
(2006) 01 DEL CK 0137
In the Delhi High Court
Case No : OMP No"s. 110 and 111 of 2002

DDA

APPELLANT

Vs

Manohar Lal and Co.
 Manohar Lal Vs DDA

RESPONDENT

Date of Decision : 12-01-2006

Acts Referred:

Arbitration Act, 1940 — Section 30

Arbitration and Conciliation Act, 1996 — Section 33, 34, 34(2)

Citation : (2006) 1 ARBLR 132 : (2006) 127 DLT 495 : (2006) 86 DRJ 751

Hon'ble Judges : Sanjay Kishan Kaul, J

Bench : Single Bench

Advocate : Anusuya Salwan and G.N. Aggarwal, for the Appellant; G.N. Aggarwal and Anusuya Salwan, for the Respondent

Final Decision : Dismissed

Judgement

Sanjay Kishan Kaul, J.—The DDA awarded the work for development of land for industrial area in Mongolpuri Industrial Area to Manohar Lal & Company in pursuance to agreement dated 28/EE/ND-25/DDA/85-86. Dispute arose between the parties which resulted in the rescission of the contract on 23.01.1990. In view of Clause 25 of the terms and conditions agreed to between the parties, same being the arbitration clause, the engineer-member DDA referred the matter to a sole arbitrator. There were series of arbitrators appointed and finally Sh. Som Dutt was appointed as the sole arbitrator, who made and published his award dated 08.01.2002.

2. Both the parties have filed objections u/s 34 of the arbitration and Conciliation Act, 1996 (hereinafter referred to as said Act).

3. Learned counsel for the parties state that they are conscious of the fact that scrutiny of this court in such objections has to be within the parameters of Section 34(2) of the said Act as elucidated by the apex court in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., . The Supreme Court expanded the ambit of the phrase "public policy of India" used in Section 34 of the said Act by

giving it a wider meaning and observed, by including aspects such as fundamental policy of Indian Law, the interest of India, justice or morality or the award being patently illegal, in Para 31 as under:

31. Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy in Renusagar's case (supra), it is required to be held that the award could not be set aside if it is patently illegal. Result would be - award could be set aside if it is contrary to : -

- (a) fundamental policy of Indian law; or
- (b) the interest of India; or
- (c) justice or morality, or
- (d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such award is opposed to public policy and is required to be adjudged void.

4. This is so since in respect of other provisions specified in Section 34(2), it is clearly stipulated as to when the award can be set aside.

5. If the objections are analysed within the aforesaid parameters, learned counsel for the DDA could not seriously contend that any of the objections, taken by the DDA, would fall within the said parameters. This court does not sit as a court of appeal to examine how the arbitrator has examined the evidence and so long as the conclusion reached by the arbitrator is a plausible conclusion, even if not the only conclusion to be arrived at, this court would not interfere. The position of law even under the earlier Act in respect of Section 30 of the Indian Arbitration Act, 1940 had been explained by the apex court to the effect that unless an award is contrary to law, the award ought not to be interfered with. In the absence of an award being absurd, reasonableness is not a matter to be considered. In this behalf reference may be made to the judgment of the Apex Court in Food Corporation of India Vs. Joginderpal Mohinderpal, . The scope of enquiry under the said Act can hardly be said to be broader than that.

6. Insofar as the objections of the learned counsel for the contractor are

concerned, learned counsel sought to initially contend that the nature of reasons given by the arbitrators did not satisfy the parameters of a reasoned award. This is so since in respect of each of the claims, after discussing the contentions of petitioner and respondent arbitrator had proceeded to record a short paragraph of reason from which it will not be possible to decipher as to why a particular claim has been allowed to a certain extent and not to the remaining extent. It was however put to the learned counsel that in case this plea was to be accepted, the flaw would permeate the whole award and it is not possible to segregate the award where the contractor has succeeded and where only part of the amounts have been allowed with which the grievance of the contractor persists. Faced with this situation, learned counsel, on instructions from Mr. Manohar Lal Sethi, sole proprietor of M/s Manohar Lal & Co, states that he would not like to press this plea as he would not want the whole award to be set aside.

7. The next question raised by learned counsel for the contractor is the issue of important documents being ignored. The position remains the same since after some arguments the contractor is keen that the award should be implemented at the earliest, no objections in this behalf are pressed.

8. The last aspect canvassed by the learned counsel for the contractor is that in terms of clause 25 of the contract, the dispute had to be referred to the sole arbitration of a person appointed by the Engineer Member, DDA. Learned counsel contends that if in terms of the arbitration clause, the designated authority has to appoint a person as Arbitrator, the person must be named and the appointment cannot be by designation. In this behalf, learned counsel referred to the judgment of the learned Single Judge of this court in K.C. Goyal v. DDA and Ors., 2001(2) Arb LR 564. It was held by the learned Single Judge that the designation of an officer does not come within the definition of "person". "Person" is an individual human being.

