

**Mohan Construction Co. Vs. Dda**

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**Court :** Delhi

**Decided On :** May-23-2005

**Reported in :** 2005(2)ARBLR486(Delhi); 2005(82)DRJ400

**Judge :** Pradeep Nandrajog, J.

**Acts :** [Arbitration Act, 1940](#) - Sections 30

**Appeal No. :** IA No. 11116/1996 and CS(OS) No. 1458A/1996

**Appellant :** Mohan Construction Co.

**Respondent :** Dda

**Advocate for Def. :** Monica Sharma, Adv.

**Advocate for Pet/Ap. :** Sandeep Sharma, Adv

**Judgement :**

**Pradeep Nandrajog, J.**

1. Present order disposes of objections filed by DDA under Section 30 of the [Arbitration Act, 1940](#) to the award dated 6.10.1995 made and published by Sh. A.C. Panchdhari, the sole arbitrator appointed to decide the disputes and differences between M/s. Mohan Construction Company and DDA arising out of contract agreement No. 2/DD-1/DDA/82-83.

2. The objections are the usual ones filed against each and every award suffered by DDA. Objections are argumentative, unfortunately without any substance. Indeed, at the hearing held on 18.5.2005, counsel for the DDA could hardly shake the foundation of the award or any part thereof. Objections which run into 33 pages are without reference to a single document. I have repeatedly directed DDA to ensure that in the objections reference is made to the documents relied upon by DDA to challenge findings of arbitrators. On 24.1.2005, I had directed DDA to file brief written synopsis indicating the submissions and page number of the document relied upon. Matter was posted for arguments on 18.5.2005. It is to be regretted that counsel for DDA has chosen not to do the needful notwithstanding the fact that nearly 4 months time was granted to the counsel to do the needful. Sh. A.C. Panchdhari, the learned sole arbitrator appointed is a retired Director General of Works (CPWD). He is a man of experience in the field of construction. Award in question is a speaking award running into 38 pages. That there is a complete application of mind and consideration of the relevant evidence led before the learned arbitrator is evidenced from the fact that claim No. 2 and 7 have been dismissed. Claim No. 3, 4, 5, 6, 8 and 9 have been partially allowed. Similarly, counter claim No. 1, 5, 6 & 7 have been rejected. Counter claim No. 2, 3, 4 and additional counter claim No. 1 have been partially allowed. After adjustment, sum awarded to the contractor is Rs. 6,91,968/-. Sum awarded is directed to be paid with interest @ 12% per annum from date of award till date of decree. For record, it may be noted that while determining the amount payable, learned arbitrator has granted benefit of interest for the pre-suit period till date of award and has included the said amount while working out the summary of the award where sum awarded under the counter claims has been adjusted from the sum awarded to the contractor.

3. Learned arbitrator has noted that the stipulated date of start of work was 1.5.1982 and stipulated date of completion was 30.4.83. He has further noted that the actual date of completion of the work was 9.1.1988.

4. On the issue of delay, learned arbitrator has noted that evidence on record brought out that the site of the work was not fully available, there was non-supply of drawings on time coupled with frequent changes in specifications and delayed

decisions. He has also noted that DDA itself granted extension of time up to 9.1.1988 without levy of compensation. Learned arbitrator has also noted that the contractor executed the work without planning as also the fact that the contractor executed several other works simultaneously thereby diverting skilled labour, machinery, T & P labour to other works. Learned arbitrator has accordingly noted that it was a situation of free will of the parties.

5. Contractor has not filed any objections to the award. It is DDA which is aggrieved. Ms. Monica Sharma, learned counsel for the DDA failed to point out any material evidence ignored by the learned arbitrator in respect of the findings that evidence on record brings out that it was a case of free will of both parties which led to the delay in completion of the work.

6. The finding of the learned arbitrator that both parties contributed to the delay is accordingly affirmed.

7. Claim No. 1 has no financial implications on the sum awarded for the reason, contractor claimed that it should be released from the rigours of the bank guarantee submitted as security for due performance of the contract. Bank guarantee is in sum of Rs. 1,00,000/-. The arbitrator has noted that the bank guarantee had expired.

8. Since works were completed and by the time the learned arbitrator published the award, guarantee period was over, I find nothing wrong in the award insofar it releases the contractor from the rigours of the bank guarantee.

9. Objection filed to the award pertaining to claim No. 1 is that DDA had prepared a minus bill in sum of Rs. 1,12,495/- and therefore sum under bank guarantee could not be released.

