

(2009) 01 DEL CK 0070
In the Delhi High Court
Case No : FAO (OS) No. 420 of 2006

Gujarmal Modi Hospital and Research Centre for Medical
Science

APPELLANT

Vs

Utility Engineers India Ltd.

RESPONDENT

Date of Decision : 28-01-2009

Acts Referred:

Citation : (2009) 01 DEL CK 0070

Hon'ble Judges : Vipin Sanghi, J;Mukul Mudgal, J

Bench : Division Bench

Advocate : Kirti Uppal and Vaibhav Sharma, for the Appellant; S.K. Luthra, for O.L., for the Respondent

Final Decision : Dismissed

Judgement

Mukul Mudgal, J.—On 30th September, 2008 this court passed an order that the delay in filing the appeal is condoned subject to the appellant depositing the decretal amount in this Court within six weeks from today. The said period of six weeks expired around 15th November, 2008 and up till date the deposit has not been made, nor any application has been preferred seeking either the waiver of deposit or extension of time to deposit the money. Accordingly, the appeal warrants dismissal on the ground of 38 days delay in filing the appeal not being condoned.

2. In any event, to satisfy our conscience, we have heard the learned Counsel and examined the impugned order, and find no merit in this appeal.

3. A dispute arose between the appellant/Gujarmal Modi Hospital and the respondent/Utility Engineers (I) Ltd. (now represented by the Official Liquidator) in relation to, and arising out of the agreement between the parties for the construction of Gujarmal Modi Hospital and Research Centre for Medical Sciences. The appellant had awarded the contract for the construction of the aforesaid hospital and research centre to respondent M/s. Utility Engineers (I)

Ltd. The terms and conditions of the contract contained an arbitration clause. The respondent invoked the arbitration agreement and appointed one Sh. J.R. Bhalla as an Arbitrator. The appellant, it appears, did not exercise its right under the agreement to appoint the second Arbitrator. The Arbitrator, Sh. J.R. Bhalla proceeded with the reference and made his award on 14.12.1990 in favour of the respondent. The appellant raised a challenge to the award by filing objections u/s 30 and 33 of the Arbitration Act 1940 which have been rejected by Learned Single Judge of this Court by the impugned judgment dated 15.02.2006. The Learned Single Judge has made the award a "rule" of the Court and has also awarded future interest at the rate of 9 per cent per annum (S.I.) from the date of decree till the date of realization. Aggrieved by the said decision the appellant has preferred the present appeal.

4. The main issue urged by the appellant/objector before the Learned Single Judge was, and before us is, that the Arbitration Clause contained in the agreement dated 29.09.1983 was not adhered to. The Arbitration agreement was not invoked in the manner provided for, and therefore, the Arbitrator had no jurisdiction to proceed with the Reference. The Arbitration Clause as contained in the agreement between the parties reads as under:

(37) Settlement of Dispute, Arbitration All disputes and differences of any kind whatever arising out of or in connection with the contract or the carrying out of the works (whether during the progress of the works or after their completion, and whether before or after the termination, abandonment or breach of the contract) shall be referred to and settled by the Architects who shall state their decision in writing. Such decision may be in the form of a final certificate or otherwise. The decision of the Architect with respect to any of the excepted matters shall be final and without appeal as stated in Clause No. 35. But if either the employer or the contractor be dissatisfied with the decision of the Architect or any matter question or the dispute of any kind (except any of the excepted matters) or as to withholding by the Architect of any certificate to which the contractor may claim to be entitled, then and in any such case either party (the Employer or the Contractors) may within 28 days after receiving notice to such decision give a written notice to the other party through the Architects requiring that such matters in dispute be arbitrated upon. Such written notice shall specify the matters which are in dispute and such dispute or difference of which such written notice has been given and no other shall be and is hereby referred to the arbitration and final decision of a single Arbitrator being fellow of the Indian Institute of Architects to be agreed upon and appointed by both the parties or in case of disagreement as to the appointment of a single Arbitrator, to the arbitration of the Arbitrators being both fellow of the Indian Institute of Architects one to be appointed by each party, which Arbitrators shall before taking upon themselves the burden of Reference appoint an Umpire.

The Arbitrator, the Arbitrators or the Umpire shall have power to open up, review and revise any certificate, opinion, requisition or notice, save in regard to the

excepted matters referred to in Clause No. 35 and to determine all matters in dispute which shall be submitted to him or them and of which notice shall have been given as aforesaid.

