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**(1998) 05 DEL CK 0057**

**In the Delhi High Court**

**Case No : Suit No. 2591/94 and I.A. 1009/96**

Mangla Builders

APPELLANT

Vs

Union of India

RESPONDENT

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**Date of Decision :** 08-05-1998

**Acts Referred:**

**Citation :** (1998) 05 DEL CK 0057

**Hon'ble Judges :** S.N. Kapoor, J

**Bench :** Single Bench

**Advocate :** Mr. S.K. Chandwani, for the Appellant; Mr. Dalip Singh, for the Respondent

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## **Judgement**

S.N. Kapoor, J.—In this case award has been filed by the arbitrator himself. Notices were issued to both the parties and Union of India has filed objections against the award.

2.1. Relevant facts are as under:

2.2. Chief Engineer, N.S.G.P., C.P.W.D., New Delhi under his letter No. 15(13)92-A&C dated 22.10.1992 appointed Shri S.S. Juneja, as sole arbitrator to decide and make award regarding the disputes falling within the purview of clause 27. Accordingly the arbitrator Shri S.S. Juneja gave the award dated 26th October, 1994.

2.3. According to the objections filed against the award the work of construction of permanent complex for N.S.G.P. at Manesor - S.H. Construction of 3,00,000 litre capacity OH 65 near Petrol Pump was awarded to M/s. Mangla Builders vide agreement No. 12/EE/NSGP/D.II/89-90. The estimated cost of work was Rs. 16,77,948/- while the tendered cost was Rs. 8,90,260/-. The date of start of work was 26.2.1990 while the stipulated date of completion was 25th November, 1990. It was actually completed by the contractor on 2.3.1993. The arbitrator has ignored material facts and travelled beyond the scope of agreement and thereby committed misconduct; and the findings are contradictory and

inconsistent with his own findings. According to the arbitrator himself there were certain deficiencies in the design in respect of mix of concrete and evaluation of wind and seismic forces for the worst conditions had not been worked out by the claimant. Yet, the learned arbitrator observed that the respondents have not disputed the evaluation for quantity as worked out by the claimants but have denied the claims on other grounds, and concluded that the claimant was entitled to compensation for variation in quantities over and above those required as per the provisions of I.S. codes. The learned arbitrator has also ignored a material document Exhibit R/12, and by not considering exhibit R/12 committed misconduct. Inconsistent conclusions against arbitrator's own findings amounts to misconduct. The learned arbitrator has no jurisdiction to award future interest at the rate of 14% per annum as the arbitrator has become functus officio after making the award.

2.4. These objections are being contested by the petitioner M/s. Mangla Builders. It is claimed that while granting claim No. 1 the reasons recorded by the arbitrator are logical and cogent. There is no alleged error much less error apparent on the record. The findings of the fact as set out in the Award are based on evidence on the record and the said findings of fact are not amenable to judicial review. Neither any ground exists nor has been disclosed in the objection petition to attract Section 16, 30 and 33 of the Arbitrator Act, 1940. The objections filed on behalf of respondent under reply are barred by limitation. Allegations of misconduct or ignoring any material piece of evidence has been denied.

2.5. The Union of India reiterated their case by filing rejoinder to reply to the objections.

3. I have heard the parties and gone through the record. Following three points need consideration:

(1) Whether the arbitrator has misconducted in any manner while allowing claim No.1?

(2) Whether the arbitrator could award future interest?

(3) Whether the objections barred by limitation?

#### 4.1. POINT 1

Clauses 52.1 and 52.2 which relate to mode of submission of tender and clause 51 which relate to time schedule of submission and approval of drawings are relevant for the purpose of decision on the point along with letters referred to by the learned counsel for the objector. Clauses 52.1, 52.2. and clause 51 reads as under:

"52.1 Tenders shall be lump-sum tenders which will be on P.W.D. Form-12. The tenderer shall quote his rates for the items as described in the tender Schedule. The over-head tank shall be constructed as per attached Architectural Drawing

No. SA/NSGP/500/II/R-I dated nil and contractor's own design. The design of over-head tank shall be based on I.S. Codes of practice and according to the prescribed conditions and specifications etc. which are mandatory and subjected to change. Conditional tender and tenders not conforming to the prescribed conditions, are liable to be rejected."

"52.2 The contractor shall also quote in the attached "variation Schedule", his rates at which additions/alterations/omissions from the work contracted are to be adjusted."

"51.1 Within thirty (30) days from the receipt of the letter of acceptance of his tender, the Contractor shall submit to the Engineer in Charge six sets of signed detailed designs and working drawings for scrutiny and approval."

