

(2009) 11 DEL CK 0075

In the Delhi High Court

Case No : IA 6581 of 1996 in CS (OS) 2730A of 1995

Goel Associates

APPELLANT

Vs

Shama Cooperative Group Housing Society

RESPONDENT

Date of Decision : 03-11-2009

Acts Referred:

Arbitration Act, 1940 — Section 30, 33

Citation : (2009) 11 DEL CK 0075

Hon'ble Judges : Manmohan, J

Bench : Single Bench

Advocate : D.R. Bhatia, for the Appellant; P.D. Gupta, for the Respondent

Final Decision : Dismissed

Judgement

Manmohan, J.—Present application has been filed under Sections 30 and 33 of the Arbitration Act, 1940 challenging the Award dated 13th November, 1995 passed by Mr. Avadh Behari Rohatgi, Sole Arbitrator.

2. Mr. P.D. Gupta, learned Counsel for respondent/objector-cooperative society submitted that the impugned Award was liable to be set aside as the appointment of the Arbitrator was illegal inasmuch as the Arbitrator had been unilaterally appointed by petitioner/claimant-architect. In this connection, Mr. Gupta relied upon a judgment of Supreme Court rendered in the case of Dharma Prathishthanam v. Madhok Construction Pvt. Ltd. reported in 4 (2004) CLT 130 (SC).

3. Mr. Gupta further submitted that the learned Arbitrator could not have awarded any compensation to claimant-architect as under the contract, claimant-architect was only entitled to, "a fee of 2.5% on total cost of executed works excluding the cost of land." In this connection, Mr. Gupta relied upon a judgment of Supreme Court rendered in the case of Ramnath International Construction Pvt. Ltd. Vs. Union of India (UOI) and Another, .

4. On the other hand, Mr. D.R. Bhatia, learned Counsel for petitioner/claimant-

architect stated that the arbitration Clause in the agreement had been invoked by the claimant-architect vide legal notice dated 6th May, 1995. He stated that as the objector-society vide its reply dated 1st June, 1995 had refused to appoint an arbitrator, the claimant-architect's nominee had become the Sole Arbitrator. He submitted that the objector-cooperative society was estopped from raising this objection as it had not only participated in the arbitration proceedings before the learned Arbitrator but had also filed its counter-claim before him.

5. Mr. Bhatia further submitted that it is well settled that compensation can be awarded to a party whose rights have been violated. In this connection, Mr. Bhatia relied upon the case of *Thomas v. Hammersmith Borough Council* reported in (1938) 3 All ELR 203 wherein it has been held as under:

...I think it helpful first to consider what would have been the agreement between the parties if the appointment had been simpliciter to act as architect for the erection of the new town hall, without any provision as to scale of charges, and if the council had then, before the work was completed without cause other than their mere volition, terminated the agreement. In such case, I entertain no doubt that the architect would have been entitled to reasonable remuneration for the work which he had already done, and also to damages for the loss of remuneration which he had been prevented from earning until the work was finished: see *Planche v. Colburn* (1831) 8 Bing. 14 and *Prickett v. Badger* (1856) 1 C.B.N.S. 296. Although the contract in this assumed form would contain the no express term to this effect, I think that it would be implied that the council, having employed the plaintiff to build their town hall, agreed with him that they would not prevent him from doing the work, and so prevent him from earning his remuneration....

6. Having heard the parties at length, I am of the view that Mr. Avadh Behari Rohatgi's appointment as a Sole Arbitrator was neither unilateral nor illegal. The arbitration Clause in the agreement executed between the parties reads as under:

8. Arbitration: In the event of any dispute, difference of question arising out of or touching or concerning this agreement or execution of the said works, the same shall be referred to the arbitration of two persons, one each appointed by the parties, who in turn may appoint an umpire, if required.

7. After the disputes arose, the claimant-architect had issued a legal notice dated 6th May, 1995 wherein it was stated as under:

6. In the facts and circumstances stated above, my clients exercise the right of invoking the above arbitration Clause and propose to appoint Mr. Justice Avedh Behari, a retired Judge of Delhi High Court, now residing at N-217, Greater Kailash-I, New Delhi to decide the disputes which have arisen between the contracting parties under the agreement.

7. You are therefore requested and called upon to appoint your arbitrator within fifteen days after the receipt of this notice failing which legal consequences will

follow, including the right of my clients to claim damages amounting to Rs. 20,00,000/- (Rupees Twenty Lakhs).

8. In response to the aforesaid legal notice, objector-cooperative society through its Counsel replied vide letter dated 1st June, 1995 as under:

2. That my client does not dispute the existence of the agreement which was terminated for the reasons duly informed to your client also vide letter dated 1.5.1995.

