
(2012) 05 DEL CK 0188
In the Delhi High Court
Case No : O.M.P. 193 of 2006

Driplex Water Engineering Ltd.

APPELLANT

Vs

Delhi Jal Board and Another

RESPONDENT

Date of Decision : 11-05-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 14, 16, 23(3), 34

Citation : (2012) 5 AD 246

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : Vikram Nandrajog and Mr. Sushil Jaswal, for the Appellant; Ashok Bhasin with Ms. Anuradha Anand and Mr. Sunklan Porwal, for the Respondent

Final Decision : Allowed

Judgement

S. Muralidhar, J.—The challenge by the Petitioner, Driplex Water Engineering Limited, in this petition u/s 34 of the Arbitration and Conciliation Act, 1996 ("Act") is to an Award dated 31st January 2006 passed by the learned sole Arbitrator, Respondent No. 2 in the dispute between the Petitioner and Respondent No. 1 Delhi Jal Board ("DJB") arising out of the award of work of supply, installation and commissioning of the electrical and mechanical equipment in respect of the effluent pumping station at the sewage treatment plant of DJB at Okhla, New Delhi under a contract agreement dated 18th August 1987. The completion period of the work was 13 months reckoned after expiry of seven days of issue of work order. The stipulated date of start of work was 3rd October 1987 and the completion date was 2nd November 1988. With disputes having arisen between the parties, the Petitioner invoked arbitration clause. By an order dated 14th December 1992 the Commissioner of the Municipal Corporation of Delhi ("MCD"), the person designated as the appointing authority under the contract, referred the claims of the Petitioner to arbitration of a retired Engineer. Before the said Arbitrator, the Petitioner filed its claim on 14th April 1993. Despite repeated adjournments granted for that purpose, DJB did not file

its reply and counter claim. Ultimately, on 6th September 1994 DJB filed its reply but not any counter claim. The Arbitrator was at that stage removed as Arbitrator and in his place Justice G.C. Jain (Retired) was appointed as the sole Arbitrator. Upon the demise of Justice G.C. Jain, Justice N.C. Kochhar (Retired) was appointed as an Arbitrator by a letter dated 14th December 1998 by the Chief Executive Officer ("CEO") of DJB.

2. Justice Kochhar framed the following issues on 13th July 1999:

1. Is the delay in the execution of the work attributable to the claimant or the respondent?
2. Whether the claimant completed the work as per the NIT Specifications/agreement between the parties.
3. Did the respondent discharge its obligations under the agreements/as per the NIT Specifications?
4. Whether the non-commissioning of the plant is attributable to the claimant or to the respondent.
5. Did the respondent provide the requisite inputs required to be provided by the respondent for the purpose of commissioning of the plant?
6. Whether it was the obligation of the claimant to obtain sanction for the electricity connection from DESU to run the plant.
7. If issue No. 6 is decided against the claimant, whether failure to obtain the sanction is due to non-performance of obligations attributable to the respondent or to the claimant.
8. Whether the Respondent was justified in levying penalties on the claimant.
9. Whether Claim Nos. 3,4,7,9,10,11 and 12 are non-arbitrable as alleged by the respondent.
10. Whether the claimant is entitled to the amounts as claimed in the claim petition.
11. Relief.

3. On 7th December 1999 DJB filed an application before Justice Kochhar seeking permission to file its counter claims. By an order dated 31st January 2000 Justice Kochhar rejected the said application. The said order of Justice Kochhar was not challenged by DJB.

4. On 13th September 2000 DJB referred its counter claims to arbitration and appointed Mr. B.K. Sharma, IAS (retired) as an Arbitrator. DJB filed its claim petition before Mr. Sharma on 16th October 2000. The Petitioner resisted the second reference to arbitration and filed OMP No. 272 of 2000 in this Court u/s 14 of the Act. By an order dated 9th November 2000 the said petition was

dismissed. The Petitioner also filed a petition u/s 16 of the Act before Mr. Sharma which was rejected by him by an order dated 20th November 2001. An application by the Petitioner seeking review of the said order was rejected by Mr. Sharma on 6th December 2001.

5. On 12th December 2002 Justice Kochhar passed an Award in favour of the Petitioner. The Petitioner then filed Suit No. 133 of 2003 for making the said Award Rule of the Court. By its letter dated 21st March 2003 DJB accepted the Award and made the payment to the Petitioner. Subsequently, by an order dated 27th November 2003 in Suit No. 133 of 2003 this Court made the Award dated 12th December 2002 rule of the Court.

