

**Oriental Structural Engineers Vs. Delhi Development Authority**

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**SooperKanoon Citation :** [sooperkanoon.com/688606](http://sooperkanoon.com/688606)

**Court :** Delhi

**Decided On :** Nov-11-1992

**Reported in :** 1993(2)ARBLR74(Delhi); II(1993)BC21; 50(1993)DLT551

**Judge :** D.K. Jain, J.

**Acts :** [Arbitration Act, 1940](#) - Sections 14

**Appeal No. :** Suit No. 670A of 1989

**Appellant :** Oriental Structural Engineers

**Respondent :** Delhi Development Authority

**Advocate for Pet/Ap. :** R.K. Watel,; P. Dewan and; Anupam Dhingra, Advs

**Judgement :**

**D.K. Jain, J.**

(1) On petitioner/contractor's application under Sections 14 and 17 of the [Arbitration Act, 1940](#), notice was issued to the arbitrator for filing the award. Shri V. D. Tewari the Id. arbitrator, filed his award dated 6/02/1989. Notice of filing of the award was given to the parties. Delhi Development Authority (for short the DDA) has filed objections against the award, being I.A. No. 5028/89, which are opposed by the Contractor.

(2) The objection against the award is that the Id. arbitrator has misconducted himself in acting contrary to the terms of the agreement, the award on Claim No. 2 as such is illegal as under Clause 2 of the Agreement, the Superintending Engineer is the final authority to levy compensation for delay in execution of the work, which could not be reopened by the Id. arbitrator, he had no jurisdiction to adjudicate the question of compensation under Clause 2 of the Agreement and the finding of the arbitrator is without jurisdiction, The objections having been controverted, the following issues were framed:-

(1) Whether the award dated 6.2.1984 in respect of claim No. 2 deserves to be set aside for the reasons stated in the objections ? (2) Relief.

It was agreed that evidence shall be led by way of affidavits and the record of the arbitrator will be read in evidence.

(3) Both the parties have filed affidavits in support and in resistance of the objections against the award.

(4) Issue No. 1: It appears that under agreement No. 24/EE/DD.1/DDA/83-84 dated 27 March 1984 the work of development and dense carpeting of the zonal roads at Shalimar Bagh, Block B, Delhi was awarded by the Dda to the Contractor. The work was to commence on 18 March 1984 and the stipulated date of completion was 17 April 1984. The work was not completed within the stipulated time. Clause 2 of the Agreement stipulated that time would be of the essence of the contract and in case, it was not observed by the Contractor, the Dda had the authority to levy compensation for delay. The decision of the Superintending Engineer in this behalf was made final. Since there was delay in completion of the work, the authority, competent under Clause 2 of the said agreement, levied compensation of Rs. 89,442/- on the Contractor, which amount was deducted from the final bill. The Contractor raised some disputes/claims including for Rs. 89,442/-, deducted from the final bill for delayed completion of the work, as above. The contractor invoked the arbitration clause, moved the persona designata, upon which the Engineer Member, Dda, the persona designata under the arbitration clause, appointed Shri V.D. Tewari as the sole arbitrator to decide and make his award regarding the claims/disputes of the contractor.

(5) The Contractor's claims were resisted by the DDA. Claim No. 1 was withdrawn by the Contractor. Claim No. 2 for Rs. 89,44/2- 'for compensation Unjustifiably levied by the department' was resisted by the DDA, inter alia on the plea that by Clause 2 of the Agreement, the time allowed for carrying out the work as entered in the tender was to be strictly observed and was deemed to be of the essence of the contract; the Contractor failed to complete the work within the stipulated time; the Superintending Engineer, who is the competent authority under Clause 2 of the agreement, after issue of show cause notice levied compensation under the said clause; the levy as such was as per the terms and conditions of the agreement and, therefore, the claim may be rejected.

(6) After hearing the parties, the Id. arbitrator allowed claim of the contractor for Ra. 89,442/- and also awarded pendente lite interest thereon.

(7) I have heard Id. Counsel for the parties.

