IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision : 18th September 2009

FAO(OS) 152/1995

SUDHIR BROS. APPELLANT
Through Mr. Harish Malhotra, Sr. Adv. with Mr. Rajendra Aggarwal, Adv.

versus

DELHI DEVELOPMENT AUTHORITY
&ANR. RESPONDENTS
Through Ms. Anusuya Salwan with
Ms. Monica Sharma, Advs.

FAO(OS) 274/1995

DELHI DEVELOPMENT AUTHORITY …. APPELLANT
Through Ms. Anusuya Salwan with
Ms. Monica Sharma, Advs.

Versus

SUDHIR BROS. RESPONDENT

Through Mr. Harish Malhotra, Sr. Adv.
with Mr. Rajendra Aggarwal, Adv.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE DR. MR. JUSTICE S. MURALIDHAR

1. Whether Reporters of local papers may be allowed to see the judgment? No
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in Digest? Yes

S. MURALIDHAR, J.

1. M/s Sudhir Bros., the appellant in FAO(OS) 152/1995 was awarded the work of construction of 396 LIG Dwelling Units at Pitampura,

Pocket-W (Poorvi), including internal services, by the Respondent No.1 Delhi Development Authority (DDA). An agreement was executed between the parties. The disputes that arose between them were referred to the arbitration of Respondent No. 2. The Arbitrator's Award was published on 26.12.1992. M/s. Sudhir Bros. filed Suit No. 201-A/1993 for a direction to the arbitrator to file the award dated 26.12.1992 in the court and for the Award to be made rule of the court. Further, the Appellant prayed interest at 18% per annum on the amount awarded together with quarterly rests from the date of the institution till realization. The objections filed by the DDA to the Award were numbered as I.A. No. 5830/1993 in the said suit. By the impugned judgment dated 25.1.1995 by the learned single Judge allowed the objections to the Award as regards Claim Nos. 1 (c), 1 (d), 7 and Counter Claim No.1 of the DDA. As regards the other Claims the Award was made rule of court.

2. Claim No. 1 (c) to the extent of Rs.30657.54 pertained to balance payment of labour charges on account of escalation in prices as envisaged under Clause 10C of the Agreement. It was contended by the Appellant that the completion of the contract was delayed beyond the stipulated date of 15.1.1982. Meanwhile there was an escalation in labour charges which was admissible in terms of a Circular of the Chief Engineer (CE), DDA with effect from 1.3.1982. Since the delay in completion of the work was not attributable to it, the Appellant claimed

the aforementioned amount constituting the increase in labour charges after adjusting the amount of Rs.34557.15 already released to it by the DDA. The learned Arbitrator found that the delay was attributable to the DDA accordingly awarded the Appellant aforesaid amount as claimed. Claim 1(d) likewise related to the increase in the price of bricks payable under Clause 10C of the Agreement. The Arbitrator awarded the Appellant Rs.86601 as claimed.

3. Claim No. 7 by the Appellant was for a sum of Rs.2,81,114 towards loss and profits on the balance gross amount of the work left to be executed at the time of repudiation of the contract by the Appellant. The jurisdiction of the arbitrator to adjudicate this claim was disputed by the DDA on the ground that the finding recorded by the Superintending Engineer (SE) on the question of delay was final. However, the learned Arbitrator, after examining Clause 2 of the Agreement, held that it gave finality only to the quantum of compensation to be levied and not to the question of attributability of delay. It was held that since the appellant was compelled to repudiate the contract and abandon the work incomplete for no fault of theirs, they were entitled to claim loss of profit on the balance work.

4. DDA's Counter Claim No. 1 was to the extent of Rs.444629 being 10% of the tender amount payable to it as compensation for the delay in

completion by the Appellant of the work in terms of the contract. The said counter claim was disallowed by the arbitrator on the ground that the delay was attributable to the DDA and they could not be allowed to take advantage of their own default.