10. Objection of DDA is baseless for the reason DDA worked out a minus bill but the learned arbitrator while dealing with the claims of the contractor and in particular claim No. 6, being the claim for non-payment for work done, has awarded a sum of Rs. 1,07,235.78 to the contractor. As would be noted hereunder, DDA could not shake the foundation of the award pertaining to claim

No. 6 of the contractor. Position, therefore, would be that the minus bill prepared by DDA has not been accepted by the learned arbitrator. DDA could succeed to knock off claim No. 1 only if it could establish that it has to effect recovery from the contractor. DDA has failed to do so. Objection to the award pertaining to claim No. 1 is accordingly repelled.

11. Claim No. 2 has been rejected. There are no objections to this part of the award.

12. Coming to claim No. 3, claim was in sum of Rs. 28,365.11 on the ground that the contractor had offered rebate of 0.50% if regular monthly payments were released. Contractor stated that timely payments were not released and yet rebate was deducted.

13. It is trite that where rebate is offered contingent upon performance of a reciprocal obligation, if obligation is not performed, benefit of rebate cannot be availed off. Ms. Monica Sharma, counsel for DDA did not challenge this legal position. Perusal of the award shows that the learned arbitrator has noted that 21 bills were not paid in time and therefore has held that rebate deducted has to be refunded. Learned arbitrator has awarded Rs. 10,050.38 to the contractor.

14. Finding of the learned arbitrator is a pure finding of fact. DDA could upset the finding by showing to this court that in respect of the 22 bills relied upon by the learned arbitrator, DDA had effected timely payment. Counsel for the DDA failed to do so. Challenge to the findings pertaining to claim No. 3 are accordingly rejected.

15. Claim No. 4 in sum of Rs. 70,000/- has been allowed in sum of Rs. 21,547.50. Claim was on account of wrongly withholding of amounts from the running bills. Learned arbitrator has noted that DDA had effected recoveries from the running bills. Not all recoveries have been found to be unauthorized. Only 3 recoveries have been held to be unauthorized. These recoveries pertained to bill No. 5/86 and 8/87. Sum ordered to be refunded is Rs. 9050/- under bill No. 5/86 and Rs. 12,497.40 under bill No. 8/87. Learned arbitrator has held that under bill No. 5/86, penal rate recovery was effected in sum of Rs. 9050/-. Holding that penal rate recovery can be made only when work is completed, learned arbitrator has held

the amount as refundable. Ms. Monica Sharma, learned counsel for DDA conceded that when work is in progress, it is not possible to determine the exact quantity of material consumed and only when work is completed and final measurements taken it can be determined as to what quantity of material has been consumed. Learned arbitrator has thereforee rightly proceeded to order refund of the amount recovered under bill No. 5/86.

16. In respect of the other amount, learned arbitrator noted that sum withheld under bill No. 8/87 in sum of Rs. 4,497.40 could not be withheld as the work was done. The other sum withheld i.e. Rs. 8,000/- was held to be refundable as it was deducted on account of certain observations of the quality control cell. Learned arbitrator has rightly held that for bad quality work, reduction had to be effected from the rate at which payment had to be released. I may note that though learned arbitrator has not so stated, logical corollary of the finding of the learned arbitrator is that where final work is accepted, defects have to be gone into and at that stage, if defects are not rectified, reduction in rate has to take place. I, thereforee, do not find any merit in the objections filed by DDA.

17. Claim No. 5 in sum of Rs. 3,85,000/- has been allowed in sum of Rs. 2,62,000/-. Claim was on account of the benefit under clause 10(c) of the contract. Said clause required contractor to be compensated due to statutory increase in labour wages and cost of material.

18. A perusal of the award would show that the learned arbitrator has acted on the basis of indices available and has apportioned the labour component of the work into unskilled and skilled labour. For material escalation, learned arbitrator has noted the cost indices. Learned arbitrator has also noted the work recorded as certified for payment in the running bills.

19. Perusal of the objections raised by DDA to claim No. 5 is that benefit of clause 10(c) was available only during contract stipulated period and not indefinite. The other objection raised is that the contractor did not produce his account books to show the price at which it had procured raw material as also the wages paid to the labour.

20. Perusal of the award shows that the learned arbitrator has analysed clause 10(c) of the agreement and in the context of books of account, has noted that the clause empowered the engineer-in-charge to inspect the books of accounts where there was a claim for labour and/or material escalation due to statutory amendment. Learned arbitrator has noted that at no point of time, DDA requested the contractor for inspection of the books of accounts. Learned arbitrator has noted that the cost indices showed increase in the wages of labour and price of material.

