

**(2002) 05 DEL CK 0086**

**In the Delhi High Court**

**Case No :** Suit No. 421 of 1998 and IAs 5395 and 7541 of 1998

Hindustan Construction Corporation

APPELLANT

Vs

Delhi Development Authority and Another

RESPONDENT

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**Date of Decision :** 24-05-2002

**Acts Referred:**

Contract Act, 1872 — Section 70

**Citation :** (2002) 98 DLT 519

**Hon'ble Judges :** Jiwan Dass Kapoor, J

**Bench :** Single Bench

**Advocate :** Vijay Kishan and Vikram Jaitely, for the Appellant; Anil Sapra and Amit Goel, for the Respondent

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## **Judgement**

J.D. Kapoor, J.—The respondent-objector has challenged the award mainly on the premises that Arbitrator has traversed beyond the terms of the agreement between the parties and has also not dealt with the contentions and objections raised by the respondent during the proceedings.

2. It cannot be gainsaid that any award which is beyond the terms of the agreement is a nullity. The award is liable to be set aside if it suffers from perversity if it is writ large over it. At the same time reappraisal or re-appreciation of the material and evidence produced before the Arbitrator is not permissible as no award is a subject matter of appeal.

3. Claim No. 1 has been assailed on the ground that the Arbitrator gas straightaway resorted to Sub-clause (iv) of Clause 12 of the contract without discussing as to how none of Sub-clauses from (i) to (iii) is not applicable. Clause 12 (iv) reads as under:-

"If the rates for the altered, additional or substituted work cannot be determined in the manner specified in Clause (i) & (ii) above, then the rates for such work shall be worked out on the basis of the Schedule of Rates of the District specified above minus/plus the percentage which the total tendered amount bears to be

estimated cost of the entire work put to tender. Provided always that if the rate for a particular part or parts of the item is not in the schedule of rates, for such part or parts will be determined by the Engineer-in-Charge on the basis of the prevailing market rates when the work was done."

4. The main grouse is that the Arbitrator has proceeded on the presumption that Engineer-in-charge has to fix rate of extra item. The question before the Arbitrator was as to which was the authority competent to fix rates of extra item in the contract. According to the learned counsel for the respondent it is the Superintending Engineer to whom the powers for fixing rates for extra work has been conferred and Therefore rates have to be fixed by Superintending Engineer. I am afraid the interpretation of Sub-clause (iv) of Clause 12 is wholly incorrect as put up by the learned counsel for the respondent.

5. Any authority either specified by name or designation in any clause or terms of the agreement for doing any particular act is the only authority to whom the power vests. The official procedure or process adopted by a particular department is of no relevance. It is the named authority with whom ultimate decision lies. In the instant case it was Engineer-in-charge who was empowered to fix rate of such items. No doubt the Engineer-in-Charge is allowed to fix rates after obtaining views of Superintending Engineer or any other authority or official but it does not mean the ultimate authority is Superintending Engineer. The Arbitrator has rightly held that it was Engineer-in-Charge alone who was empowered to fix rates for extra items and none else. I do not find any error in this finding of the Arbitrator. The objection is wholly groundless and unacceptable.

6. The award with regard to claim No. 1 is being challenged on the ground that without obtaining instructions in writing to provide 12 mm thickness of top layer instead of 6 mm top layer due to increase in size/guage of marble chips for work item 7.3 in the contract, the contractor could not have undertaken the said work merely on the verbal instructions of the respondent. There is no doubt that the terms of the contract executed between the parties in writing are to be observed in letter and spirit. However, if some verbal instructions are given by a party for providing some extra work or item and the said party takes the benefit of extra work, it cannot be allowed to put the other party to loss by taking the objection that the executing party did not obtain instructions in writing before carrying out the said extra work and as such is not entitled for compensation.

7. In the instant case, learned counsel for the respondent mainly relied upon the letters C-13 & C-19 sent by the contractor to the respondent whereby it was pointed out that the contractor was applying extra material than the agreed material but the same was replied by respondent-DDA vide letters R-9, R-12 and R-14 and R-16 with the direction not to execute such work but in spite of that contractor continued doing extra item and Therefore he is no more entitled to claim compensation on account of extra work done by them. The learned Arbitrator returned the finding that before R-9 and R-14 were received by the

claimant, the work had already been done.