5. Before the learned single Judge, DDA contended that in terms of Clause 2 as well as Clause 10C the decision of the SE as to the reasons for the delay in completion of the work was final and therefore in terms of Clause 25 of the contract they were 'excepted matters' which could not be referred to arbitration. The SE had by a letter dated 15.5.1985 communicated to the appellant that the delay in completion of the work beyond 16.1.1982 was on account of the appellant. The appellant on the other hand placed reliance on the decision of the Supreme Court in ***Vishwanath Sood v. Union of India AIR 1989 SC 952*** where similarly worded clauses were interpreted. It was held by the learned single Judge that the decision of the SE was final even on the question of attributability of delay. After referring to various decisions including those of this Court, the learned single Judge concluded that the Award made by the Arbitrator on Claims 1(c) , 1 (d) and 7 and Counter Claim No. 1 was required to be set aside as being without jurisdiction and having been rendered contrary to the terms of the contract. Counter Claim no. 1 of the DDA was deemed to have been upheld by the Arbitrator. The rest of the Award was made rule of court.

6. It is submitted by the appellant that the decision of the SE for the purposes of Clause 2 of the contract was very different from his decision in terms of Clause 10C. In fact there was no decision by the SE for the purposes of Clause 10C to the effect that the delay in completion was attributable to the appellant. Moreover, DDA had itself released payments under Clause 10C and the dispute was only in relation to the calculation. Both parties sought a decision from the learned Arbitrator on this issue. The DDA had not raised any objection to the jurisdiction of the Arbitrator. As regards Clause 2 it is submitted that the DDA had itself extended the time for completion of the work till 30.9.1984 without any application by the appellant for extension. Accordingly Clause 2 had become inoperative. The decision by the SE to levy compensation thereunder was taken more than three years after the expiry of the stipulated date which was 15.1.1982 and nearly one year after the rescinding of the contract by the appellant. As regards Claim 7 it was submitted that this was based on the loss of profit for the balance unexecuted work on account of breaches committed by the DDA which led to the Appellant rescinding the contract. The issue whether the contract was lawfully rescinded by the appellant or illegally terminated by the DDA did not fall in any of the excepted matters and therefore the Arbitrator did not lack jurisdiction to consider this claim. As regards Counter Claim no. 1, it is submitted that if the learned single Judge was of the view that even this could not have been decided by the learned Arbitrator then the Award under this head should have been simply set

aside. The learned single Judge ought not to have held that the counter claim should be deemed to have been upheld by the Arbitrator.

7. Mr.Harish Malhotra, learned Senior counsel for the appellant submits that the learned single Judge failed to appreciate that in ***Vishwanath Sood*** the Supreme Court held that the decision of the SE was final only in relation to the quantum of compensation and not on the question of the attributability of the delay. Reliance was also placed on the decision of this court in ***DDA v. Bhagat Construction Co. (P) Ltd. 2004 (3) ALR 548 (Delhi)*** in which it was held that Clause 2 only prohibits the Arbitrator from interfering with the determination of the SE as regards the quantum of compensation and does not preclude the Arbitrator from deciding a dispute as to which of the parties was responsible for the delay. Reliance was placed on the decision of the Division Bench of this court in ***DDA v. Sudhir Brothers 1995 (2) ALR 306*** in which it was held that the decision of the Arbitrator to reexamine the decision of the SE under Clause 2 was erroneous. It is accordingly submitted that the learned single Judge could not have held that the amount claimed by the DDA in Counter Claim No. 1 should be deemed to have been awarded by the learned Arbitrator. Reference is also made to the judgment of the Supreme Court in ***General Manager, Northern Railways v. Sarvesh Chopra AIR 2002 SC 1272***.

8. As regards the award of profit on percentage basis i.e. 10% of the balance value of the work done, reliance is placed upon the decisions of the Supreme Court in ***M/s A.T. Brij Paul Singh and Bros. vs. State of Gujarat AIR 1984 SC 1703*** and ***Dwarka Das vs. State of Madhya Pradesh AIR 1999 SC 1031***. As regards the levy of 18% interest, it is submitted that during the pendency of the present appeal the amount that had been made rule of court was released by the DDA to the appellant together with 18% interest and therefore DDA was estopped from questioning the award of 18% interest.