21. The objections raised by DDA that books of accounts were not produced is without any merit. DDA never sought production/inspection of the books of accounts. Arbitrator has so recorded. The other objection that benefit of clause 10(c) was available only during the contract stipulated period is again without any basis for the reason, as noted above, arbitrator has held neither party responsible for delay. That apart, admittedly, DDA extended time for completion of the contract up to 9.1.1988 without levy of penalty. It is not the case of the DDA that while extending time for completion of the work, it had notified to the contractor that the contractor would not be entitled to the benefit of clause 10(c) of the contract.

22. Since DDA extended time for completion of the contract without any reservation, all clauses of the contract would continue to operate during the extended period of the contract. Objection to the award pertaining to claim No. 5 is accordingly repelled.

23. Claim No. 6 in sum of Rs. 11,00,000/- has been allowed in sum of Rs. 1,07,235.78. Claim was on account of non-payment and under payment in respect of various items as also extra and substituted items. Further, claim included wrongful deductions and wrongful recoveries. Claim No. 6 was divided into 5 parts and each part had further sub-heads. I need not deal with all heads and sub-heads for the reason, Ms. Monica Sharma, counsel for DDA questioned only a few at the hearing held on 18.5.2005.

24. First item objected to was the award by the learned arbitrator in sum of Rs. 3,200/- to the contractor for providing and fixing SCI collars of various sizes. Counsel urged that under clause 3.14(6) of the contract, contractor was to provide

SCI collars for fixing SCI Pipes free of cost and nothing extra had to be paid.

25. A perusal of the award shows that the learned arbitrator has taken note of condition number 3.14(6) of the contract. He has noted that the contractor was to provide SCI collars for fixing SCI Pipes of the required size. However, learned arbitrator has noted that DDA did not supply the pipes of the required size but issued pipes of a single length which required excess number of collars to be used. Findings of the learned arbitrator are as under:-

'All this presumes that the respondent will issue required different lengths of pipes. In the market SCI pipes of different lengths are available ..... However in this case the contractor was issued pipes of one length only which made use of collars a necessity in place of rarity and to state that he will provide these collars which are required on account of default of respondent would be a travesty of facts.'

26. Indeed, under condition 3.14(6) DDA was obliged to provide SCI pipes of the required size. Only then, contractor was to provide SCI collars free of cost. Obviously, if pipes of requested lengths are issued, less number of collars would be used. As noted above, learned arbitrator is a retired Director General of Works (CPWD). Who else would know better than him? The award is rationale and within the domain of the arbitrator.

27. The second objection was to the sum of Rs. 2,054.88 awarded by the learned arbitrator in respect of the claim of the contractor of having provided and affixed plugs and sockets in water meter boxes. Objection raised is that it was not established that the work had been executed.

28. A perusal of the pleadings of DDA would reveal that before the arbitrator, DDA pleaded that it had paid for the item of work. Learned arbitrator has recorded that he had perused the final bill prepared by DDA and had noted that no such payment had been made. Accordingly, the sum was awarded by the learned arbitrator.

29. Before me, a totally contrary stand was sought to be projected namely that the item of work was not executed. I am afraid, DDA cannot change the track.

30. I may also note in this context that even pertaining to SCI collars, in the written objections filed by DDA, it is stated that the work was not executed. Before the arbitrator, a totally different stand was adopted.

31. Next item objected to was the award of Rs. 3,972.53 under sub-head (9) of the claim. Objection raised is that the sum awarded is without any evidence.

32. Learned arbitrator has noted that as per contract specifications, flushing system of Indian WC was to be fixed at a height of 1.95 mtrs. from flush level whereas as per specifications level of the flush pipe was 1.25 mtrs. Accordingly, learned arbitrator has noted that there was a variance in the contract pertaining to the specification of the length of flush pipe and the distance between the flushing system of the Indian WC. Learned arbitrator has held that the contractor would be entitled to the benefit of this variance in the specification and accordingly held that the contractor would be entitled to benefit of the difference in price for the extra 70 Cms. of pipe length used.

33. It is indeed debatable whether the contractor quoted the rate for the work in question in the context of specifications and conditions pertaining to the flushing system of Indian WC or in the context of the specifications of the length of flush pipe. But that should not bother the court, for the reason arbitrator is a Judge appointed by the parties to decide and interpret the contract. If two views are possible and the arbitrator adopts one, court cannot sit over judgment.

