(2010) 07 DEL CK 0373

Delhi High Court

Case No: CS (OS) 2057A of 1996

P.C. Sharma and Co.	APPELLANT
Vs	
Delhi Development Authority	RESPONDENT

Date of Decision: July 2, 2010

Acts Referred:

- Arbitration Act, 1940 - Section 20, 29, 30, 33

Hon'ble Judges: Rajiv Sahai Endlaw, J

Bench: Single Bench

Advocate: Sandeep Sharma and Vikas Sharma, for the Appellant; Bhupesh Narula, for the Respondent

Judgement

Rajiv Sahai Endlaw, J.

The objections (IA No. 12005/1996) preferred by the respondent Delhi Development Authority (DDA) u/s 30 & 33 of the Arbitration Act, 1940 upon being served with the notice of the filing of the award dated 30th April, 1996 in this Court are for consideration. The petitioner P.C. Sharma & Company has not preferred any objections to the award.

2. The disputes arose between the parties out of the contract dated 14th September, 1982 awarded by the respondent DDA to the petitioner contractor for construction of 540 houses under the Self Financing Scheme. The estimated cost put to tender of the said works was of Rs. 2,37,98,571/- and the work was to start on 24th September, 1982 and to be completed by 23rd September, 1983. The works were however completed on 31st January, 1986. On the arbitration clause being invoked by the petitioner contractor, the respondent DDA appointed Shri G.S. Rao, retired Director General (Works) as the Arbitrator. The Petitioner contractor made claims under as many as 34 heads and for a total sum of Rs. 1,07,65,314/- along with interest and costs against the respondent DDA. The Arbitrator has allowed claims for a total sum of Rs. 35,75,931/- and has also awarded interest thereon, pendente lite at the rate of 15% per annum and future at the rate of 18% per annum.

3. The counsel for the petitioner contractor at the outset has contended that the scope of interference by this Court in the award is limited. Reliance in this regard is placed on:

(i) Judgment dated 17th December, 1999 of this Court in Suit No. 21-A/1996 titled Sh. Anil Garg v. DDA. However, the same is a judgment on the requirement of giving reasons and that the Arbitrator is only required to indicate the trend of his thought process but not his mental meanderings. It was also reiterated that the reasonableness of the reasons given by the Arbitrator cannot be challenged and that if on a reading of the award it is obvious that the Arbitrator at the time of the passing of the award has dealt with the rival contentions in perspective, then the award sufficiently complies with the requirement of giving reasons.

(ii) Judgment dated 19th March, 2009 of the Division Bench of this Court in FA(OS) No. 267/1996 titled DDA v. Madhur Krishna. This judgment is again on the same aspect as in Anil Garg (supra).

(iii) Delhi Development Authority Vs. Bhagat Construction Co. (P) Ltd. and Another, where the Division Bench of this Court held that where the Arbitrator is a retired Chief Engineer of CPWD and thus well conversant with the kind of disputes he is adjudicating, the Court ought not to substitute its own view on the opinion taken and the decision rendered by the Arbitrator unless and until the decision of the Arbitrator is manifestly perverse or has been arrived at on the basis of wrong application of law.

(iv) D.D.A. Vs. Bhagat Construction Co. Pvt. Ltd., where also the Division Bench of this Court for the reason of the Arbitrator, being well versed in the matter being the former Director General of CPWD, held no interference possible in the award.

(v) Arosan Enterprises Ltd. v. Union of India 1999 (3) Arb. LR 310 (SC) holding that the interference by the Court u/s 30 is rather restrictive and the Arbitrator being the judge chosen by the parties, his decision is final and reappraisal of evidence, and interference where two views are possible is not permissible and the Court cannot substitute its evaluation for that of the Arbitrator except in the case of patently erroneous findings, easily demonstrable from the material on record.