9. Ms. Anasuya Salwan, learned counsel for the DDA submitted that the decision of the Supreme Court in ***Vishwanath Sood*** was a complete answer to the question whether the learned Arbitrator could have entertained an excepted matter which was within the sole purview of the SE. According to her the said decision does not make any distinction between the question of quantum of compensation and the decision as to who was responsible for the delay. Both matters, according to her, are within the sole purview of the learned Arbitrator. She also placed reliance on the decision of the Division Bench of this Court in ***DDA v. Sudhir Bros*** and ***DDA v. Bhagat Constructions***.

10. The first question that arises for the consideration is whether the decision of the Supreme Court in ***Vishwanath Sood*** answers the point

concerning the jurisdiction of the learned Arbitrator. Clauses 2 and 25 of the contract executed in the said case were identical to the corresponding clauses of the contract in the instant case. The learned Arbitrator in that case entertained the dispute and awarded a sum to the contractor. One of the items claimed by the contractor, which were rejected by the Arbitrator was a sum of Rs.12720 which was the loss incurred by the contractor on account of the delay by the department in handing over the site to him for executing the contract. The learned single Judge had discussed the evidence adduced by the parties before the Arbitrator and upheld the decision of the Arbitrator negating the claim of the contractor. The second claim was in relation to the security deposit where again the decision of the Arbitrator was upheld. The third was a sum of Rs.30,000/- claimed by the contractor as compensation for the amount spent by him for the purchase of a truck for the carrying out the work. On all three claims the decision of the learned single Judge was upheld by the Division Bench. The Supreme Court also did not interfere with the said determination.

11. The Union of India which was the respondent had filed counter claims which had been allowed by the Arbitrator but reversed by the single Judge of the High Court. The Arbitrator had awarded a sum of Rs.20,000/- to the Government in respect of the said counter claim which was reversed by the single Judge holding that under Clause 2 the Arbitrator could not have entered upon a reference in regard to that

claim made by the Government as the decision thereunder had to be taken only by the SE. The Division Bench disagreed with the single Judge by pointing out that the sine qua non of Clause 2 was that the contractor should have been guilty of delay in completing the work. However, that clause did not specify either the authority or the procedure for determining whether the contractor was responsible for the default. It was pointed out that the statement in Clause 2 that the decision of the SE is final only constituted a declaration that no officer in the department could interfere with his quantification. However, that finality could not be construed as excluding the jurisdiction of the Arbitrator under Clause 25. Therefore, it was held that the Arbitrator had not travelled outside his jurisdiction in awarding Rs.20,000/- as compensation to the Government for the delay in executing the work.

12. The interpretation by the Supreme Court in ***Vishwanath Sood*** of the relevant clauses is contained in paras 8, 9 and 10. In para 8 the Supreme Court ruled that Clause 2 of the contract "contains a complete machinery for determination of the compensation which can be claimed by the Government on the ground of delay on the part of the contractor in completing the contract as per the time schedule agreed between the parties." It was held that the decision of the SE is in the nature of a "considered decision" which he has to arrive at after considering the various mitigating circumstances that may be pleaded by the contractor or his plea that he is not liable to pay compensation at all under this

clause." It was further held that the decision "regarding the amount of compensation leviable under clause 2 has to be decided only by the Superintending Engineer and no one else." Thereafter in paras 9 and 10 it was held:

> "9. The Division Bench has construed the expression in Clause 2 in parenthesis that "the Superintending Engineer's decision shall be final" as referring only to a finality qua the department : in other words, that it only constitutes a declaration that no officer in the department can determine the quantification and that the quantum of compensation levied by the Superintending Engineer shall not be changed without the approval of the Government. After referring to certain judicial decisions regarding the meaning of the word "final" in various statutes the Division Bench concluded that the finality cannot be construed as excluding the jurisdiction of the arbitrator under Clause 25. We are unable to accept this view. 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. These words in our opinion can have reference only to provisions such as the one in paranthesis 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**.