(8) In support of the objections. Shri Pradeep Dewan, Id. Counsel for the Dda, while fairly conceding that he is not addressing any arguments on the merits of the compensation payable under Clause 2 of the agreement, submits that the levy of compensation under the said clause is an excepted matter and, therefore, beyond the ambit of the Arbitration Clause 25 of the agreement. He urges that the decision on the levy of compensation under Clause 2 of the agreement being exclusively within the discretion of the Superintending Engineer, is final and not arbitrable. He contends that the reference on the issue made to the arbitrator by the persona designate was illegal and the arbitrator could not adjudicate upon it and the award is illegal and void. Thus, the main thrust of his argument is that the arbitrator had no jurisdiction to go into the question of levy of compensation under Clause 2 of the agreement. He has placed reliance on a decision of the Supreme Court in Vishwanath Sood v. Union of India and Another, : [1989]1SCR288 and of this Court in M/s. Bharat Furnishing Co. v. Delhi Development Authority & Another 1991 (4) Delhi Law 355

(9) Shri R.K.. Watel, Id. Counsel for the Contractor on the other hand, has urged that there being a specific reference on the aforesaid issue for adjudication of the arbitrator and the Dda having not taken any objection about his jurisdiction before

the arbitrator, the Dda is precluded from now raking up the issue of jurisdictional error on the part of the arbitrator. While relying on the judgments of this Court in the cases of Sudhir Brothers v. Dda (Suit No. 1522-A/87) decided on 21 December 1990, K.C. Chhiber v. Dda (Suit No. 1985-A/84) decided on 18 January, 1991, M/s Dewan Suraj Parkash Chopra & Sons v. Delhi Development Authority & Another; 1991 (1) Delhi Law 393. G.D. Rathi Steels Pvt. Ltd. V. Delhi Development Authority, : AIR 1992 Delhi 343, he contends that as the Id. arbitrator's award on question of delay and levy of compensation there for had been upheld in the said cases, he, thus, had jurisdiction to go into this question.

(10) Thus, the only legal question, which falls for consideration in the present case is, whether the question of levy of compensation/penalty under Clause 2 of the agreement is arbitrable and is covered by the Arbitration Clause 25 of the agreement or not.

(11) To appreciate rival contentions and the judicial opinion on the issue, it is necessary to notice Clauses 2 & 25 of the agreement, which are set down below :-  
Clause 2

'THE time allowed for carrying out the work as entered in the tender shall be strictly observed by the Contractor and shall be deemed to be of the essence of the contract on the part of the contractor and shall be reckoned from the 10th day after the date on which the order to commence the work is issued to contractor. The work shall throughout the stipulated period of the contract be proceeded with all due diligence and the contractor can pay as compensation an amount equal to 1% or such smaller amount as the Superintending Engineer Delhi Development Authority (whose decision in writing shall be final) may decide on the amount of the estimated cost of the whole work as shown in the tender, for every day that the work remains uncommenced or Unfinished after the proper dates. And further, to ensure good progress during the execution of the work, the contractor shall be bound in all cases in which the time allowed for any work exceeds, one month (save for special jobs) to complete one-eighth of the whole of the work before one-fourth of such time has elapsed. However, for special jobs if a time-schedule has been submitted by the Contractor and the same has been accepted by the

Engineer-in-Charge, the contractor shall comply with the said time-schedule. In the event of the contractor failing to comply with this condition, he shall be liable to pay as compensation an amount equal to one percent or such smaller amount as the Superintending Engineer Delhi Development Authority (whose decision in writing shall be final) may decide on the said estimated cost of the whole work for every day that the due quantity of work remains incomplete; provided always that the entire amount of compensation to be paid under the provisions of this Clause shall not exceed ten percent, on the estimated cost of the work as shown in the tender.'