(v) Sudarsan Trading Co. Vs. Government of Kerala and Another, holding that interpretation of contract is a matter for the Arbitrator on which Court cannot substitute its own decision and carving out a distinction between disputes as to the jurisdiction of the Arbitrator and the disputes as to in what way that jurisdiction should be exercised.

(vi) Order dated 2nd February, 2009 of the Division Bench of this Court in FA(OS) No. 143/2006 titled DDA v. P.C. Sharma & Co. negating the objection as to the claims allowed being overlapping and holding the claims for prolongation of contract, for site expenses and for loss of profitability to be forming three distinct heads of

damages.

(vii) Goa, Daman and Diu Housing Board Vs. Ramakant V.P. Darvotkar, ; however the said judgment is not found apposite to the matter in controversy.

4. The objections of respondent DDA are hereafter taken up claim wise.

Re: Claim No. 1

5. This claim was for refund of Rs. 1,32,460/- deducted by the respondent DDA out of payment made to the petitioner contractor towards rebate for timely payments of bills. The Arbitrator has allowed the claim to the extent of Rs. 35,380/-. Under the contract the respondent DDA was entitled to rebate of 0.5% for making monthly payments of the running bills. It was the admitted position that neither monthly running bills were submitted nor were payments made monthly. It was the case of the respondent DDA that the responsibility for preparing and submitting the bills was of the petitioner contractor and the petitioner contractor having not prepared and submitted monthly bills, it could not make the monthly payments but the same would not deprive it of the benefit of the rebate. It was the case of the petitioner contractor that no date was fixed for the petitioner contractor to submit the monthly bills and in any case as per the practice of the respondent DDA, it was the Executive Engineer of DDA who was to get the bills prepared after getting the measurement of the work done. The Arbitrator found that in May, 1983 no running bill was paid; in August, 1985, though two bills were paid but because respondent DDA did not have enough funds to honour these two bills, an amount of Rs. 60,000/- was withheld; again in October, 1985, the respondent DDA did not have funds and hence an amount of Rs. 1,50,000/- was deducted which was paid along with bill of November, 1983. Accordingly, the claim to the extent of Rs. 35,380/- only was allowed.

6. The counsel for the respondent DDA has contended that the Arbitrator has without any basis believed the contention of the petitioner contractor of the practice prevalent in DDA; it is further contended that in any case the contractor first has to submit the bills for measurement and without the contractor taking the first step, the respondent DDA itself cannot prepare the bills. It is also urged that there was nothing before the Arbitrator to show that there was any fund problem with the respondent DDA, a chart is handed over to show that payments were made every month.

7. Per contra the counsel for the petitioner contractor in this regard relied on Sanyukt Nirmata Vs. Delhi Development Authority and Another, where this Court held that the pre-requisite for submission of the bills is the date to be fixed by the Engineer In-Charge. It is contended that without any date being fixed in the present case also for submission of the bills, no delay can be attributed to the petitioner contractor. Attention is also invited to the second hearing before the Arbitrator held on 9th April, 1990 where the Executive Engineer of the DDA had admitted the

correctness of the statement of payments by the petitioner contractor and wherein short payment forming the basis of the award under this claim is reflected.

8. In the absence of the respondent DDA being able to demonstrate that a date was fixed for the petitioner contractor to raise the bill, the judgment in Sanyukt Nirmata (supra) would apply. Moreover the findings as to whether the payments were made so as to entitle the respondent DDA to rebate or not is a finding of fact and if this Court were to interfere with such findings, no distinction will be left between an appeal and in a challenge to the award. The objection to award under Claim No. 1 is thus dismissed.

Re: Claim No. 3

9. This claim was of Rs. 1,77,945/- for cost of cement slurry used in roughcast plaster. It was the case of the petitioner contractor that the application of cement slurry was necessary to secure proper bond for roughcast plaster and was directed to be done by the Executive Engineer and the costs thereof were included in the analysis sent by the Executive Engineer to the Superintending Engineer but sanction thereof was not obtained. The respondent DDA did not dispute the application of cement slurry but contends that it was not provided for and the cost of ordinary plaster only was provided for in the schedule of rates. The Arbitrator, assuming the costs of extra labour as 50 paise per sq.mt. awarded a sum of Rs. 31,890/-.