10. We may confess that we had some hesitation in coming to this conclusion. As pointed out by the Division Bench, **the question of any negligence or default on the part of the contractor has may facts and to say that such an important aspect of the contract cannot be settled by arbitration but should be left to one of the contracting parties might appear to have far reaching effects. In fact, although the contractor in this case might object to the process of arbitration because it has gone against him, contractors generally might very well prefer to have the question of such compensation decided by the arbitrator rather than by the Superintending Engineer. But we should like to make it clear that our decision regarding non arbitrability is only on the question of any compensation which the Government might claim in terms of Clause 2 of the contract**. We have already pointed out that this is a penalty clause introduced under the contract to ensure that the time schedule is strictly adhered to. It is something which the Engineer-in-charge enforces from time to time when he finds that the contractor is being recalcitrant, in order to ensure speedy and proper observance of the terms of the contract. This is not an undefined power. The amount of compensation is strictly limited to a maximum of 10% and with a wide margin of discretion to the Superintending Engineer, who might not only reduce the percentage but who, we think, can even reduce it to nil, if the circumstances so warrant. It is this power that is kept outside the scope of arbitration. We would like to clarify that **this decision of ours will not have any application to the claims, if any, for loss or damage which it may be open to the Government to lay against the contractor, not in terms of Clause 2 but under the general law or under the Contract Act**. As we have pointed out at the very outset so far as this case is concerned the claim of the Government has obviously proceeded in terms of Clause 2 and that is the way in which both the learned single judge as well as the Division Bench have also approached the question. **Reading clauses 2 and 25 together we think that the conclusion is irresistible that the amount of compensation chargeable under Clause 2 is a matter which**

> **has to be adjudicated in accordance with that clause and which cannot be referred to arbitration under Clause 25**." (emphasis supplied)

Consequently, the amount of compensation of Rs.20,000/- awarded by the arbitrator in favour of the Government was directed to be deleted.

13. An analysis of the above paragraphs of ***Vishwanath Sood*** reveals that that the Supreme Court arrived at the following conclusions:

(i) The decision as to the amount payable under Clause 2 has to be that of the SE alone and no one else.

(ii) 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".

(iii) The question of any negligence or default on the part of the contractor "has many facets and to say that such an important aspect of the contract cannot be settled by arbitration but should be left to one of the contracting parties might appear to have far reaching effects".

(iv) The decision of the Supreme Court regarding non-arbitrability was "only on the question of any compensation which the Government might

claim in terms of Clause 2 of the contract". …… "It is this power that is kept outside the scope of arbitration".

(v) The decision of the Supreme Court "will not have any application to the claims, if any, for loss or damage which it may be open to the Government to lay against the contractor, not in terms of Clause 2 but under the general law under the Contract Act".

(vi) Reading Clauses 2 and 25 together "the conclusion is irresistible that the amount of compensation chargeable under Clause 2 is a matter which has to be adjudicated in accordance with that clause and it cannot be referred to arbitration under Clause 25".

14. The facts of the present case are not exactly similar to the fact situation in ***Vishwanath Sood***. Here the counter claim by the DDA for a sum of Rs.4,44, 629 was made to the learned Arbitrator with reference to Clause 2 despite there being a determination by the SE that the delay was on account of the Appellant. The decision in ***Vishwanath Sood*** makes it clear that such a matter simply cannot be referred to the Arbitrator at all even by the DDA. It completely stands outside the purview of arbitration.

15. The facts in ***Delhi Development Authority v. Sudhir Brothers 1995 (2) ALR 306*** are more or less similar to the present case. There the DDA

had gone before the arbitrator claiming Rs.569473 against the contractor. Following the decision in ***Vishwanath Sood*** it was held that the question of the validity of the levy of compensation was outside the purview of the Arbitrator and therefore could not form part of the Award. However, it was not as if the DDA was without a remedy. In para 6, it was held as under:

> "6. It will, therefore, be for the DDA to seek to recover the said amount of Rs.5,69,743 in whatever manner it is open to it and in case any such proceedings are taken, it will be open to the contractor to raise all defences that may be open to him in law to contend that the levy is bad. In case, the DDA seeks to recover the said amount of compensation from the contractor it will be open to the contractor to file a suit and raise all such contentions as he may deem fit. We make it clear that the question of limitation will not be raised by either of the parties, in view of the above unfortunate procedure adopted by both parties."