6. The Petitioner filed an application before Mr. Sharma to the effect that the claims of DJB were barred by limitation and in any event could not be entertained in view of the doctrine of res judicata. DJB in the meanwhile filed an application u/s 23 (3) of the Act seeking to amend its claim petition.

7. Both the applications were heard by Mr. Sharma and the following three issues were framed on 6th August 2005:

(i) Is the claimant's application u/s 23 (3) of the Arbitration and Conciliation Act, 1996 maintainable?

(ii) Are the claims preferred by the claimants within time?

(iii) Does the principle of res judicata operate in the case in view of the findings recorded by the previous Arbitrator Justice Kochhar, vide his Award dated 12th December 2002?

8. Mr. Sharma reserved orders on the said applications on 22nd October 2005. Thereafter Mr. Sharma proceeded to pass the impugned Award dated 31st January 2006 rejecting the Petitioner's application and partly allowing DJB's claims on merits for a sum of Rs. 32,25,962 with interest @ 9% per annum from 25th April 2002 till the actual payment.

9. The conclusion of the learned Arbitrator in the impugned Award as regards the three issues framed was as under:

(i) The amendments sought by DJB did not seem to alter the nature and substance of the case. Therefore, the amendment was allowed.

(ii) The Petitioner had not countered the averments that the cause of action for DJB's claims arose on 15th October 1997 when the representative of the Petitioner refused to authenticate the inventories of the missing and defective items, though it was prepared by it. Therefore, DJB's counter claims before the previous Arbitrator Justice Kochhar were "within time and were not barred by limitation."

(iii) The work order clearly stated that the Petitioner would secure the electrical inspector's report which was a pre-condition for awarding of the work. However,

this fact was not brought to the notice of the earlier Arbitrator Justice Kochhar. But on material facts, there was a conspicuous difference in the two cases. Consequently, the principle of res judicata was not applicable.

(iv) DJB claimed Rs. 32,25,962 for the actual amount paid on the completion of the entire balance work including overhauling of the plant. The second contract was awarded through open tender and the due formalities in this regard were observed. Accordingly, this amount was awarded to DJB and all other claims were rejected. The amount was directed to be paid together with interest @ 9% from 25th April 2002 till the actual date of payment. The fees and costs were directed to be shared equally by the parties.

10. This Court has heard the submissions of Mr. Vikram Nandrajog, learned counsel for the Petitioner and Mr. Ashok Bhasin, learned Senior counsel for DJB.

11. Mr. Vikram Nandrajog, learned counsel appearing for the Petitioner submitted that the learned Arbitrator Mr. Sharma erred in holding that the earlier Award of Justice Kochhar dated 12th December 2002 did not constitute res judicata. He pointed out that the issues framed in the earlier arbitration comprehensively covered the entirety of the matter in dispute between the parties. The defence put forward by DJB before Justice Kochhar was the basis of the claim petition by DJB before Mr. Sharma. Likewise, the Petitioner's claim before Justice Kochhar was the defence put forward by the Petitioner before Mr. Sharma. Therefore, the matter directly and substantially in issue in the arbitration proceedings before Mr. Sharma was the matter directly and substantially in issue in the earlier arbitration wherein an Award dated 12th December 2002 was passed by Justice Kochhar. Consequently, there was no occasion for the matter to be agitated and tried again before Mr. Sharma.

12. In reply, it is submitted by Mr. Ashok Bhasin, learned Senior counsel for DJB, that a fresh cause of action had arisen in favour of DJB after the Petitioner prepared joint inventory of work, and handed it over to DJB on 15th October 1997. It is contended that the claims filed by DJB before Mr. Sharma were totally different from the dispute decided by Justice Kochhar. It is stated that nomenclature, basis and amount of each dispute was different and the issues framed by both the Arbitrators were also different.