34. Next objection was to the sum of Rs. 720/- awarded by the learned arbitrator under sub-head (10). Award shows that the parties were at variance with each other on the interpretation of the specifications of the conditions of the contract. Learned arbitrator has reconciled by holding that when there is a specific condition which the parties have agreed, it will operate only within its four corners. The condition relied upon by DDA was for bath and kitchen and accordingly learned arbitrator held that it will operate only for that purpose. Accordingly, for making sunken floor, learned arbitrator has held that extra labour was involved in making

edges and therefore contractor had to be compensated. Sum awarded is Rs. 720/-. For the reason, I have rejected challenge to sub-head (9) of this claim challenge to award pertaining to sub-head (10) has also to fail.

35. Though in the written objection sub-head (11) of claim No. 6 as awarded has been challenged but during arguments no such challenge was urged.

36. Sub-head (14) of the claim No. 6 has been allowed in sum of Rs. 50,856/-. Claim was for watch and ward after completion.

37. Learned counsel for the DDA argued that document R-68 has been wrongly interpreted by the learned arbitrator.

38. Document R-68, is an undertaking dated 6.3.1990 from the contractor, undertaking being to provide for watch and ward without payment of any cost by DDA.

39. Learned arbitrator has not ignored R-68. He has considered the same. Noting that the work was admittedly completed on 9.1.1988, learned arbitrator has held that under normal circumstances it was the duty of DDA to maintain watch and ward. After all, works belonged to DDA. Learned arbitrator has upheld the plea of the contractor that the undertaking was obtained under duress. Learned arbitrator has held the undertaking to be a result of arm-twisting.

40. Is the finding perverse? I feel not. Why should the contractor undertake to provide watch and ward and that also free of cost for more than two years. It has to be noted that the undertaking goes beyond 6.3.1990. Award shows that the contractor had to maintain chowkidars till the month of June, 1992 i.e. for a period of 52 months after the works were completed.

41. The award pertaining to sub-head 14, in my opinion suffers from no jurisdictional infirmity.

42. The next objection is to sub-head 18. Learned arbitrator has held that DDA has to pay to the contractor Rs. 1,519.12. Learned counsel for the DDA urged that as per contract, contractor was to provide clamps fabricated from turn Steel. Clams

provided were of mild steel. Counsel argued that DDA rightly withheld payment.

43. Perusal of the award shows that the arbitrator has held that DDA could have rejected the work. It could not have retained the clamps and simultaneously not paid for the same.

44. Learned counsel for the DDA could not point out any letter written by DDA rejecting the mild steel clamps affixed. Had DDA done so, contractor could have replaced the same with clamps of turn Steel. Be that as it may, sum involved is Rs. 1,519.12. I need not bother myself much.

45. No other contention pertaining to any other sub-head of claim No. 6 were urged, though I may note that in the objections filed, sub-para (iii) under sub-head (18) of claim No. 6 and sub head (d) under claim No. 18 have been objected to.

46. I accordingly uphold the award pertaining to claim No. 6.

47. Claim No. 7 has been rejected. There is no challenge by the contractor. That closes the chapter.

48. Claim No. 8 in sum of Rs. 12,00,000/- has been allowed in sum of Rs. 96,634/- . Claim was on account of increase in price of material other than the price occasioned due to government legislation i.e. claim was distinct from claim under clause 10(c) of the contract.

49. Award shows that the learned arbitrator has noted the benefit granted under clause 10(c). Learned arbitrator has segregated the items of work. He has applied the cost indices and has worked out the quantum of work executed in the context of the running bills.

50. Learned counsel for DDA, Ms. Monica Sharma could not point out any error in the computation effected by the learned arbitrator. Only submission made was that the contractor could not benefit due to prolongation of the work.

51. As noted by me above, learned arbitrator has held both parties responsible for delay, therefore, in the context of time for completion being extended without any reservation, contractor would be entitled to the benefit of price rise. Objection to

the award pertaining to claim No. 8 is accordingly repelled.

52. Claim No. 9 in sum of Rs. 20,00,00/- has been allowed in sum of Rs. 49,984/-. Claim was on account of expenditure sustained due to prolongation of the contract.

53. Learned arbitrator has held that delay was due to defaults of both parties. Perusal of the award shows that the learned arbitrator has compensated the contractor only for limited period of delay i.e. 11 months.