16. The decision in ***Delhi Development Authority v. Sudhir Brothers*** was affirmed by the Supreme Court when Special Leave Petition (Civil) No. 11932 of 1995 was dismissed.

17. Following the above dicta, as far as the present case is concerned, it has to be held that Counter Claim no. 1 by the DDA was an excepted matter which could not have been gone into by the learned Arbitrator at all. Following the decision in ***Vishwanath Sood*** as well as ***DDA v. Sudhir Bros.***, this Court holds that the decision of the learned Arbitrator

as regards Counter Claim No. 1 is a nullity and cannot form part of the Award. To that extent the decision of the learned single Judge setting aside the Award of the learned Arbitrator on this score is upheld. However, this Court disagrees with the learned single Judge "the result would be that the Counter Claim No. 1 preferred by the DDA shall be deemed to have been upheld by the Arbitrator". If the learned Arbitrator could not have examined this counter claim at all, then there is no question of the said counter claim being deemed to have been upheld by the learned Arbitrator. Following the decision in ***DDA v. Sudhir Bros***. it is held that it will be open to the DDA to recover the said amount of Rs.4,44,629 if so permissible in law. In that event it will be open to the Appellant M/s. Sudhir Bros. to raise all defences available to it in law.

18. As regards Claims 1 (c) and 1 (d) which are relatable to Clause 10C of the Contract it may be recalled that the learned Arbitrator had held the delay was attributable to the DDA and consequently the claim of the Appellant for increased costs of labour and bricks was upheld. This was reversed by the learned single Judge on the ground that the decision of the SE on attributability of delay was final and that the Arbitrator could not have therefore adjudicated on that issue. It appears that the learned single Judge equated Clause 10C with Clause 2 to arrive with the conclusion that the decision of the SE thereon was final. This is where the learned single Judge appears to have erred.

19. There is a distinction to be drawn between Clause 2 and Clause 10C. For easy reference the relevant portions both the clauses may be compared:

> "**Clause 2**:
>
> The time allowed for carrying out the work as entered in the tender shall be strictly observed….. The work shall throughout the stipulated period of the contract be proceeded with all due diligence and **the contractor shall pay as compensation an amount equal to one per cent or such smaller amount as the Superintending Engineer DDA (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**. …….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 per cent or such smaller amount as the Superintending Engineer DDA (whose decision in writing shall be final) may decide, on the said estimated cost of the whole work 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 per cent on the estimated cost of the work as shown in the tender."
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> **Clause 10C**
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> 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 increase 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 per cent 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 becomes operative after the contract or extended date of completion of the work in question." (emphasis supplied)

20. It will be seen at once that Clause 2 is about the compensation payable by the contractor to the DDA for any delay in completion of the contract. It was an identical clause that was interpreted by the Supreme Court in ***Vishwanath Sood***. It was held thereunder that the decision of the Supreme Court was only regarding "the question of any compensation which the **Government** may claim in terms of the Clause 2 in contract". The Supreme Court was conscious that the question of any negligence or default on the part of the contractor if left to one of the contracting parties to decide "might appear to have far reaching effects" and that "contractors generally might very well prefer to have the question of such compensation decided by the arbitrator rather than by the Superintending Engineer". In para 8 of the said judgment it was clarified that "the question regarding the amount of compensation leviable under Clause 2 has to be decided by the Superintending Engineer and no one else". It was held that Clause 2 contained a

complete machinery for determination of the compensation which can be **claimed by the Government** on the ground of delay on the part of the contractor. Therefore Clause 2 will not come into the picture when the claim is by the contractor for which one has to examine Clause 10 C.

21. Clause 10C also talks of the opinion to be formed by the SE being be final but it is differently worded. Incidentally Clause 10C was not the subject matter of interpretation in ***Vishwanath Sood***. It also does not appear to have come up for consideration in ***Delhi Development Authority vs. Sudhir Brothers 1995 (2) ALR 306***. This is really about the escalation of prices as the result of the delay in completion of the work. Clause 10 C requires the SE to form an opinion that delay in the execution of the contract was attributable to factors within the control of the contractor. This would require a decision to be taken specific to this Clause by the SE.