8. This court has taken a view in *Civil Engineers (India) v. Delhi Development Authority*, 1995 (35) DRJ wherein identical objection was raised that there were no instructions in writing in this behalf by the Engineer in charge and Therefore the contractor had acted contrary to the agreement and so did the Arbitrator in awarding the amount. However in the above case the respondent-DDA did not take this point before the Arbitrator and it was observed that work had been done by the contractor on the instructions by the DDA and the DDA had the benefit of it and is bound in law to make the payments.

9. In the instant case not only the contractor had completed the work before letters R-9 and R-14 were dispatched to him for not providing 12mm thickness of top layer instead of 6 mm top layer but the work has already been completed by them, the respondent is precluded from taking the plea that the petitioner was not entitled to claim compensation for the extra work done by him. The Arbitrator has also observed that claimant had no reason to carry out this extra work on extra cost gratuitously and no objection was raised at the time this work was taken in hand. The fact that the work was being executed under supervision of officers of the respondent on day to day basis cannot be lost sight of.

10. Section 70 of the Contract Act provides that where a person lawfully does anything for another person or delivers anything to him, not intending to do so gratuitously and such another person enjoys the benefit thereof the latter is bound to make compensation to the former in respect of, or to restore the thing so done or delivered. C-13 & C-19 are the letters by the contractor asking for payment towards aforesaid work. It was in response to these letters that the respondent asked the contractor not to do extra work. However, by that time the work had already been completed.

11. It is settled law that court should always refrain to interfere with the findings of facts returned by the Arbitrator. This claim falls squarely under the said principle governing the examination of the award.

12. Next challenge is in response to claim No. 3-A whereby the claimant claimed Rs. 66,000/- on account of statutory hike in wages of labour under Clause 10C of the contract which was restricted to Rs. 22,625/- only as per Annexure D.

13. The only objection is that the Arbitrator has awarded this amount on the presumption that there had been no complaints of the labourers with regard to payment of hiked wages whereas it was incumbent upon the contractor to furnish account books and vouchers etc. to show that requisite wages have been paid to the labourers. There is no doubt that there has been statutory hike in the wages of labourers during the relevant period. Under Clause 10C of the contract the respondent was obliged to compensate the contractor in respect of hike in wages of labourers.

14. In order to ascertain whether contractor has actually paid hiked wages to the

labourers, the Executive Engineer sent a letter R-7 dated 6.9.1986 to the petitioner-claimant to furnish accounts books and vouchers etc. These were sent in response to demand letters. Vide letter dated 17.11.1986 the claimant wanted the respondent to spell out precisely as to which records were required. The respondent remained unresponsive for two long years. Every running bill was certified by the respondent. In the final bill there being no labour complaints that petitioner claimant was not paying wages as per hiked wages.

15. Let us assume for the sake of argument that the petitioner did not have record of payment of wages to the labourers at the rate of hiked wages. Once it is agreed between the parties that the contractor would be entitled to claim compensation on account of statutory hike in rate of wages, the only requirement of law is that not only there should have been statutory hike in actuality but payment should also have been made. Nobody can be allowed to be made unjustly enriched.

16. In order to appreciate the contention of learned counsel for the respondent relevant extracts of Clause 10C need to be reproduced:-

"CLAUSE 10C:

If during the progress of the works, the price of any material incorporated in the works, (not being a material supplied from the Engineer-in-Charge's stores in accordance with Clause 10 hereof) and/or wages of labour increases as a direct result of the coming into force of any fresh law or statutory rule or order (but not due to any changes in sales tax) and such increase exceed ten percent of the price and/or wages prevailing at the time of receipt of the tender for the work, and contractor thereupon necessarily and properly pays in respect of the material (incorporated in the work) such increased price and/or in respect of labour engaged on the execution of the work such increased wages, then the amount of the contract shall accordingly be varied provided always that any increase so payable is not, in the opinion of the Superintending Engineer (whose decision shall be final and binding) attributable to delay in the execution of the contract within the control of the contractor. Provided, however, no reimbursements shall be made if the increase is not more than 10% of the said prices/wages and if so the reimbursements shall be made only on the excess over 10% and provided further that any such increase shall not be payable if such increase has become operative after the contract or extended date of completion of the work in question.

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The contractor shall, within a reasonable time of his becoming aware of any alteration in the prices of any such materials and/or wages of labour, give notice thereof to the Engineer-in-Charge stating that the same is given in pursuant to this condition together with all informations relating thereto which he may be in a position to supply."