54. In light of the fact that the scheduled date of completion of the work was 30.4.1983 and the contract was completed on 9.1.1988, compensation to the contractor for prolongation towards overhead expenses restricted to 11 months is fair, just and equitable. I see no reason to interfere with the same.

55. Learned counsel for DDA challenged the award insofar it rejected counter claim No. 1 by alleging that compensation levied was under clause 2 and therefore the arbitrator had no jurisdiction to deal with the issue.

56. Pleadings of DDA before the arbitrator show that it did not raise the issue, much less drew attention of the learned arbitrator to clause 2 of the contract. Perusal of the award shows that the learned arbitrator has proceeded under clause 14 of the agreement.

57. Pleadings of the parties before the learned arbitrator would show that DDA predicated its case under clause 14 of the contract and not clause 2 thereof. Clause 14 required the contractor to remove defective work. If not removed, contractor was to compensate the department. Learned arbitrator has noted clause 14 of the agreement and has held that as per said clause, in respect of improper work, same had to be notified within six months of completion of the work. In default, contractor was to pay compensation at 1% of the estimated amount of the tender price. He noted that there was no evidence that within six months of completion of the work, defect was notified to the contractor, though, DDA had in its file recorded defective work. Accordingly, counter claim was rejected.

58. Pleadings of the DDA show that counter claim was predicated on clause 14 and not on clause 2 of the contract. Objection raised by DDA to the rejection of counter claim No. 1 is accordingly without any substance.

59. Counter claim No. 2 and 3 have been partially allowed. In fact, counter claim No. 3 has been fully allowed for the reason, during hearing, DDA reduced the counter claim. Counsel for DDA did not attack the findings pertaining to counter claim No. 2 and 3. Neither has the contractor challenged the same. I am, therefore, not required to deal with the issue any further.

60. Counter claim No. 4 towards penal rate recovery of material supplied, in sum of Rs. 47,698.78 has been allowed in sum of Rs. 34,315.76/-. Perusal of the award shows that the learned arbitrator has considered the registers maintained by DDA pertaining to the items supplied. He has noted theoretical quantities of consumption. For the unaccounted material, learned arbitrator has applied the market rates. Learned counsel for DDA could not point out any infirmity in the findings recorded qua counter claim No. 4. I uphold the award. Other findings pertaining to counter claims 5 to 8 were not questioned during arguments. I need not deal with the issue at all.

61. Pertaining to the interest awarded, the learned arbitrator has recorded the following as per the award:-

'The amounts awarded in the following claims and counter-claims are in the realm of contract dues for which no notice of interest is needed.

-----Claim No.3 - 10050/-Claim No.4 - 21547/-Claim No.5 - 262000/-Claim No.6 - 107235/------400832/-Deduct counter-claim 107507/------293325/------Thus from 8/88 till 9/95 end i.e. 7 years, and 2 months, the interest will be due at 12% per annum simple interest will be  $293325 \times 7.16 \times 12\% = 252024/-$

Future interest will be at 12% simple per annum.

Thus summary of Award-----Claim No.1 to 10 =  $547451+252024= 799475/-$ Deduct counter- = 107507/-claim and Addl.Counter-

claimNo.1-----691968/-----'

62. Learned arbitrator has awarded interest @ 12% per annum from the date of award till the date of decree. Interest has been awarded on the sum of Rs. 6,91,968/-. Sum of Rs. 6,91,968/- arrived at by the learned arbitrator includes interest in sum of Rs. 2,52,024/-. Learned arbitrator has therefore awarded interest on interest.

63. Principal sum adjudged in favor of the contractor as per the award comes to Rs. 4,39,944/-. I accordingly modify the award, in that the concluded para of the award shall stand substituted as under:-

'Now, therefore, on consideration of claims by claimant and counter claims and additional counter claim by respondent I do hereby make this award that respondent do pay Rs. 6,91,968/- (Rupees six lakhs ninety one thousand nine hundred and sixty eight only) to claimant + simple interest at 12% per annum on the sum of Rs. 4,39,944/- from the date of award till the date of decree or actual payment, whichever is earlier.'

58. is stands disposed of.

CS(OS) No. 1458-A/96

In view of the decision in is No. 11116/1996, award dated 6.10.1995 passed and published by Sh. A.C. Panchdhari as modified above is made a rule of the court. Post decretal interest is awarded to the claimant/contractor on the principal sum adjudged i.e. Rs. 4,39,944/- @ 12% per annum from date of decree till date of payment.

No costs.

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