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"51.4 Within 15(fifteen) days from the date of receipt of the comments of the SE/SSW mentioned in Sub Clause (3) hereof, the Contractor shall ensure that the revised drawings, duly modified in the light of these comments, along with parawise replies to the same, are submitted to the SE/SSW for necessary technical approval. The SE/SSW shall, within 15 (fifteen) days from the date of receipt of the modified drawings, arrange to accord his approval to all such revised working drawings after taking due cognizance, to the extent possible, of the Contractor's reply/clarifications to the comments earlier received by the contractor and, if required, incorporating therein all additional modifications that may still be necessary, in the opinion of the SE/SSW in the light of the above."

"51.5 The contractor shall, irrespective of the estimated quantities and/or dimensioned details furnished by him in the design notes, calculations, schedule of quantities, or the outline drawings accompanying his Tender for the work, carry out all changes that may, during the scrutiny and approval of the detailed designs and drawings, he considered necessary in the opinion of the SE/SSW(NSGP) for compliance with the Basic Design Data and performance specification or coal provisions as specified in the Contract, or as per principles of sound engineering practice as laid down or as directed by the SE/SSW(NSGP) without any variation in the contract price and no extra charges consequent on any misunderstanding whatsoever, or otherwise, shall be allowed. entertained."

4.2. There is no dispute in between the parties that as per Exhibit C-21 the claimants have worked out the difference in quantity as 68.81% over and above those required as per provisions of relevant I.S. Codes and they have claimed an extra cost of Rs. 4,45,889/- on this ground. Various documents filed by the claimant as well as the respondent indicated that the respondents have accepted the terms and conditions contained in Exhibit C-1 and vide Exhibit R-2 they informed the claimant that the terms and conditions offered vide letters dated 11.12.1989, 13.12.1989 and 13.2.1990 are hereby accepted and these letters shall form part of the agreement. Letter dated 11.12.1989 is exhibit C-1 which provides that "The Department shall supply a copy of SBC test report before we

undertake the design work. If we are asked to test the soul, the same shall be got tested through same specialised firm at the quoted rates and the recommendations shall be binding on both the parties. Extra amount, due to variation, if any, shall be paid after casting of R Raft foundations." It is also apparent that vide Exhibit R-2 these conditions were accepted subsequently vide letter dated 11.3.1991 (exhibit R-7) "The claimants were informed that it would not be out of mention that your tender is a lump sum tender and the design is to be approved as per I.S.I. specification. I do not feel extra is required over and above." Again vide exhibit R-8 on 9.4.1991 "it is informed that the design has been checked as per I.S.I Codes and standards and prevailing practice. Therefore there is no question paying you anything extra over and above your tendered rate since your tender is a lump sum tender which includes the approval of design based on I.S.I. Codes." Exhibit R-9 also indicate that "it is informed that it is a lump sum tender and the design has got to be approved from the Department as such any variation during checking of design does not mean that Department will pay you extra for the same over and above the design submitted by you." Exhibit R-10 indicate that "no extra charges consequent on any misunderstanding whatsoever or otherwise shall be allowed/entertained." It appears that till 29.4.1991 work had not been started. It meant that the Department was no more accepting the terms and conditions laid down in the letters sent by the defendant. In such circumstances the claimant would have been entitled to claim amount only at the I.S.I Codes had not the variations over and above I.S.I. Code been imposed on him. In this light the observations of the arbitrator to the following effect may be quoted"

"Vide letter dated 30.12.89, the claimants had submitted their preliminary design and they stated that they were not agreeable to withdraw their letter submitted with the tender (page 189 of the agreement). In their letter dated 13.2.1990 (page 211 of the agreement), the claimants modified certain conditions of their tender dated 11.12.89 but the conditions regarding shape to be as per departmental tender and overriding priorities of the design dates given by them over tender documents as mentioned above were not withdrawn by them. Thus the claimants were to provide the tank strictly as I.S. Codes and wherever tender conditions contradicted the requirements of the codes, the values given in I.S. Codes were to be followed. In letter at Exh. R-1, the respondents had stated that only those bids would be considered whose designs were found in order. Thus, the contention of the claimants that their design was found in order as their bid was accepted has force. Of course, the Respondents were still within their right to ask for modifications in the preliminary design submitted by the claimants based on requirements of I.S. Code, but at the same time, the claimants were within their right to know the deficiencies in the design especially when the claimants had disputed the increase in quantities and had claimed extra payment for the same. In Exh. C-13, dated 27.3.1991, the claimants had informed the respondents that the S.W. of the Respondents had not put in black and white the objections to the design submitted by them (Claimants). Moreover, when the

