

(2007) 11 DEL CK 0036

In the Delhi High Court

Case No : CS (OS) No. 1575A of 2005 and is No. 11088 of 2003

Milan Kumar Mondal and Another

APPELLANT

Vs

Deshbandhu Chittaranjan Memorial Society (Regd.) and
Another

RESPONDENT

Date of Decision : 01-11-2007

Acts Referred:

Arbitration Act, 1940 — Section 14, 20, 28, 3, 33
Limitation Act, 1963 — Article 137

Citation : (2007) 11 DEL CK 0036

Hon'ble Judges : Sanjay Kishan Kaul, J

Bench : Single Bench

Advocate : Savita Malhotra, for the Appellant; D.P. Mukherjee and Nandini Sen,
for the Respondent

Final Decision : Dismissed

Judgement

Sanjay Kishan Kaul, J.

IA No.11088/2003 (Under/Section 33 of the Arbitration Act, 1940)

1. An agreement dated 21.12.1989 was executed between the parties whereby the petitioners were engaged as contractors by respondent no.1 for construction of the building of the Desh Bandhu Chittaranjan Memorial Society known as Chittaranjan Bhavan at C-405, A, Chittaranjan Park, New Delhi - 110019 for respondent no.1.

2. It is the case of respondent no.1 that the contractor left the site work half way, but it is also not in dispute that the matter was re-negotiated in July, 1991 for completion of the work. The disputes between the parties again arose and in view of the existence of the arbitration clause in the contract between the parties, a petition being CS(OS) No.2752 of 1992 was filed u/s 20 of the Arbitration Act, 1940 ("the said Act" for short) by the petitioner in July, 1992.

3. The Petition was allowed on 10.05.1994 by appointing Sh. Parijat Sinha,

Advocate as the arbitrator to enter upon reference and adjudicate upon the disputes between the parties. The Order also provided for the arbitrator to make and publish the award within four months from the date of the reference of disputes to the arbitrator and gave liberty to respondent no.1 to also submit their disputes to the arbitrator.

4. The arbitrator, Mr. Parijat Sinha, however, expressed his inability to conduct the arbitral proceedings resulting in filing of an application in the earlier suit for appointment of a substituted arbitrator. In terms of the Order dated 09.09.1998, Mr. N.N. Chakraborty was appointed as the sole arbitrator. The said arbitrator after entering upon reference made and published the Award dated 09.07.2003 allowing part claims of the petitioners. The respondent no.1 aggrieved by the same, has filed the present objections.

5. The principal grievance of respondent no.1, as advanced by learned Counsel, is that the arbitrator has misconducted himself in law and in the proceedings and on that account alone, the Award is liable to be set aside apart from the objections on the merits of the Award. In this behalf, learned Counsel emphasized that though the Order was passed on 09.09.1998 appointing Mr. N.N. Chakraborty as the arbitrator, the first time when the arbitrator issued a letter calling upon the parties to file the pleadings was on 23.11.1999. It is thus the submission of the learned Counsel that on the expiry of the period of four months of the Order, the Arbitrator had become functus officio and had no authority to commence arbitral proceedings. In this behalf learned Counsel has also emphasized that the earlier Order dated 10.05.1994 provided for the arbitrator to make and publish the Award within four months after entering upon reference and even though undisputedly such a direction had not formed a part of the Order dated 09.09.1998 appointing Mr. N.N. Chakraborty as the arbitrator, the later Order was only for substitution of the name of the Arbitrator. It is thus the submission of the learned Counsel that the said stipulation would equally apply to Sh. N.N. Chakraborty apart from the fact that same is in accordance with Clause 3 to the First Schedule read with Section 3 of the said Act.

6. Learned Counsel further contends that even though respondent no.1 joined the arbitral proceedings, there was never any waiver of the objection in this behalf. In response to the notice of the arbitrator dated 23.11.1999, the petitioners filed their Statement of Claim only on 08.12.2000, which is after more than a year of the notice. Respondent no.1 filed the reply to the Statement of Claim along with counter claim on 07.05.2001. The arbitral proceedings were commenced only on 16.02.2002. The minutes are stated to have also been recorded subsequently behind the back of the parties, though undisputedly, the presence has been recorded by the parties by signing the presence sheets in this behalf. The Award was reserved on 04.08.2002 and was delivered only on 09.07.2003.

7. A further grievance made by learned Counsel for respondent no.1 is that neither of the parties has filed an appropriate application u/s 14 of the said Act

and thus there was no occasion for the Award to be filed in the Court. However, contrary to the mandate of Section 14 of the said Act, the arbitrator suo moto filed the Award in Court on 06.10.2005.