10. The counsel for the respondent DDA has contended that the award is on the basis of assumption without reference to any actual data; that even if assumptions were to be made, the same ought to have been made on the basis of CPWD rates or DSR rates and there is no basis for the assumption made in the award. The counsel for the petitioner contractor on the other hand contended that such assumption is on the basis of the experience of the Arbitrator. Reliance is placed on Delhi Development Authority Vs. Polo Singh and Co., where a Division Bench of this Court reiterated that interference with award even if based on guess work is not permissible.

11. In view of it being undisputed that the cement slurry was used and the rate thereof not provided for, no case for interference with the award is made out inasmuch as the reasoning given by the Arbitrator is a possible reasoning and this Court cannot substitute its view for the same.

Re: Claim No. 5

12. The petitioner contractor claimed Rs. 5,572/- towards extra labour for filling concrete in door frames and consolidating the same; it was its case that the rate at which the said claim was made, was accepted by the respondent DDA by paying / sanctioning the running bills at the said rate but was subsequently declined. It was the contention of the respondent DDA that payment under the running bills, as per the terms of agreement, is merely by advance and payment under the running bills

at the increased rate was not binding in any manner on the respondent DDA. The parties were also at issue as to whether any extra labour at all was involved in filling concrete in the door frames. The Arbitrator concluded that compared to mass concrete the work involved in filling concrete in small sections of pressed steel is more involved and extra labour is involved and hence allowed the claim.

13. The counsel for the respondent DDA has contended that there was no proof of any extra work being involved and in the absence thereof the same ought not to have been allowed. It is also contended that the said work was admittedly part of the contract and no rate having been provided therefore in the contract, could not be claimed or awarded. Per contra the counsel for the petitioner contractor has contended that the Arbitrator has applied his expert knowledge in concluding that extra work/labour is involved in filling concrete on door frames and the same ought not to be interfered with. He has also taken me through the claim before the Arbitrator and the reply thereto to demonstrate that the only question for adjudication before the Adjudicator was of the rate to be applied to the said work and there was no controversy before the Arbitrator that a separate rate for the said work had to be applied for and the only question was of the rate to be applied.

14. I find that the contention of the petitioner contractor and the pleadings before the Arbitrator show that the only controversy with respect to the said claim was as to the rate to be applied for the work of filling concrete on door frames. For the reason of the respondent DDA having not objected to the rate in the running bills and for the reason of the Arbitrator, who was admittedly an expert, having applied his experience and expertise in concluding the rate to be applied, no interference in the award under the said claim is called for and the objections to the award under the said claim are also dismissed.

Re: Claim No. 8

15. Claim No. 8 for Rs. 6,07,726/- was on account of extra work/effort required to be undertaken by the petitioner contractor for the reason of the respondent DDA having changed the layout plan. The respondent DDA controverted that the layout plan had been changed. The award however records that the respondent DDA in its written arguments admitted some charge in the orientation of blocks. The Arbitrator found a change in plans and that the new site was hilly and undulating resulting in slow progress of work and that the change involved shifting of the labour camp also. The Arbitrator held the claim to be "more or less correct" but being not convinced of the amount claimed under the said claim, awarded only Rs. 1,00,000/-.

16. The counsel for the respondent DDA has contended that the Arbitrator has not even returned a definite finding of the claim being correct and has arbitrarily awarded Rs. 1,00,000/-. It is also urged that the denial by the respondent DDA of any change in plans has not been considered. Attention in this regard is also invited to Annexure R-3 in the Arbitrator''s record and to the drawing register and it is

contended that there was no change in plan. Per contra the counsel for the petitioner contractor contends that the finding being factual cannot be interfered with. Reliance is placed on Bhagat Construction Co. (P) Ltd. (supra) where owing to the experience and expertise of the Arbitrator, the Court had refrained from interfering with the award.