9. Learned counsel for the contractor, however, does not dispute that the aforesaid objection was not taken before the Arbitrator but has been taken in Ground 13 in the Objection Petition. Learned counsel submits that the objection can be taken even at this stage since the acceptance and acquiescence would be of no value. In this behalf, learned counsel referred to the judgment of the apex court in U.P. Rajkiya Nirman Nigam Ltd. Vs. Indure Pvt. Ltd. and others, where it was observed in para 15 as under:

15. The clear settled law thus is that the existence or validity of an arbitration agreement shall be decided by the Court alone. Arbitrators, Therefore, have no power or jurisdiction to decide or adjudicate conclusively by themselves the question since it is the very foundation on which the arbitrators proceed to adjudicate the disputes. Therefore, it is rightly pointed out by Shri Adarsh Kumar Goel, learned counsel for the appellant that they had by mistake agreed for reference and that arbitrators could not decide the existence of the arbitration agreement or arbitrability of the disputes without prejudice to their stand that no valid agreement existed. Shri Nariman contended that having agreed to refer the

dispute, the appellant had acquiesced to the jurisdiction of the arbitrators and, Therefore, they cannot exercise the right u/s 33 of the Act. We find no force in the contention. As seen, the appellant is claiming adjudication u/s 33 which the Court alone has jurisdiction and power to decide whether any valid agreement is existing between the parties. Mere acceptance or acquiescing to the jurisdiction of the arbitrators for adjudication of the disputes as to the existence of the arbitration agreement or arbitrability of the dispute does not disentitle the appellant to have the remedy u/s 33 through the Court. In our considered view the remedy u/s 33 is the only right royal way for deciding the controversy.

10. Learned counsel also referred to the judgment of the Supreme Court in Bihar State Mineral Dev. Corpn. and Another Vs. Encon Builders (I) Pvt. Ltd., to advance the submission that an order which lacks inherent jurisdiction is a nullity and the procedural law of waiver would have no application.

11. It may be noticed that the aforesaid judgments were relied upon on the last date of hearing but today learned counsel concedes that he is instructed not to press this objection nor would this objection be sustainable in view of an unreported judgment of the Division Bench of this court in FAO (OS) No.416/2001 DDA v. Prominent Electric Works and Anr. The Division Bench considered the judgment in K.C. Goyal's case (supra). The Division Bench took note of the fact that no objection was raised by the Objector in the said proceedings till the last date. The dispute was required to be referred to "the sole arbitration of the person appointed by the Engineer Member, Delhi Development Authority at the time of disputes". Learned counsel, however, took note of the decision of the Supreme Court in Construction India Vs. Secretary, Works Department, Government of Orissa and Others, . The dispute related to the appointment of an Arbitrator who was so appointed with the consent of the parties. The Arbitrator, however, demitted his office as Chairman during the pendency of arbitration proceedings and objections were raised that on demitting the office, the Arbitrator had ceased to have jurisdiction to continue with the arbitration. The Supreme court while dealing with this question upheld two decisions: the first one rendered by the Orissa High Court in Union of India (UOI) Vs. Ch. Radhanath Nanda and Another, and the second of this court in Sushila Seth and Others Vs. State of Madhya Pradesh, . In Ch. Radhanath Nanda's case (supra), the name of the Arbitrator was not mentioned and it was held that the identity of the Arbitrator had to be determined with reference to the point of time when the reference was made. Thus, whoever was holding that office on the date of reference was the Arbitrator, although he was not named as such. The apex court also approved the decision of the Calcutta High Court in Pratima Sarkar Vs. Corporation of Calcutta and Others, in which case the appointment of the Arbitrator was by designation. It was held that although the Arbitrator was named and described by his designation, it would refer to an individual, since the parties had selected that person having technical qualification.

12. The Division Bench in DDA v. Prominent Electric Works case (supra) agreed

with the decision in Ch. Radhanath Nanda's case (supra) to come to the conclusion that when the appointment of Superintendent Engineer (Arbn)-I was made by the Engineer Member of DDA, it had reference only to the holder of that office on the date when the reference was made. The Division Bench was also of the view that when no objection was raised by the Objector who continued to participate in the arbitration proceedings, the Objector was precluded from challenging the authority of the Arbitrator to enter upon reference on grounds of acquiescence. In this behalf, the division Bench held that in view of the explicit position in law on the point that where a party having consented to arbitration by a person and participated in the proceedings before him subsequently wishes to challenge jurisdiction of the Arbitrator, he would be estopped from doing so and thus the lack of possessing the qualification required by the arbitration clause was not a plea available.

13. The result of the aforesaid is that both the objection-petitions are liable to be dismissed leaving parties to bear their own costs.