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## **Arbitration Award can be set aside for Non- determination of Quantities and Item rates in Construction Disputes**

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Arbitration, even though is a private dispute resolution mechanism, the arbitration system provides for supervising courts to avoid any major miscarriage of justice. Even though Arbitrator is the final fact finding authority and his decisions on questions of fact are final and binding on the parties, it is essential that there must be a reasoned determination by the arbitrator. Arbitrator has maximum powers to determine the issues relating to the merits of the case within the provisions of the Contract. Normally Courts interfere in the arbitration awards only when the arbitrator exceeds its jurisdiction and travel beyond the provisions of the contract. Even though in India, almost all the arbitration awards relating to construction disputes are getting challenged, the scope of S.34 of Arbitration and Conciliation Act,1996 is very limited.

In Construction and infrastructure contracts, normally disputes are technical in nature and determination of those technical issues, if reasoned are upheld by the courts. But when damages are awarded in construction matters, the arbitrator should not determine a damage amount just on a tentative estimation without applying scientifically approved metrics. For example, when there are variation claims, due to extra works executed as per the decision taken during the course of execution, the parties will make claims as per the market rates prevailing at that point of time. The market rate claims require a reliable foundation and calculation method. Hence in such matters Arbitrator should first determine the item wise rates and then the difference in the quantum executed to arrive at the award amount.

For example, if there is a variation claim, first determination should be the difference in BOQ quantities item wise and then the rates applicable to each item as per a reliable price Index. This is because normally parties do not specify the item wise rates in the contract hence escalation on the contract rate will be difficult for variation matters.

In a recent Judgment in the matter of M/S. Shipra Estate Ltd & Jai kishan Estates Developers Pvt Limited 2017 SCC Online Del 8691, Delhi High Court dealt with an arbitration award which had the components of extra work idling charges, escalation rates etc., Since there was no revised and agreed item rates between the parties, the arbitrator ought to have determined the item rates and difference in quantity before arriving at the final amount. The court held that a mere award without determination/adjudication of the facts necessary to return findings would render the arbitral award susceptible to challenge under Section.34 of the Act. Hence the above said award was set aside by the Delhi High court on 4<sup>th</sup> July 2017.

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