17. There is no challenge to the finding of the Arbitrator of the respondent DDA in the written arguments having admitted to the change in orientation of blocks. It is not as if the Arbitrator has allowed the entire claim of the petitioner contractor. Less than 1/6 of the claimed amount has been awarded. In view of the admission of some change, the assessment of the Arbitrator of the extra work involved therefore cannot be interfered with. The respondent DDA had the choice to appoint an Arbitrator and appointed a technical person rather than a legal person. The sole purpose of appointment of a technical rather than a legal person as an Arbitrator is to take benefit of the special knowledge of the Arbitrator relating to the matters in dispute. Once a change in plan is admitted, the reasoning of the Arbitrator of the new site requiring additional labour is a finding of fact and the assessment by the Arbitrator of the value of the extra work entailed is not interferable. After all, all such matters cannot be measured with precision. There is a certain amount of estimation to be made. It is for such estimation only that a technical person was chosen as the Arbitrator. As for the language used by the Arbitrator, he is not a person steeped in law. The language used by the Arbitrator of the claim being "more or less correct" cannot be read to mean that the Arbitrator was unsure of the basis of the claim. The Arbitrator has used the expression "more or less" only for the reason of the change being not of the magnitude as claimed by the petitioner contractor but of a lesser magnitude. The objection to the award under the said claim is thus also dismissed.

Re: Claim No. 9

18. The petitioner contractor had claimed Rs. 2,64,920/- by way of refund of the rebate for charges for water not supplied by the respondent DDA. As per the agreement, it was to be supplied by the respondent DDA at a single point at site and further distribution was the responsibility of the petitioner contractor. The Arbitrator found and it is not disputed, that arranging of an electricity connection for drawing the water at the said point was the responsibility of the respondent DDA. It was the admitted position that though the respondent DDA applied for electricity connection for operating the pump for drawing the water but the same was not obtained till the completion of the work and for which reason the petitioner contractor supplied electricity for the said pump from its own connection. Though a sub meter was installed to measure the electricity consumption for operating the pump but the same was done after sometime; the claim was of the electricity consumption for the said pump before the installation of the sub meter and for water obtained from tankers when the pump failed to function for non maintenance thereof by the respondent DDA. There is no dispute about the said factual position. The Arbitrator,

finding that the petitioner contractor had borne electricity charges for the pump for the initial period, awarded Rs. 50,000/- against the said claim.

19. The contention of the respondent DDA is that the said amount awarded under the claim is without any quantification and evidence. On inquiry as to what evidence could have been led by the petitioner contractor, the counsel for the respondent DDA states that use of diesel for operating the generator for running the said pump could have been shown.

20. In view of it being not disputed that the petitioner contractor did for sometime bear electricity charges which the respondent DDA was to bear, no interference with the award, even if on estimation basis, is called for and the award is not found to be perverse. The respondent DDA has been unable to show as to what the award for the amount admittedly due should have been, if not Rs. 50,000/. Again for such claims there is bound to be an element of estimation and guess work and without it being shown that the estimation based on the guess work is perverse, the Court can neither substitute any other amount nor is it in the fitness after a long lapse of time to remand the matter. The objections to award under Claim No. 9 are also dismissed.

Re: Claim No. 10

21. The said claim was for Rs. 27,521/- for use of white cement for affixing the tiles. Under the contract, the cement was to be supplied by the respondent DDA. It was the case of the petitioner contractor that the respondent DDA supplied grey cement only and which if it had been used for affixing the glazed tiles would have affected the colour of the tiles and that white cement is normally used for affixing the tiles. The petitioner contractor, therefore, used white cement and made the claim for the difference in cost of grey cement and the white cement. The Arbitrator found that the use of white cement was not disputed. It was the case of the respondent DDA that under the contract the petitioner contractor was not entitled to the extra cost of white cement. The Arbitrator found that the respondent DDA has not contested the quantity of white cement used by the petitioner contractor or the rate thereof and accordingly allowed the claim in toto.