22. The Appellant is right in its contention that in the instant case there is no decision of the SE specific to Clause 10 C of the contract. The letter dated 15.5.1985 which according to the learned single Judge contained the decision of the SE about the delay reads as under:

> "Whereas you were served a show cause notice vide this office No. F9(41) CD-I/SE-VII/1026 dated 2.4.1985 as to why action should not be taken against you under **clause 2** of the above mentioned agreement due to your failure to

> complete the work in due time and whereas your reply dated 7th April, 1985 has been considered and not found satisfactory.
>
> Therefore in exercise of powers conferred on me under clause of the said agreement, I, the Superintending Engineer decide and determine that you are liable to pay Rs. 4,44,629/- as and by why of compensation as stipulated in clause 2 of the agreement. The said amount of compensation is hereby levied on your for the period of 16.1.1982 to 27.7.1982 and at the rate of 10% as determined by me on the estimated cost of the work shown in the agreement and you are hereby called upon to pay the same to the DDA within seven days failing which the said amount shall be recovered by the DDA from your security/other dues lying with the DDA."
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> The letter makes it clear that for delay beyond 16.1.1982 the Superintending Engineer had held the claimant responsible after serving a show cause notice on him, considering his reply and finding it not satisfactory and consequently compensation at the rate of 10% for the period of delay was imposed on the claimant.

23. The aforementioned letter conveys if at all the decision of the SE relevant to Clause 2 of the contract agreement. As explained by ***Vishwanath Sood*** the SE issued a show cause notice and invited a reply specific to Clause 2. No such exercise appears to have been undertaken as regards Clause 10C. For the purposes of Clause 10C it would have had to be shown that the increase in price was on account of "delay in the execution of the contract within the control of the contractor". Therefore, if a show cause notice had been issued, it would have been possible for the contractor to show that the delay was due to circumstances not within the control of the contractor. In the absence of any decision at all by the SE relevant to Clause 10 C it cannot be said

that Claims 1 (c) and 1 (d) were excepted matters that could not be referred to arbitration. The condition precedent to the matters being 'excepted' is absent. In order to show that the claim under Clause 10-C is an excepted item, the DDA would first have to satisfy the court that there is a decision by the SE specific to Clause 10 C that the delay in the execution of the contract was on account of factors within the control of the contractor and as a result of which the increase in the prices was not payable to the contractor. In the absence of such a decision, it cannot be said that the claim thereunder is an excepted item over which the arbitrator does not have jurisdiction. By contrast in this very case it is seen that in respect of Clause 2 the DDA is able to show that there is a decision of the SE and therefore the claim thereunder is not within the purview of the arbitrator.

24. Consequently, this court is unable to agree with the conclusion of the learned single Judge as regards Claims 1 (c) and 1 (d). The award of the learned Arbitrator in regard to these claims is upheld and made rule of the court.

25. Claim No. 7 by the Appellant was on account of the loss of profit on the balance work remaining to be executed at the time of repudiation of contract. A perusal of the Award shows that the learned Arbitrator has, after discussing the evidence, come to the conclusion that the delay is

attributable to the DDA and that the Appellant was compelled to repudiate the contract for no fault of theirs. This again was not an excepted matter and had nothing to do with the claim relatable to Clause 2. In ***DDA v. Bhagat Construction 2004 (3) ALR 548*** it was explained by this Court that outside of Clause 2, when a question arises whether there can be any claim arising out of the breach of the contract, then Clause 2 would not come in the way of the Arbitrator deciding such issue. Further, reference may also be made to the decision of the Supreme Court in ***General Manager Northern Railway v. Sarvesh Chopra*** where the task of a court making a reference of disputes to arbitration has been explained. There in paras 16 and 17 it was held as under:

> "16. Thus, it may be open to prefer a claim touching an apparently excepted matter subject to a clear case having been made out for excepting or excluding the claim from within the four corners of "excepted matters". While dealing with a petition under Section 20 of the Arbitration Act, the Court will look at the nature of the claim as preferred and decide whether it falls within the category of "excepted matters". If so, the claim preferred would be a difference to which the arbitration agreement does not apply, and therefore, the Court shall not refer the same to the arbitrator. On the pleading, the applicant may succeed in making out a case for reference, still the arbitrator may, on the material produced before him, arrive at a finding that the claim was covered by "excepted matters". The claim shall have to be disallowed. If the arbitrator allows a claim covered by an excepted matter, the award would not be legal merely because the claim was referred by the Court to arbitration. The award would be liable to be set aside on the ground of error apparent on the face of the award or as vitiated by legal misconduct of the arbitrator. Russell on Arbitration (Twenty-First Edition, 1997) states vide para 1-0 27 (at p.15) "Arbitrability. The issue of

> arbitrability can arise at three stages in an arbitration; first, on an application to stay the arbitration, when the opposing party claims that the tribunal lacks the authority to determine a dispute because it is not arbitrable, second, in the course of the arbitral proceedings on the hearing of an objection that the tribunal lacks substantive jurisdiction and third, on an application to challenge the award or to oppose its enforcement. The New York Convention, for example, refers to non- arbitrability as a ground for a court refusing to recognize and enforce an award.
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> 17. To sum up, our conclusion are: (i) while deciding a petition under Section 20 of the Arbitration Act, 1940, the Court is obliged to examine whether a difference which is sought to be referred to arbitration is one to which the arbitration agreement applies. If it is a matter excepted from the arbitration agreement, the Court shall be justified in withholding the reference, (ii) to be an excepted matter it is not necessary that a departmental or 'in-house' remedy for settlement of claim must be provided by the contract. Merely for the absence of provision for in-house settlement of the claim, the claim does not cease to be an excepted matter, (iii) an issue as to arbitrability of claim is available for determination at all the three stages - while making reference to arbitration, in the course of arbitral proceedings and while making the award a rule of the Court."

26. In terms of the above law, when the Claim No.7 cannot be held to be an excepted matter which was not referable to the arbitrator. The learned single Judge has erred in coming to a conclusion to the contrary.

27. Under Claim No.7, relying on the decision of the Supreme Court in ***AT Brijpal Singh vs. State of Gujarat*** the learned Arbitrator has awarded loss of profit at 10%. This court finds that there is nothing perverse in the said finding of the learned Arbitrator. The learned single

Judge has not discussed the Award of the learned Arbitrator as regards Claim 7. In our view the learned single Judge was in error in setting aside the award as regards Claim No. 7. The award to this extent is restored.

28. For the aforementioned reasons, the impugned judgment of the learned single Judge is set aside. The Award of the learned Arbitrator on Claims 1 (c), 1 (d) and Claim No. 7 is upheld and made rule of the court. As regards Counter Claim No. 1, the Award of the learned Arbitrator is set aside. However, the decision of the learned single Judge that Counter Claim No. 1 should be deemed to have been upheld by the arbitrator is also set aside. The Award of the learned Arbitrator on Counter Claim No. 1 having been set aside, it will be open to the DDA to take such measures as are available and permissible to it under law.

29. The appeal is accordingly allowed in the above terms with costs of Rs.25,000/- which will be paid by the respondent to the appellant within a period of four weeks.

FAO(OS) No. 224/1995

30. This is an appeal arising out of the same impugned judgment dated 25.1.1995 passed by the learned single Judge in Suit No. 201-A/1993. The scope of the present appeal by the DDA is that it is aggrieved by the

impugned judgment of the learned single Judge to the extent that the award of the learned Arbitrator as regards Claim No. 1 (except Claim 1(c) and 1(d)) and Claim Nos. 2, 4 to 10 and Counter Claims 2 to 5 have been upheld by the learned single Judge.

31. Having examined the findings of the learned Arbitrator on each of the above claims and counter claims, this court finds that the said findings cannot be said to be arbitrary or contrary to law. The scope of interference with the award being limited, no ground has been made out by the DDA with respect to any of the items of claims or counter claims to enable this court to interfere with the reasoned Award of the learned Arbitrator. There is no merit in this appeal by the DDA and it is accordingly dismissed.

CHIEF JUSTICE

S. MURALIDHAR, J

SEPTEMBER 18, 2009
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