Clause 25:

'EXCEPT where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs drawings and instruction herein before mentioned and as to the quality of workmanship or materials used on the work or as to any other questions claim, right matter or thing whatsoever, in any way arising out of or relating to the contract designs drawings, specifications, estimates, instruction, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitration of the person appointed by the Engineer Member Delhi Development Authority at the time of dispute. It will be no objection to any such appointment that the arbitrator so appointed is a Delhi Development Authority employee that he had to deal with the matters to which the contract relates and that in the course of his duties as Delhi Development Authority employees he had expressed view on all or any of the matters in dispute of difference. The arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason, such Engineer Member Delhi Development Authority as aforesaid at the time of such transfer, vacation of office or inability to act shall appoint another person to act as arbitrator in accordance with the terms of the contract. Such person shall be titled to proceed with the reference from the stage at which it was left by his predecessor it is also a terms of this contract that no person other than a person appointed by such Engineer Member, Delhi Development Authority as aforesaid should act as arbitrator and, if any reason that is not possible, the matter is not to be referred to arbitration at all. In all cases

where the amount of the claim in dispute is Rs. 50,000/- (Rupees Fifty thousand) and above, the arbitrator will give reason for the award. Subject as aforesaid the provisions of the [Arbitration Act, 1940](#) or any statutory modification or re-enhancement thereof and the rules made there under and for the time being in force shall apply to the arbitration proceeding under this Clause. It is a term referred to arbitration under this clause together with the amount or amounts claimed in respect of each such dispute. It is also a term of the contract that if the contractor(s) does/do not make any demand for arbitration in respect of any claim (s) in writing within 90 days of receiving the intimation from the Engineer-in-Charge that the Bill is ready for payment, the claim(s) of the contractor(s) will be deemed to have been waived and absolutely barred and the Delhi Development Authority shall be discharged and released of all liabilities under the contract in respect of those claims.'

(12) Clause 2 of the agreement highlights the necessity of keeping time schedule in the execution of the work by the contractor. It stipulates for timely start, maintenance of requisite progress, and timely execution and completion of the work. Time allowed has to be strictly observed by the contractor at all the stages and deemed to be of the essence of the contract. In the event of the contractor's failing to comply with this, the Clause provides, he shall be liable to pay as compensation an amount equal to 1% or such smaller amount as the Superintending Engineer in his discretion may decide. The clause is mandatory, it lays down the machinery for assessment and levy of compensation if time is not maintained as of the essence of the contract by the contractor. The decision of the competent authority (SE) on the question of awarding compensation, within the ambit of Clause 2, is made final and cannot be called in question. It thus, impliedly negatives the competence of any other person, authority or body to arrogate to itself any power to do so.

(13) A bare perusal of Clause 25 of the said agreement, reproduced above, would show that any matter left for the decision of any authority under the contract, is taken out of the ambit of the arbitration. The opening words of the arbitration clause 25, namely, 'except where otherwise provided under the contract', specifically excludes the jurisdiction of the arbitrator from adjudicating on any

matter for which a separate provision has been made in the contract. In common parlance these are called excepted matters and are beyond the domain of the arbitration. Compensation for breach of contract, like delay in execution, can be claimed under the general law or under the Contract Act or under the terms of a contract. When compensation is claimed under the terms of the contract, the question of arbitration ability of the claim for compensation on delay would depend on the other terms of the contract itself. If the terms of the contract, specify any authority to determine it and its decision is made final, whatever is decision, the matter is taken out from the ambit of the arbitration. Support is lent to this view by Vishwanath Sood's case (supra) which fully covers the case in hand. It is not disputed that Clauses 2 and 25 herein are in pari-material with the corresponding relevant clauses in Vishwanath Sood's case. In Vishwanath Sood's case it was held in para 9 as under:

'CLAUSE 25 which is the arbitration Clause starts with an opening phrase excluding certain matters and disputes from arbitration and these are matters or disputes in respect of which provision has been made elsewhere or otherwise in the contract. The words in our opinion can have reference only to provisions such as the one in parenthesis in Clause 2 by which certain types of determinations are left to the administrative authorities concerned. If that be not so, the words 'except where otherwise provided in the contract' would become meaningless. We are, therefore, inclined to hold that the opening part of Clause 25 clearly excludes matters like those mentioned in Clause 2 in respect of which any dispute is left to be decided by a higher official of the department. Our conclusion, therefore, is that the question of awarding compensation under Clause 2 is outside the purview of the arbitrator and that the compensation, determined under Clause 2 either by the Engineer-in-Charge or on further reference by the Superintending Engineer will not be capable of being called in question before the arbitrator.'