22. The counsel for the respondent DDA contends that the use of white cement in affixing the tiles is not as per the contract or as per the CPWD specifications. Per contra the counsel for the petitioner contractor relies on Villayati Ram Mittal Vs. Union of India and Others, , copy whereof was filed as C-1 13 before the Arbitrator also in this regard. Even though in the present case it was not provided in the contract that the glazed tiles were to be affixed by white cement, as in the Villayati Ram Mittal (supra) but it cannot be denied that if the glazed tiles had not been affixed with white cement and had been affixed with grey cement, they would have lost their colour and the use of white cement being for the benefit of the respondent DDA and in accordance with the standard practices, the award under this claim

cannot be interfered with and the objection is dismissed.

Re: Claim No. 11

23. This claim of Rs. 5,81,890/- for straightening and cutting of steel bars was allowed to the extent of Rs. 1,14,400/-. The law with respect to the said claim is no longer res-integra. In Wee Arr Construction Builders v. DDA 2001 (IV) AD (Delhi) 65 as reiterated in Anant Raj Agencies v. DDA 2005 (1) Arb. LR 590 this Court has held that bending, binding and placing in position steel for RCC work is included in the contract and the said work necessarily requires the process of straightening of steel before cutting and it was held that no claim for extra was maintainable on such account. It was also held that the contractor cannot make such a claim for the reason of having not given any notice to the respondent DDA at the time of carrying out the said work that the same was to be treated as an additional/extra work. The counsel for the petitioner contractor admitted the said legal position and stated that he will check up and inform whether there was any evidence in the present case of such notice having been given. However, the counsel for the petitioner contractor has not shown any evidence of such notice having been given.

24. The award does not record that any such notice was given. Resultantly the objection to the award of Rs. 1,14,400/- under the said claim is allowed and the award under the said claim is set aside.

Re: Claim No. 12

25. The petitioner contractor claimed Rs. 1,38,724/- in respect of overweight of steel. Under the agreement, steel was to be issued by the respondent DDA. While measure of steel at the time of issuance was by actual weight, the consumption thereof by the petitioner contractor was by other measure. The Arbitrator allowed the said claim to the extent of Rs. 98,750/- by calculating overweight as the rate of 4% for 8mm and 3% for 10mm to 12mm steel.

26. The counsel for the respondent DDA has challenged the said award as presumptive and has contended that Clause 42 of the contract provided for unutilized steel and shows there was no question of overweight. It is further contended that the petitioner contractor did not return any steel and hence no case for allowing claim on account of overweight was made out. Per contra the counsel for the petitioner contractor has contended that the recovery on account of steel was being made by the respondent DDA from the petitioner contractor in excess of the quantity given and hence the need for applying overweight arose.

27. The Arbitrator has also recorded that the petitioner contractor has not returned any steel. Nevertheless, claim on account of overweight has been allowed because though the quantity of steel measured at the time of issuance was 536.875 MT, recovery on account of cost of steel was being made for 581.8502 MT. The said figures have not been disputed by the counsel for the respondent DDA. If the

respondent DDA had issued 536.875 MT of steel, it could have made recovery for that quantity only and not for any excess quantity. The respondent DDA itself having claimed price of excess quantity then issued, cannot object to the formula of overweight being applied by the Arbitrator. The contention of the respondent DDA was that the said formula has to be as per Clause 42 only. The Arbitrator has however held that Clause 42 does not require diameter wise tallying. It was the contention of the petitioner contractor that the field staff of the respondent DDA maintained the register of overweight and on which its signatures were taken but the said register was not produced by the respondent DDA. It was in these circumstances that the Arbitrator, not accepting the claim of petitioner contractor of overweight at the rate of 5% in overall diameter, allowed the claim only to the extent of Rs. 98,750/-.