preliminary design which is part of the agreement is generally found in order before award of work, the variation in quantity can be marginal. The very purpose of accepting lump sum offers on contractors' own design is lost if they are not intimated the deficiencies in their design and drawings giving reference to relevant provisions of I.S. Codes. The claimants are, Therefore, entitled to compensation for variation in quantities over and above those required as per provisions of relevant I.S. Codes. In Exh. C-21, the claimants have worked out the difference in quantity as 68.81% and have claimed an extra cost of Rs. 4,45,889/- on this account. The Respondents have not disputed the variation in quantity as worked out by the claimants but have denied the claim on other grounds as discussed above. However, I find that there were certain deficiencies in the design in respect of mix of concrete and evaluation of wind and seismic forces for the worst conditions had not been worked out by the claimants. Thus, there could be some increase in quantity and cost. Considering the above aspect and also taking into consideration that there could be some marginal variation in quantities at the time of finalisation and approval of detailed designs and drawings, I assess and restrict the extra amount payable to the claimants to Rs. 2,90,000/-."

4.3. It cannot be said to be unjust. Nor it can be said that by not quoting the entire Exhibit R-12 the arbitrator has committed any misconduct. It may be mentioned that this Court is not supposed to see the reasonableness of the reasons. Moreover the Court cannot substitute its own opinion for the arbitrator had taken a different view on the basis of evidence, nor it has power to look into evidence and go into the question of sufficiency of reasons. It is within the jurisdiction of the arbitrator to draw inferences and conclusions on the evidence on record. This Court cannot sit in appeal over the award given by an arbitrator. Accordingly I do not see any reason to set aside or modify the award so far as claim No. 1 is concerned.

#### 5.1. POINT No. 2

In so far as the question of awarding interest is concerned now in view of the settled law this submission appears to be slightly misconceived. The earlier view was that the arbitrator could not grant pendente lite interest. But now settled legal position is otherwise. In *Secretary, Irrigation Department, Government of Orissa and others Vs. G.C. Roy*, the Supreme Court took the view in para 43(i) and 45 as under:

43(i) A person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, call it by any name. It may be called interest, compensation or damages. This basic consideration is as valid for the period the dispute is pending before the arbitrator as it is for the period prior to the arbitrator entering upon the reference. This is the principle of S. 34, C.P.C., and there is no reason or principle to hold otherwise in the case of arbitrator.

(45) Where the agreement between the parties does not prohibit grant of interest and where a party claims interest and that dispute (along with the claim for principal amount or independently) is referred to the arbitrator, he shall have the power to award interest pendente lite. This is for the reason that in such a case it must be presumed that interest was an implied term of the agreement between the parties and Therefore when the parties refer all their disputes or refer the dispute as to interest as such - to the arbitrator, he shall have the power to award interest. This does not mean that in every case the arbitrator should necessarily award interest pendente lite. It is a matter within his discretion to be exercised in the light of all the facts and circumstances of the case, keeping the ends of justice in view."

5.2. In *The Board of Trustees for the Port of Calcutta Vs. Engineers-De-Space-Age*, , the Supreme Court observed as under:

"Strictly construed the term of the contract merely prohibits the Commissioner from paying interest to the contractor for delayed payment but once the matter goes to arbitration the discretion of the Arbitrator is not, in any manner, stifled by this term of the contract and the Arbitrator would be entitled to consider the question of grant of interest pendente lite and award interest if he finds the claim to be justified."

5.3. The arbitrator has certainly a right to award interest from the date of award till the date of decree or realisation whichever is earlier specially after coming into force of Interest Act, 1978.

The arbitrator was accordingly justified in awarding interest at the rate of 12% per annum on the amounts awarded against claim N 1, 3 & 6 simple interest from 2.12.1992 at the rate of 12% per annum till the date of publishing of award as pendente lite and future interest at the rate of 14% per annum from the date of award till the date of its payment or decree whichever may be earlier. Therefore this objection has to be rejected.

#### 6.1. POINT 3

It appears that the objection has been filed on 30th January, 1996 but from the inspection application on record it appears that counsel for UOI inspected the record on 14.11.1995. At least it is evident that the inspection was intended on 14.11.1995. If it is taken that the Union of India had received notice even on 14.11.1995 the objections which were filed on 30.1.1996 are barred by time. There is yet another interesting thing. The verification itself is dated 16.10.1995 while the application is dated 16.10.1995 and below it date of 10.1.1996 has been put. No application for condensation of delay has been moved so far. Consequently this objection of the claimant is upheld.

7.1. The award given by Shri S.S. Juneja dated 26th October, 1994 is made rule of the Court with simple interest 12% per annum from 2.12.92 till the date of publishing of award as pendente lite interest. The claimant is also entitled to

simple interest 14% per annum on the principal awarded amount on item 1, 3 and 6 from the date of award till the date of decree as well as till the date of realisation.