3. That in terms of the Agreement, there is neither any dispute nor any difference of any question or any other matter requiring arbitration and, therefore, the contention of your client to appoint arbitrator or liability of my client to damages for Rs. 20 lac, is nothing but a dream of your client without there being any basis and is, therefore, not tenable in law.

I, therefore, require you to inform your client accordingly so that he may abstain from initiating any frivolous litigation, but still if he chooses for any action, the same shall be defended by my client as advised, at the costs of your client.

9. Since in the present case, the Agreement dated 29th July, 1988 executed between the petitioner/claimant-architect and respondent/objector-cooperative society admittedly contained an arbitration Clause and the objector-cooperative society had failed to appoint an arbitrator despite being given an opportunity to appoint one, it cannot be said that the appointment of Mr. Avadh Behari Rohatgi as an Arbitrator was a unilateral one. Accordingly, judgment in Dharma Prathishthanam's case (supra) referred to by learned Counsel for objector-cooperative society has no application to the facts of the present case.

10. I am also in agreement with Mr. Bhatia's argument that if a party's rights had been violated, said party is entitled to compensation so as to place him in the same position so far as money can do, as if party's rights had been observed. A Division Bench of this Court in Bhatia Nidhi Ltd. v. Union of India Ltd. and Ors. reported in 26 (1984) DLT 21, has held as under:

the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed. Victoria Laundry (Windsor) Ltd. v. Newman Industries (1949) 2 KB 528 at p 539 per Asquith LJ. In actions for breach of contract, the object is to put the plaintiff in the position he would have been in if the contract had been satisfactorily performed.

11. I have also perused the Agreement dated 29th July, 1988 executed between the parties and I find that there is no Clause in the Agreement which prohibits the grant of compensation to claimant-architect in case the Agreement was illegally terminated by respondent-cooperative society. Accordingly, judgment of Ramnath International Construction (P) Ltd.'s case (supra) referred to by learned Counsel for objector-cooperative society, has no application to the facts of the present case inasmuch as there is no Clause prohibiting award of

compensation in the present case. Consequently, in my view, claimant-architect is entitled to compensation as awarded by the learned Arbitrator.

12. In fact, in the present case, learned Arbitrator in the impugned Award has observed as under:

The agreement dated 29.7.1988 subsisted for 7 long years. Suddenly in 1995 the agreement was terminated. The letter dated 24.3.1995 terminating the architect's appointment reads as follows:

The Managing Committee of the Society in its meeting held on 23.3.95 has terminated your appointment as Architect of the Society as well as the agreement with you on account of the following:

1. The rate of your fees is very high.
2. You have not helped the Society in getting the land from DDA.
3. You have not coordinated with DDA for possession of land.
4. You have not ever helped for fixation of MCL of the society and verification of membership.
5. You have not helped in getting the Bridge Loan from the DCHFC for the society.
6. You have not taken any keen interest in starting the Project.

You are therefore requested to refund Rs. 25,000/- the advance money paid to you.

To this notice the architect on 15.4.1995 replied that the termination was wrongful. In their letter dated 1.5.1995 the Society contended that they had every right to terminate the contract on the ground that:

the work had not started till 5.4.1995 and you had not rendered any professional services to the Society and therefore the Managing Committee has every right to refuse the old rate which was agreed in 1988 i.e. 7 years ago.

The President of the Society in his evidence said:

The claimant is not entitled to any fee because he did not work for us.

Later on he admitted that:

Before the possession of the land was given to the society by DDA on 5.4.1995, we terminated the architect's contract on 24.3.1995.

In the letter of the society dated 1.5.1995 it is admitted that the work had not started till 5.4.1995. Therefore before the work started the architect's employment was terminated on the specious ground that "you have not rendered any professional services". It is not clear what services were required of him when the work admittedly had not started.

Hudson says "an architect is a person who is skilled in the art of building and who is competent to design buildings and to supervise their erection". (Building Contracts 10th ed. Page 84). But in this case before the stage of designing and supervision arrived the architect's employment was terminated.

Two other facts may be mentioned here in order to appreciate the case of the architect. It was established in evidence and not denied by the Society that on 30.4.1993 the architect advanced a loan of Rs. 27,501/- to the Society because the Society was short of funds and needed money to pay to DDA. This loan was repaid after three or four days by the Society to the architect. Similarly Society again needed money to qualify for getting possession letter. On 1.2.1995 rupees one lakh was advanced by the architect to the Society as a loan. This loan was repaid in March, 1995. This shows that the architect helped the Society in getting land from DDA. He came to their help in the hour of need. The relations between the parties it appears were cordial and that there was no complaint against the architect. The case of the architect is that he is entitled to his professional fees at the rate of 2.5% of the estimated cost of the works (excluding the cost of land) as stipulated in the agreement dated 29.7.1988.

Regarding termination of the contract architect's case is two fold. One that there is no provision for termination in the contract. Secondly termination is on false and fictitious grounds.