13. The facts not in dispute are that the Commissioner, MCD first appointed Mr. L.R. Gupta as an Arbitrator by an order 7th December 1992 in which it was noted that DJB also had a number of claims/disputes. It was observed that DJB would submit a list of claims separately before Mr. Gupta. Mr. Gupta had issued notice dated 27th January 1993 to the parties and granted time to DJB to file reply to the statement of claim and the counter claims, if any, within 15 days of the receipt of the copy of the statement of claim of the Petitioner. While the Petitioner filed its statement of claim by its letter dated 14th April 1993, DJB after many adjournments filed its reply on 6th September 1994 but not its counter claims. Before Justice Kochhar, DJB filed an application on 7th December

1999 seeking permission to file counter claims. By an order dated 31st January 2000 Justice Kochhar dismissed the said application. He held: "if the cause of action for filing the counter claim is the disputes referred in 1992, the counter claim sought to be filed, was hopelessly barred by time, and if the cause of action is any dispute not already referred, I could not go into it." It is inconceivable therefore that after the rejection of this application seeking permission to file counter claims before Justice Kochhar, DJB could seek to agitate those very counter claims by appointing Mr. Sharma as an Arbitrator and filing them before him as its claims. There is no satisfactory answer to this by DJB except saying that the subject matter of its counter claims before Justice Kochhar was not the same as its counter claims before Mr. Sharma.

14. A perusal of the application filed by DJB on 7th December 1999 before Justice Kochhar reveals that what were sought to be filed by it as counter claims, were the following:

- (i) Claim No. 1 for Rs. 2 lakhs towards expenses to be incurred for repairing the building
- (ii) Claim No. 2 towards bills of the DVB on account of equipment charges for the period ending July 1999.
- (iii) Claim No. 3 for interest on the aforementioned amount.
- (iv) Claim No. 4 towards cost of arbitration.

15. The claims filed by DJB before Mr. Sharma were more or less similar. They read as under:

Claim No. 1

(a) Expenses to be incurred on account of procurement and fixing of missing items and overhauling of equipments etc.

(b) Overhead expenses of the Deputy @ 15% Rs. 47,82,356.

47,82,356.00

7,17,353.00

Claim No. 2

(a) Amount to be paid to DVB towards bill raised on account of equipments and minimum demand charges and surcharge charges up to Sept 2000

(b) Account of interest @ 18% per annum w.e.f. 1st January 1990 till date on the payment of Rs. 42,28,608 already made to DVB by claimant for providing 11 KV electric connection.

1,16,33,996.00

81,80,000.00

Claim No. 3

(a) Towards expenses to be incurred on the repair of pump house Building and rising mains to make it workable.

(b) On account of interest on Rs. 1,22,71,000 w.e.f. 1st January 1990 till 30th September 2000 @ 18% per annum incurred by claimant in construction of pump house building and laying of rising main.

5,00,000.00

(approx.)

2,37,44,385.00

Claim No. 4

On account of Penalty equivalent to 10% of work order value for non-completion of work as per contract.

15,87,000.00

Claim No. 5

Towards interest @ 18% per annum w.e.f. 1st January 1990 till 30th September 2000 on Rs. 1,45,000 spent on supply of equipments/material and erection of the equipment by the claimant.

2,80,57,500.00

Grand Total

7,92,02,590.00,

16. The learned Arbitrator appears to have completely overlooked the above aspect while observing that the claims before him by DJB were totally different from the counter claims earlier sought to be filed before Justice Kochhar. Secondly, Mr. Sharma also failed to notice that the issues framed by Justice Kochhar were no different from the issues before him. Both the claims and counter claims arose out of the same set of facts and cause of action for both was the same. Thirdly, Justice Kochhar had by a separate order dated 31st January 2000 rejected the application filed by DJB for filing counter claims. In the said order he observed that those counter claims were time barred. That order of Justice Kochhar was not challenged by DJB.

17. This Court, in the circumstances, is unable to sustain the impugned Award to the extent that it holds that the claims of DJB before Mr. Sharma were not barred by the principle of res judicata or that they were not time barred.

18. Apart from the above patent illegality in the Award, it is seen that Mr. Sharma had heard submissions on the three preliminary issues and had reserved orders. His order thereafter had to deal with those issues. Instead Mr. Sharma

appears to have not stopped at doing that but by the impugned Award decided the claims of DJB on merits. The submissions of the parties on the merits of DJB's claims were not heard by him. If he was going to, as he indeed did, negative the plea of the Petitioner on the preliminary issues, he was expected to set down the matter for hearing on the issues on merits. This he did not. This resulted in a denial of opportunity to the Petitioner to be heard on merits of DJB's claims. This is another reason why the impugned Award suffers from a patent illegality.

19. For all the aforementioned reasons, the impugned Award dated 31st January 2006 passed by Mr. Sharma cannot be sustained in law and is hereby set aside. The petition is allowed with costs of Rs. 5,000 which will be paid by DJB to the Petitioner within four weeks.