17. As is apparent from Clause 10C, the contractor is entitled to claim compensation on account of statutory increase in wages of labourers in case he necessarily and properly pays in respect of material (incorporated in the work) such increased price and/or in respect of labour engaged on the execution of the work such increased wages then the amount of the contract shall accordingly be varied provided always that any increase so payable is not in the opinion of Superintending Engineer (whose decision shall be final and binding) attributable to delay in the execution of the contract with the control of the contractor. Another obligation cast upon the contractor was that on his becoming aware of any alteration in the prices of any such material and/or wages of labour, the contractor shall give notice thereof to the Engineer-in-Charge stating that the same is given in pursuant to this condition together with all informations relating thereto which he may be in a position to supply.

18. One cannot be oblivious of the fact that vide letter dated 6.9.1986 (R-7), the Executive Engineer called upon the contractor to furnish account books and vouchers etc. as proof of payment made by him to the labourers as per increased wages. Clause 10C also empowered the Superintendent Engineer not to pay increased wages in case he finds that such increase is attributable to delay in the execution of the contract within the control of the contractor.

19. So far as the notice by the contractor is concerned, there is a reference in the letter dated 6.9.1986 (R-7) sent by the Executive Engineer of the respondent. It was in reference to statutory increase in wages of labourers that the Executive Engineer called upon to produce accounts as proof of its claim but the contractor failed to submit the same.

20. Merely because there are no complaints by the labourers does not raise the presumption that the contractor has been paying the labourers at the same rates as were statutorily hiked. It is not unknown that the labourers who are an unorganized sector are being exploited and have been exploited since long. It was by virtue of Clause 10C that the Contractor has to show that he has properly paid wages in respect of the material such increased price and/or in respect of labour engaged on the execution of the work such increased wages then the amount of the contract shall accordingly be varied provided always that increase so payable is not in the opinion of the Superintending Engineer (whose decision shall be final and binding) attributable to delay in the execution of the contract within the control of the contractor.

21. A person seeking his livelihood on day to day basis has no courage to take up the cudgels with the might of his employer or contractor who can just relieve him in a minute if he makes complaints against him for non payment of statutory hike in wages. Thus there are three requirements for claiming compensation on account of Clause 10C. Firstly that there should be statutory increase in wages of labour during the subsistence of contract; secondly the Contractor should give notice that within a reasonable time of his becoming aware of any alteration in the prices of any such materials and/or wages of labour to the Engineer-in-

Charge with all informations relating thereto which he may be in a position to supply; thirdly that he should necessarily and properly pay in respect of labour engaged on the execution of the work such increased wages. In order to ensure that contractor has made actual payment in respect of increased wages, the Executive Engineer may call upon the Contractor to furnish all accounts books, vouchers etc as a proof of payment. This is the only way to combat exploitative conduct of a contractor.

22. The words "necessarily and properly" appearing in Clause 10C are of great significance when read in context of payment made by the contractor towards the increased wages. Facts of no two cases are akin. Each case has to be scanned and scrutinised in the perspective of its own facts. It was incumbent upon the Arbitrator to see whether the condition of Clause 10C enumerated above were fulfilled by the contractor or not. Once the contractor is called upon by the respondent to produce the proof of payment by specifically giving notice in writing in this regard, the least that is expected from the contractor is to show that payment made by the contractor to the labourers as per increased wages. It is the satisfaction of the respondent which is material and not a presumption that the labourers have not made any complaints in this regard.

23. Thus, there was no occasion for the contractor to send a letter dated 17.11.1986 to the respondent to spell out precisely as to which records were required. It was sufficiently clear in the letter dated 6.9.1986 that it was in response to the notices and information about statutory increase in labour wages such record is being sought as a proof of payment made by the contractor.

24. By acting on presumption, the Arbitrator has undoubtedly acted beyond Clause 10C and Therefore his award in this regard cannot be maintained and is set aside.

25. I have perused award in respect of remaining claims. These claims are within terms and clauses of the agreement which are based purely on findings of facts and on the basis of evidence and material produced by the parties.

The award is made rule of the court in respect of all claims except claim No. 3A. Suit is decreed in respect lite and future interest @ 12% p.a. till realisation. Decree sheet be prepared accordingly.