter of the second arbitral Award has been settled between the parties at the lump-sum figure of Rs. 17 lakhs which is inclusive of

Claim No. 19. Thus, large sum of Rs. 11,18,588/- was awarded against Claim No. 19 on account of loss of profit. Since the gravamen of the

argument of Mr. Lakhanpal raised before us was that claims under Clause 10CC are necessarily restricted only to an increase in the price of

material and wages, and not loss of profits, Claim No. 19 was essentially and intrinsically in the nature of loss of profits, which had not been

referred for arbitration to the first Arbitrator, despite the Contractor's demand. It has not been argued before us that this Claim was subsequently

referred due to a change the circumstances or in the thinking of the parties. Its adjudication before Shri Sharma, arguably, was legally

impermissible.

22. Be that as it may, when Claim No. 1 before Shri Dharwadker is considered, it would clearly fall within the observations of the previous

Division Benches in Kashyap's case as well as in Jetley's case (supra). What is sought to be claimed by the Contractor in Claim 1 before Shri

Dharwadker is enhancement of rates at a percentage different to that as envisaged under Clause 10CC, it is clearly legally untenable. Mindful of

this impediment in his path, the Claimant has now given the colour of damages to Claim No. 1 before Shri Dharwadker. We find merit in the

submission of Mr. Shah that the effort of the Contractor is to change the nature of Claim No. 1 from an increase in percentage to a claim for

damages. In either case, we find no error in the impugned Award and reject the appeal.

23. It has also been contended by Mr. Lakhanpal that the approach of Shri Dharwadker was legally faulty inasmuch as it has been observed by

him in the impugned Award that there is no Explanation of the material on the basis of which the Arbitrator has returned the finding that ""it could

not also be ruled out that part of the delay is attributable to the Claimants themselves. I, Therefore, in the absence of information on the exact

contribution by the two sides, hold them both equally responsible for the delay and the consequent award/damages."" The Hon'ble Supreme Court

has time and again observed that the Court is expected to adopt an approach which would affirm the legal propriety of an Award. Equally-well

settled is the proposition that the Arbitrator, not having the benefit of legal training, is not expected to writ an Award with the meticulous detail and

reasoning to which lawyers are accustomed. Semantic consideration must not thwart implementation of Awards. As we see it, after referring to the

evidence placed before him both the adversaries the Arbitrator returned a finding of fact that neither side had proved the fault of the other or the

extent of damages. The Award must not be read in a pedantic manner; if not so done the Arbitrator's conclusion cannot be faulted.

24. Mr. Lakhanpal has sought to press in his favor the decision in K.P. Poulse Vs. State of Kerala and Another, in support of his contention that

the Arbitrator should have himself gathered evidence in connection with the Claim for damages. We are unable to read this decision as an authority

for the extreme proposition put forward by Mr. Lakhanpal. Firstly, it cannot be understood how an arbitrator can possibly collect evidence which

is non-existence. Secondly, the duty to prove the case cannot possibly rest on the Arbitrator but must lie on the parties themselves. In Poullose's

case (supra) two very material documents, Ext. P-11 and P-16 were ignored by the Arbitrator. The counter argument was that these documents

were not even marked before the Arbitrator; but that they were marked only before the Subordinate Judge. The Hon'ble Supreme Court was of

the opinion, on being taken through Exts. P-11 and P-16 that they were the material documents to arrive at a just and fair decision to resolve the

controversy between the department and the contractor. It, Therefore, held that "in the background of the controversy in this case even if the

department did not produce the documents before the Arbitrator it would be incumbent upon him to pursue the relevant documents including

Ext.P-11 and P-16 for the purpose of justice." The Apex Court had restricted its observations to the facts of that case as is evident from the

words emphasised above. Furthermore, both the documents were available on the arbitral record, and since they were relevant, ought not to have

been ignored merely because they had not been formally exhibited. Strict and punctilious adherence to rules of evidence are not expected in

arbitration proceedings. This is all that the Hon'ble Supreme Court was emphasising in Poullose's case (supra). It is too far fetched to cite this case

as obligate the Arbitrator to gather evidence not placed before him, or beyond his ken.

25. We feel constrained to observe that the Contractor had failed to inform this Court about the receipt of the payment of Rs. 17 lakhs against the

second Award. This has been brought to our notice by learned counsel for the Respondent. It is also significant that in arriving at the compromise

of Rs. 17 lakhs the Contractor had sagaciously not made any reference or drawn attention to the first Award. This must have been deliberately

done since otherwise the second Award may have also been assailed, for the reasons mentioned above, namely that they could not be adjudicated

since they had already been declined to be preferred in 1992; and that Claim No. 1 would be barred by the operation of Clause 10CC. This case

exemplifies the vulnerability of Governmental authorities in preparing a proper defense to claims leveled against them; or to allow inadmissible and

legally untenable claims for reasons which every one suspects. This is a fit case, and we recommend so, for the Administrator to institute an inquiry

to fix the responsibility of the negligence and ineptitudes of its officers in defending the NDMC. While the application of principle of res judicata

may be of some legal intricacy calling for it to be overlooked, the failure of the officials of the NDMC to link the Dharwadkar Award with the

subsequent Sharma Award, prima facie, indicates a drastic dereliction of duty. But for the diligence and the assiduous preparation of the case by

Mr. Shah, learned Counsel for the respondent the overlapping of the claim of the first and second set of claims might have gone unnoticed.

26. The appeal is dismissed with exemplary costs of Rs. 25,000/- payable by the appellant to the Prime Minister's Relief Fund. These costs have

been imposed because of the male fide conduct of the Claimant not only before Shri V.K. Sharma, Arbitrator and the NDMC, but also before us

inasmuch as it had failed, of its own, to clarify the factum of the receipt of Rs. 17 lakhs. This fact ought to have been disclosed in writing, before

hearings in the Appeal had commenced, even if the Appellant was of the opinion that the scope of two Arbitrations were totally distinct.