In the claim put forward before me the total cost of the project is estimated at Rs. 468 lakhs. On this the architect has claimed Rs. 12 lakhs as his professional remuneration @ 2.5%. In addition he has claimed Rs. 8 lakhs as compensation for damage to reputation because he alleged his image suffered in the market. Thus the claim is for Rs. 20 lakhs....

xxxx xxxx xxxx What is of crucial importance in this case is that the Society did not make any complaint in writing to the architect at any stage or at any time during the period of 7 years when the contract of employment subsisted. There is not a word of dissatisfaction or complaint in writing before the notice dt. 24.3.1995 was issued. Not a single recorded syllable of grievance of any kind. Not even a whisper. The President in his evidence admitted that there is nothing in writing. There is nothing on record to show that the society found the architect useless or no good at work. They did not say that he was deficient in his services till the notice of termination came.

Possession of the land was given by DDA to the Society on 5.4.1995. But the Society terminated the architect's contract of employment even before that. It was terminated on 24.3.1995. This is the outstanding fact of this case. Before services could be rendered the architect's contract was determined without any good cause. The notice terminating the contract bears marks of invalidity on its forehead.

In my opinion the Society has not been able to substantiate the grounds of termination of the contract taken in the notice dated 24.3.1995. Some of the

grounds are not listed as contractual duties e.g. verification of members. Other grounds are without substance viz. possession of land and bridge loan which the society got.

The President of the society admitted in evidence that after termination of Mr. Goel's contract another architect has been employed by the Society at the rate of 2%. This is why the notice says "the rate of your fees is very high". But the rate of 2.5% is a term of the contract to which both parties agreed in 1988 when the agreement was executed. To say now that the rate is high cannot be a good ground to terminate the contract.

It appears to me that the main reason for cancellation of the agreement was that the architect's rates settled in 1988 were found to be high and a new managing committee in 1995 wanted to get a new man of cheaper rates. They thought that they had every right to terminate the contract of the architect as the work of the Society had not started and no professional services had been rendered. This was their view as would appear from Society's letter dated 1.5.1995. But this was a mistaken view. They attached little importance to the sanctity of contract entered into on 29.7.1988. They thought that they can make or unmake a contract at their sweet will.

xxxx xxxx xxxx I have held that in the instant case termination of the architect's employment by the Society is wrongful. The architect was dismissed before the project was even started. In a way it was an anticipatory breach of the contract.

I have no doubt that in such a case the measure ought to be damages for the loss of remuneration which he had been prevented from earning until the work was finished. Because the architect's employment was terminated before the project took off.

What do we find in the present case? One management gives the contract in 1988. Another management cancels it in 1995 on the ground that the architect's rates are high. Is it a good and sufficient ground in law? This is the question.

The architect was engaged for the whole work of completing the houses. The Society committed breach of the contract in terminating the architect's engagement on the grounds which were not established in evidence. The architect, in my opinion, can claim damages if his services are ended in the manner it was done in this case.

On the question of damages I think the estimated cost worked out by the architect is on the high side. In my opinion it should be at the rate of Rs. 400/- per sq. ft. and not Rs. 500/- per sq. ft. as claimed. On this rate the total cost would work out to Rs. 4,04,88,360/-. The total fees at the rate of 2.5% on the total cost comes to Rs. 10,12,209/-. After deducting Rs. 25,000/- paid as advance, the architect is entitled to Rs. 9,87,209/-.

Regarding compensation for loss of reputation it is enough to say that the damages claimed are too remote. They were not in the contemplation of the

parties to the contract. Nor is the claim supported by any reliable evidence. Nor is it sustainable in law. I, therefore, reject the claim of Rs. 8 lakhs for loss of reputation.

In the result I award a sum of Rs. 9,87,209/- to the architect against the society. The claimant shall be entitled to interest at the rate of 18% p.a. from the date of the award till the passing of the decree by the court.

13. Moreover, it is settled law that arbitrator has the jurisdiction to construe and interpret an agreement and the said decision is not liable to be interfered with if the same was a plausible view. In the present case, I find that the impugned Award is not only a well reasoned one but also perfectly legal and in conformity with the contract/agreement executed between the parties.

14. Accordingly, present application filed by objector-cooperative society is dismissed. However, keeping in view the excessive rate of interest awarded by the learned Arbitrator and the fact that the principal awarded sum had been deposited by the objector-cooperative society in this Court on 24th March, 2001, I deem it appropriate to modify the Award by directing that the claimant-architect would only be entitled to principal awarded sum as well as the interest that has accrued on the sum deposited in this Court.

15. With the aforesaid modifications, the Award is made rule of the Court and the Registry is directed to prepare a decree sheet in terms thereof.

16. List this matter before Registrar General of this Court on 10th November, 2009 to facilitate release of money lying deposited with this Court to learned Counsel for petitioner/claimant-architect against a receipt.