28. I do not find the view of the Arbitrator in the circumstances to be an impossible one. Once it is a possible view, the same does not call for any interference and the objections are dismissed.

Re: Claim No. 18

29. The petitioner contractor claimed Rs. 40,70,423/- in respect of payment for work done beyond stipulated date of completion. The respondent DDA had extended the time for completion without taking any action for delay against the petitioner contractor. The Arbitrator therefrom concluded that the respondent DDA admitted delay to be on its own account. The petitioner contractor made a claim for increase in costs during the period of said extension. The respondent DDA contested that the petitioner contractor at the time of extension had given in writing that it will not make any claim on account of delay. The petitioner contractor contended that it was forced to give such writing as otherwise the respondent DDA would not have given extension and claimed that the construction costs has been increasing at the rate of Rs. 2.24% per month. The award records that the respondent DDA had not challenged the said figure. The Arbitrator finding that the bulk of the work was completed by June, 1984 when some allottees had started taking possession, computed the additional costs incurred by petitioner contractor on account of delay to be of Rs. 24,00,000/- and allowed the same. The Arbitrator while so computing took the value of the work done in the period of delay to be of the value of Rs. 200 lakhs.

30. The counsel for the respondent DDA has contended that even if the work done during the period of delay was of the value of Rs. 200 lakhs, the said value of Rs. 200 lakhs included the costs of material i.e. cement and steel etc. supplied by the respondent DDA and thus the computation of Rs. 200 lakhs on this basis is inherently defective. It is further contended that the total value of the work was of Rs. 263 lakhs and in the said total value the materials supplied by the respondent DDA was of Rs. 82 lakhs; so even if the work done during the period of delay was of Rs. 200 lakhs, it would still include the value of materials supplied by the respondent

DDA and with respect whereto no increase could be awarded.

31. It is also contended by counsel for the respondent DDA that the said award is without any basis. There was no evidence for the Arbitrator to conclude the value of the work done during the period of delay as Rs. 200 lakhs; no records were kept or shown in this regard.

32. It is also contended that not demanding compensation while granting extension could not have been deemed to be an admission by the respondent DDA of the delay being on its own account.

33. It is further contended that the plea of having been forced to give an undertaking not to claim any amount on account of extension of time for completion of work was taken by the petitioner contractor only for making the claim and after three years from giving the said certificate and not at the contemporaneous time. It is urged that in the circumstances, the Arbitrator could not have concluded that the respondent DDA has forced the petitioner contractor to give such no claim certificate.

34. It is further the contention of the counsel for the respondent DDA that under Clause 1 0C of the agreement, increase in price of material and labour was reimbursable if such increase is caused by Government and only on the contractor furnishing proof of having incurred the extra expenditure. It is contended that the claim, if any, of the petitioner contractor could have been under Clause 1 0C only and not otherwise as allowed by the Arbitrator; in the absence of any proof of extra expenditure having been furnished, claim on account of delay could not have been allowed on the formula of general increase in costs of construction.

35. Reliance in this regard is placed on:

(i) Steel Authority of India Limited Vs. J.C. Budharaja, Government and Mining Contractor, laying down that award of damages ignoring a prohibition in the contract in that respect is without jurisdiction.

(ii) Kochar Construction Co. v. Union of India 1994 (1) Arb. LR 269 where the Division Bench of this Court held that mere filing of costs analysis cannot be accepted as evidence of expenditure on account of increased costs of construction even if costs analysis is not disputed/controverted.

(iii) Anant Raj Agencies (supra) where this Court held that where contract provides for a formula as per which escalation has to be worked out, the Arbitrator is bound by the contract and cannot adopt a different methodology.