Upon every or any such reference the cost of and incidental to the reference and Award respectively shall be in the direction of the Arbitrators or Arbitrator or the Umpire who may determine the amount thereof, or direct the same to be taxed as between Attorney and Client or as between party and party and shall direct by whom and to whom and in what manner the same shall be borne and paid. The submission shall be deemed to be a submission to Arbitrator within the meaning of Indian Arbitration Act 1940 or any statutory modification thereof. The award of the Arbitrator or Arbitrators or the Umpire shall be final and binding on the parties. Such reference except as to the withholding by the Architects of any Certificates under Clause 32 to which the Contractor claims to be entitled shall not be opened or entered upon until after the completion or alleged completion of the works or until after the practical cessation of the works arising from any cause unless with written consent of Employer and the Contractor. Provided always that the Employer shall not withhold the payment of the Interim Certificate nor the Contractor except with the consent in writing of the Architects in any way delay the carrying out of the works by reason of any such matter, question or dispute referred to arbitration but shall proceed with the work with all due diligence and shall until the decision of the Arbitrator or Arbitrators or the Umpire be given abide by the decision of the Architects and no Award of the Arbitrator or Arbitrators or the Umpire shall relieve the Contractor of his obligation to adhere strictly to the Architect's Instructions with regard to the actual carrying out of the works. The employer and the Contractor hereby also agree that arbitration under this Clause shall be a condition precedent to any right or Action under the Contract.

5. The learned Single Judge has noted that the respondent herein i.e. the claimant, had addressed a letter dated 13.10.1989 to the architects as contemplated by the aforesaid arbitration Clause asking for a decision, failing which the matter would be referred to arbitration. Since the architects took no decision, on 30.10.1989, the complete statement of Claim was sent to the said consultants and thereafter the Arbitration Clause was taken recourse to. The respondent appointed an Arbitrator, and since the appellant failed to appoint the second Arbitrator, the sole Arbitrator made an award for a sum of Rs. 9,48,689/- along with interest @ 12 per cent per annum from the date of the award till the date of payment, or the date when the award was made "rule" of the Court, whichever is earlier.

6. The Learned Single Judge noticed that since the architects had been approached as per Clause 37, and there was no response from the architects, the plea of non compliance of Clause 37 by the respondent was wholly unjustified.

7. We have heard Mr. Uppal, learned Counsel for the appellant. He submits that the appellant had themselves requested the architect to fix a date for verifying

the measurements in relation to the quantum of work done by the respondent. However, there was response from the architects. He submits that on account of the inaction of the architects, for which the appellant was not responsible, the respondent straightway proceeded to nominate an Arbitrator. The mechanism envisaged under the agreement was, therefore, short circuited in as much as, the architects did not render a decision on the claims of the respondent. Only after a decision had been rendered by the architects and the respondent was dissatisfied with the same, could the respondent have sought resort to arbitration by an architect who is a fellow of the Indian Institute of Architecture and, in the event, the parties not agreeing to a sole Arbitrator, two Arbitrators who are fellows of the Indian Institute of Architecture could be nominated, one each by the parties, who should have then have appointed an Umpire.

8. Having heard the learned Counsel for the appellant, we are not satisfied that there is any merit in this appeal, and the appellant has not been able to point out any infirmity or illegality in the impugned judgment. The conduct of the architects in not taking a decision on the claims made by the respondent could not have defeated the right of respondent to seek arbitration of its claims under the agreement. The silence of the architects was also communicative of their intent not to take a stand on the claims of the respondent. In that eventuality, obviously, the respondent felt aggrieved and sought to invoke arbitration vide communication dated 22.02.1990. While nominating an Arbitrator the respondent in its notice dated 22.02.1990 stated as follows:

2. That though more than a period of ten weeks have completed thereafter but no decision in the form of a final certificate or otherwise has been received from the Architects. This tantamounts to a situation that the said Architects have no decision to make in the form of final certificate or otherwise and it is equivalent to withholding of certificate to which my clients are otherwise entitled.

3. That acting in terms of Clause 37 of the contract in furtherance to my clients earlier letters, I, on behalf of my clients invoking the same appoint Shri J.R. Bhalla, Architect, 5, Sunder Nagar, New Delhi, as an Arbitrator on behalf of my clients for adjudication of disputes/claims which were incorporated in and enclosed to my clients aforesaid letters and are again enclosed herewith in annexure "A". While appointing Shri J.R. Bhalla, as an Arbitrator on behalf of my clients, I also seek your concurrence and request you to agree to his appointment as sole Arbitrator and in case you have also to exercise your option, the same may be exercised within 15 days of the receipt of this letter/notice as contained u/s 9 of Arbitration Act.

9. In our view the aforesaid constitutes full and complete compliance, by the respondent, of the arbitration agreement between the parties. It is clear that the appellant was not interested in having the claims of the respondent settled through arbitration, and at their own peril chose not to nominate an Arbitrator in terms of agreement. The appellant fails to explain as to why it chose not to appoint its own Arbitrator, or even when the arbitration proceedings were going

on before the single Arbitrator appointed by the respondent, why it chose not to participate in the arbitration proceedings. Consequently, we find no reason to interfere with the judgment of Learned Single Judge. Accordingly, the appeal is dismissed.