

# Dispute Resolution Hotline

November 02, 2011

## NO WINNING BATTLES BY SPRINGING SURPRISES: AWARD BASED ON PLEADINGS AND PROOF AT VARIANCE SET-ASIDE BY DELHI HIGH COURT

### INTRODUCTION

The Delhi High Court in its judgment dated September 26, 2011 in the matter of *Delhi Development Authority* (“Appellant”), *v/s M/S. Krishna Construction Co.* (“Respondent”), ruling in favour of an application under section 34 of the Arbitration and Conciliation Act, 1996 (“Act”) held that an Arbitrator cannot award an amount in compensation to a party for a claim for which there have been no material particulars supporting the material facts pleaded.

### FACTS:

The Appellant had filled a challenge under Section 34 of the Act against two awards of arbitration arising from a dispute with respect to two agreements, which are admitted by both parties to be *pari materia*. The nature of disputes were near identical, and pertaining to Claim No. 9 in the Statement of Claim (“Claim No.9”) where the Respondent claimed compensation on account of prolongation of work caused by lapses, defaults and breaches on the part of the Appellant together with interest. Claim No. 9 read as follows:

*“The claimant claims an amount of 16,00,000/- on account of payment by way of compensation for additional cost in execution beyond the stipulated date of completion on account of prolongation of work caused by lapses, defaults and breaches of the DDA together with interest at 18% per annum from the date the amounts became due till the date of reference. “*

In this regard, Respondent stated that as per the contract between the parties, the stipulated date of start of work was April 17, 1986 and stipulated date of completion was April 16, 1987 while the work was actually completed on May 02, 1989. It was further contended by Respondent that the entire delay in completion of work is attributable to the Appellant. The Respondent also stated that the Appellant cannot escape from its liability by taking recourse to Clause 5, 10, 10CC of the agreement and additional specification No. 1, as they are not applicable in the facts and circumstances of the case.

The Respondent’s general pleading in the Statement of Claim preceding the pleadings constituting the specific heads of claims in this regards (“General Pleadings”):

The Appellant refuted the said claim of the Respondent and stated that Appellant is not responsible to make payment of compensation as claimed under Claim No. 9 and stated that in view of the fact that the escalation has already been paid under Clause 10CC of the agreement, no further compensation is liable to be paid.

During the course of the argument, the Respondent had given a note showing the details of the actual losses suffered by the Respondent due to idle labor, poor and under utilization of the Respondent’s T&P and staff.

The Arbitrator held that the contention of the Appellant is of no avail. Clause 10CC of the agreement is altogether different and talks about escalation and not about the losses, which a contractor is bound to suffer on account of prolongation of the contract. Hence the award damages of Rs. 14,28,801/- was made by the Arbitrator.

In the second award, where the nature of dispute and contentions by each party was almost identical, the Arbitrator followed the same line of reasoning and awarded the sum of Rs. 15,14,800/- to the claimant.

The awards were challenged with regards to the part of the award pertaining Claim No. 9 by filing objections under Section 34 of the Arbitration & Conciliation Act 1996, and was addressed in a single common judgment was passed by the Delhi High Court. The Delhi High Court ruled against the Appellant and hence an appeal was filed before the Division Bench of the Delhi High Court by the Appellant (“Court”).

### ISSUES

1. Whether there was a variance between pleading and proof with regards to the Claim No.9?
2. Whether Arbitrator can award damages for a claim for which there were no pleadings by the Respondent?

### ARGUMENTS

### CONTENTIONS OF APPELLANT

Appellant contended that in Claim No. 9 before the Arbitrator, the Respondent only pleaded that recompense under Clause 10CC of the contract was not enough to mitigate the expense incurred by him and never claimed damages on account of overheads in the form of staff deployed, idle T&P, labour and other machinery brought at the site during prolonged period of the contract, which were only mentioned by way of material facts without any supporting material particulars. Thus, the learned Arbitrator has awarded a sum, for which there were no pleadings, and hence the same

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## CONTENTIONS OF RESPONDENT

Respondent submitted that there is no variance between pleading and proof and for which he drew the Court's attention to the preliminary pleadings in the Statement of Claim, preceding the pleadings constituting the specific heads of claim, where the case set up by the Respondent was pleaded.

## JUDGMENT

The Court noted that that from a perusal of the General Pleadings in para 4(c)(ii), the Respondent has pleaded that as a result of the defaults committed by Appellant there was poor and under utilization of claimants T&P and staff and that the labour remained idle. But, when the specific heads of claims were justified with reference to the evidence and the loss suffered, the Respondent referred to cost indices to bring home the point that for the work done beyond the stipulated date of completion, the price escalation was 18% and hence damage was claimed as the prices had escalated by 18%

The Court also noted in that in the same para i.e. 4(c) of the General Pleading there are pleadings that due to the contract being prolonged the Respondent was subjected to increased costs of material and payments under Clause 10CC did not adequately compensate the Respondent.

The Court further observed that the details of the actual losses suffered by the Respondent due to idle labor, poor and under utilization of the Respondent's T&P and staff were not provided in the pleadings and were given only at a much later stage after the conclusion of arguments by the parties.

The Court stated that the law relating to pleadings guides us that there is a difference between a material fact to be pleaded and material particulars to be pleaded. Order 6 Rule 2 of the Code of Civil Procedure (“**Code**”) requires pleadings to contain a statement in a concise form of the material facts on which the party pleading relies for its claim or defence and as per Rule 4 thereof, whenever necessary, material particulars in relation to material facts have also to be pleaded. Conscious of the fact that the strict rules of pleadings envisaged by the Code do not apply to pleadings before an Arbitrator, the principles contained therein would have general applicability to all pleadings.

The Court further stated there cannot be any variance between pleading and proof but it has been evolved by judicial precedents with reference to Order 6 Rule 2 and Rule 4 of the Code. As a general principle of law one cannot win battles by springing surprises. Pleadings of parties are intended to focus the issues on which the parties seek a decision. It would be unjust if parties are permitted to plead and proof at variance. This principle would apply to decisions before any fora where civil disputes are adjudicated.

Hence the Court concluded that under Claim No. 9, the Respondent never claimed damages on account of overheads in the form of staff deployed, idle T&P, labour and other machinery brought at the site during prolonged period of the contract and thus, it is apparent that the learned Arbitrator has awarded a sum, for which there were no pleadings.

Hence both the appeals were allowed, the awards set aside, and both the impugned amounts were modified by setting aside the sum awarded under claim No. 9.

## ANALYSIS

The judgment lays down what seems to be a fair principle in light of strict interpretation of Code and natural justice. But at the same time it leaves some apprehensions on the capability on non-judges and/or non-lawyers acting as arbitrators. If the courts import such principles laid down by years by experienced judicial interpretation, into arbitration, more often than not non-judges and/or non-lawyers acting as arbitrators, having limited legal experience, will fail to meet these stringent test.

- **Prateek Bagaria & Vyapak Desai**

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