(iv) Judgment dated 13th July, 2009 in CS(OS) No. 154/1994 titled Republic Construction Co. v. DDA and judgment dated 23rd July, 2009 in CS (OS) No. 4405A/1992 titled Verma Construction Co. v. DDA where this Court has held that a claim under Clause 10C lies only if during the progress of work, price of any material

(not being a material supplied from the Engineer-In-Charge store) or wages of labour increases because of coming into force of any fresh law, statutory rule or order and such increase exceeds 10% of the prices/wages prevailing at the time of the receipt of tender; the contractor can claim reimbursement of prices only if it is more than 10% and only to the extent it was in excess of 10% and if he serves a notice on DDA during progress of work. Such reimbursement on increase of prices/labour is to be made only if it is approved by the Superintending Engineer. It was further held that an enhancement under Clause 1 0C can be allowed only if the conditions as set out therein are satisfied and no presumption could be drawn by the Arbitrator that because of the contract over-running, there was necessarily going to be a price rise and necessarily going to be a wage rise. The award on such basis was held to be contrary to the contract and was set aside.

36. Per contra the counsel for the petitioner contractor has contended that had the petitioner contractor not given the no claim undertaking on account of delay, the respondent DDA would not have granted the extension. It was enquired from the counsel for the petitioner contractor whether the contractor had contemporaneously written any letter that it has been so forced to give the no claim undertaking. Though no letter was shown but the counsel for the petitioner contractor contended that since the arbitration had already been invoked and the petition u/s 20 had been filed, the occasion for writing such a letter did not arose. The counsel for the petitioner contractor further contended that while adopting the formula of increase the Arbitrator has excluded the costs indices of steel and cement. It is contended that once delay was attributed to the respondent DDA, the damage to the petitioner contractor was implicit and the award of the Arbitrator in that respect need not be interfered with. It is further pointed out that the contract in question is of before the time of introduction of Clause 10CC added in the subsequent contracts of DDA. Reliance in this regard is placed on Jagat Ram Trehan and Sons Vs. DDA, where objections to the amount awarded for delay in a contract without Clause 10CC were dismissed. The counsel for the petitioner contractor in this regard also refers to:

(i) State of Rajasthan v. Puri Construction Ltd. 1995 (22) Arb. LR 1 (SC) laying down that the Arbitrator is the final arbiter for the disputes between the parties and it is not open to challenge the award on the ground that the Arbitrator has drawn his own conclusion or has failed to appreciate the facts and where the plea of the award being bad for award of lump-sum damages in the absence of any material showing actual loss suffered by the contractor was dismissed.

(ii) Uttam Singh Duggal and Co. Vs. Union of India and Others, where also the objection to the award on the ground of the same being without proof of damages were dismissed holding the same to be a matter of appreciation of facts.

(iii) N.D.R. Israni Vs. Delhi Development Authority, where award on the basis of cost index was upheld.

(iv) Bedi Construction Co. Vs. Delhi Development Authority, where also objection to the award on the basis of the same being not in accordance with Clause 1 0C was dismissed holding the assessment to be under Clause 10C.

37. Clause 10C in the contract in the present case, is identical to that in the judgments of this Court in M/s Republic Construction Co. and Verma Construction Co. (supra). The same provided for escalation during the progress of the works. The said clause is not limited only to the escalation during the stipulated period of the contract. The work was in progress during the period of extension, attributable whether to the petitioner contractor or to the respondent DDA. Clause 1 0C does not admit of any distinction in progress of the works within the stipulated period or the extended period. In any case, upon extension, the extended period is deemed to be the modified stipulated period and the escalation thereunder would be governed by Clause 1 0C. To the same effect is the recent judgment in S.J. Chaudhary Vs. CBI, , also laying down that escalation even during extended period of contract has to be under Clause 1 0C and without proof on record no amount can be awarded. The award on Claim No. 18 is admittedly not in accordance with the Clause 10C, though found to be covered by the said clause. The same thus cannot be sustained. The Arbitrator is a creature of the contract and cannot operate outside the contract. I thus allow the objection to the award on Claim No. 18 and set aside the award to that extent.