(14) In the present case, it is not disputed that the Superintending Engineer, the competent authority, acting under Clause 2, had determined that there was delay on the part of the contractor and levied a compensation of Rs. 89,442/- as payable by the contractor to the DDA. This amount was deducted by the DDA from the Contractor's final bill. For the deducted amount the Contractor raised claim No. 2

The claim was contested before the arbitrator on the basis of stipulation in Clause 2 of the agreement between the parties and the levy was defended on that score, it is true that the jurisdiction of the arbitrator to entertain the claim on that basis was not assailed in so many words, but the claim nonetheless was contested on the stipulations under Clause 2 of the agreement, about the competent authority having determined the issue. This, in my view, took the matter out of the ambit of arbitration. The reference and the award on the issue is thus, null and void. Support is lent to this view by Supreme Court's decisions in *M/s. Associated Engineering Co. v. Government of Andhra Pradesh & Anr.* : [1991]2SCR924 and *M/s. Prakash Commercial Corporation Ltd. v. The Chief Administrator Dandakaranya Project and Another*, : AIR 1991 SC957 . It is well settled that consent of parties cannot confer jurisdiction where there is none.

(15) The proposition of law laid down in Vishwanath's case (supra) was disputed in the authorities relied upon by Shri Watel. The said authority was held distinguishable on facts in each case and thus, held not applicable. It appears that in all these cases, the ratio of Vishwanath's case was not applied, inter alia, on the ground that the DDA itself had before the arbitrator, raised counter claim for compensation for delay in execution of the works by the Contractor, which was negated. The DDA's objections, against the award were, thus rejected.

(16) Besides, the authorities relied upon by Shri Watel are distinguishable. In *Sudhir Brothers*, case (supra) decided by D.P. Wadhwa, J., it was found that time was not of the essence of the contract, the case was, thus not covered by Clause?, of the contract. In *K C. Chhiber's case* (supra) the question of law on levy of compensation under Clause 2 was specifically referred to arbitration at the instance of the Delhi Development Authority and relying on *M/s. Tarapore and Company v. Cochin Shipyard Ltd. Cochin and Another*, : [1984]3SCR118 and *State of Orissa v. Dandasi Sahu*, : AIR 1988 SC1791 , S.N. (supra), J. held that the award of compensation for delay, by the arbitrator, could not be interfered with. In the said authorities it was held that if a question of Law was specifically referred and had not arisen only incidentally for arbitrator's decision, the parties choosing their own Forum, could not object to the award, whether good or bad. In the present case no specific question of Law was referred to the arbitrator and he was

not called upon to specifically determine if the matter was arbitrable. The reference only was in general terms. Claim No. 2 raised by the contractor is as below:

'CLAIMANTS claim Rs. 89,442/- towards compensation unjustified levied by the department for delayed complete of work.'

(17) The question of law, whether matter was arbitrable arose incidentally. Herein, the learned arbitrator's assumption of jurisdiction to adjudicate and review a finding of a competent authority is an error of Law apparent on the face of the award.

(18) In G.D.Rathi's case (supra) S.C. Jain, J. found as a fact that time was not maintained as of the essence of the contract as the Dda, expiry of stipulated time, kept on asking the Contractor to continue with the supplies. Clause 2 was, therefore, held to be not applicable. The said authority is clearly distinguishable from the facts of the present case.

(19) In view of the above discussion and findings, the DDA's objection against claim No. 2, in LA. 5028/89, is allowed. The award there on and the pendente lite interest awarded under claim No. 3 on the amount awarded under claim No. 2 is liable to be set aside.

(20) The award is accordingly set aside with no order as to costs.

(21) Application under Sections 14 and 17 of the Arbitration Act stands disposed of.

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