Re: Claim No. 2 1

38. The counsel for the petitioner contractor claimed Rs. 15,000/- for replenishment of loss sustained on account of works of DESU while laying the trenches. The Arbitrator has awarded Rs. 5,000/- against the said claim. The counsel for the respondent DDA has challenged the award as being without any basis and has also contended that the claim for loss on account of action of DESU should have been pursued against DESU and not against the respondent DDA.

39. DESU was also permitted on the site by the respondent DDA only. The view taken by the Arbitrator is a possible view and cannot be said to be perverse and calls for no interference. The objections to award under said claim are dismissed.

Re: Claim No. 22

40. The petitioner contractor had claimed Rs. 4,36,800/- for site expenses and other overheads for the extended period of the contract. The claim has been allowed to the extent of Rs. 1,42,800/-.

41. The counsel for the respondent DDA has besides the arguments raised with respect to the award under Claim No. 18 challenged the award as being arbitrary and without any proof or basis. It is also contended that the agreement items included the overhead. Per contra the counsel for the petitioner contractor has in this regard relied on Mr. M.L. Mahajan Vs. D.D.A. and Another, where this Court did

not find anything objectionable or perverse in the award on such basis.

42. The matter being no longer res-integra, the objections to the award under the said claim are to be dismissed.

Re: Claim No. 23

43. The petitioner contractor had claimed Rs. 2,00,000/- for doing the work of cement paint over a roughcast plaster. The Arbitrator has found that there is no item in the DSR for such specification and the rate in the DSR is for painting on a smooth surface only. Finding the CPWD specification for providing 20% increase in case of corrugated surface and holding that the consumption of cement paint would be double over a rough surface than over a plain surface, allowed the claim in toto.

44. The counsel for the respondent DDA has contended that it was known to the petitioner contractor that the work of painting over rough surface/grit finish, was to be carried out. Attention in this regard is invited to Clause 9 of the agreement together with schedule to the agreement.

45. I do not find the contract or the schedule thereto to have provided for cement paint on grit finish. The respondent DDA having admittedly required grit finish with cement paint thereon cannot object to the award and no perversity is found therein. The objections are dismissed.

Re: Claim No. 26

46. The petitioner contractor claimed Rs. 4,50,000/- for final bill of undisputed items. The said claim has been allowed to the extent of Rs. 3,64,619/-.

47. The counsel for the respondent DDA has again contended that there is no basis for the awarded figure. It is also contended that the rebate for payment of final bill within 6 months has been wrongly disallowed.

48. The award aforesaid is factual and does not admit of any interference. Suffice, it is to state that no perversity is shown therein. The objections are dismissed.

Re: Claim No. 33 for interest

49. The counsel for the respondent DDA has objected to the high rate of interest awarded and has relied on recent judgments where the rate of interest has been reduced to 8% to 10%. Per contra the counsel for the petitioner contractor has justified the rate of interest owing to long passage of time and the transaction being of a commercial nature.

50. Though the proceedings for making the award the Rule of the Court and the objections preferred against the award, have remained pending for long but it cannot be said to be for reasons attributable to the respondent DDA. It also cannot be said that the respondent DDA has in the interregnum used the money found due to the petitioner contractor commercially. In the circumstances, considering the

majority of the recent judgments providing for lower rates of interest in view of the falling rates of interest, the interest pendente lite is reduced from 15% to 6% and interest from the date of the award and till the date of payment/decree from 18% to 9% per annum.

51. The counsel for the petitioner contractor has also contended that the Bank Guarantee furnished by the petitioner contractor with the respondent DDA has not been released and an order therefore may also be made.

52. In view of the findings above, the award as modified above is made Rule of the Court and decree is passed in terms thereof. The petitioner contractor is also granted interest u/s 29 at the rate of 9% per annum. The respondent DDA is also directed to release the bank guarantee furnished by the petitioner contractor within six weeks.

Under the circumstances, no order as to costs.