8. In order to appreciate the aforesaid contentions, the arbitral record has been perused. The letter dated 23.11.1998 of the arbitrator called upon the parties to file certified copies of the agreement between the parties and to file the claims and the documents within the stipulated period of time. In the said letter, there is no specific reference to the arbitrator entering upon reference. In the records, nothing has been found whereby the respondent no.1 took any objection about the arbitrator proceeding with the arbitration after the expiry of four months or even raising any objection about non receipt of the proceeding sheets. Learned Counsel states that there were oral submissions made in this behalf.

9. Learned Counsel for respondent no.1 referred to the judgment of the Division Bench of the Patna High Court in *Lakhmir Singh Vs. Union of India (UOI) and Another*, *Kamta Pd. Nigam Vs. Ram Dayal and Others*, *Hari Shankar Lal Vs. Shambhunath Prasad and Others*, and *State of Punjab Vs. Hardyal*, .

10. A perusal of the judgments shows that the legal position which emerges from these judgments is that the Court is not devoid of the power u/s 28 of the said Act to exercise the discretion to extend the time period for making an award even after the Award has been made, but such discretion has to be exercised in a judicial manner.

11. Learned Counsel for the petitioners on the other hand referred to judgment of the Supreme Court in *Nagar Palika, Mirzapur Vs. The Mirzapur Elect. Supply Co. Ltd.*, wherein it has been held that the conduct of the parties is a major factor to waive the extension of time given by the Court and the time should be taken as having been extended. Learned Counsel also referred to the judgment relied upon by learned Counsel for the respondent no.1 in *State of Punjab v. Hardyal* (supra) to contend that this Court is not devoid of the power though the power must be exercised judicially. Learned Counsel also referred to the judgment of the learned Single Judge of this Court in *Compagnie de Compagnie De Saint Gobain Vs. Fertilizer Corporation of India Ltd.*, wherein it was held that the Court has suo moto power to move in the matter of enlargement of time for making an Award u/s 28 of the said Act and since there was voluminous documentary material, oral evidence and various other complicated issues, which had to be tackled and the arbitrator had spent considerable time over the matter and had written a well considered award, there was no reason why such power should not be exercised. The question to be considered thus in the facts of the present case is as to whether the discretion which has been vested with the Court u/s 28 of the said Act ought to be exercised in the given facts of the case. Section 28 of the said Act reads as under:

28. Power to Court only to enlarge time for making award -

1) The Court may, if it thinks fit, whether the time for making the award has

expired or not and whether the award has been made or not, enlarge from time to time, the time for making the award.

2) Any provision in an arbitration agreement whereby the arbitrators or umpire may, except with the consent of all the parties to the agreement, enlarge the time for making the award, shall be void and of no effect.

12. An important aspect in the present case is that though there are time lags between the appointment of the arbitrator, the arbitrator writing for the first time to the parties, the petitioners filing their Statement of Claim and even respondent no.1 filing its reply and counter claim, the record does not show that any of the parties has raised any objection about such delay in arbitral proceedings. The Order appointing the Arbitrator dated 10.05.1994 specifically made a direction to make and publish the Award within four months. Such a direction was absent in the Order of the appointment of the present arbitrator dated 09.09.1998. This would, however, make no difference in view of the mandate of Clause 3 to the First Schedule read with Section 3 of the said Act. The arbitral proceedings show that the parties joined the proceedings, appeared in all the proceedings, noted their presence and contested the matter till the end which resulted in an Award. Even though there are time lags between the intermittent periods, I am of the considered view that it is a fit case where the time period ought to be extended u/s 28 of the said Act and the Award be examined on the merits of the case.

13. It cannot be lost sight of that the dispute between the parties pertains to an agreement dated 21.12.1989 for construction of Society building of respondent No. 1. The first dispute pertains to the petitioners filing an application u/s 20 of the said Act in the year 1992. Considerable period of time elapsed even thereafter till finally the matter of appointment of the arbitrator could be settled by the Order dated 09.09.1998. It would be travesty of justice if the clock was to be put back and it was to be presumed that the parties were not at ad idem for adjudication of their disputes by the process of arbitration. The conduct of the parties has been to the contrary. I am thus of the considered view that the period for making of the award be directed to be suitably extended and such power, as observed in the aforesaid judgments, can be exercised suo moto.

14. A second grievance made by learned Counsel for the respondent no.1 relates to the non supply of the proceeding sheets on the date when the proceedings were held. Once again this is clearly an after thought as no such grievance had been made at the relevant stage of time. The parties marked their presence and left and the proceedings were subsequently supplied to the parties. Even after the supply of the proceedings, there has been no grievance made in this behalf.

15. The last aspect of the legal objections raised by learned Counsel for respondent no.1 arises from the failure of either of the parties to seek filing of the Award in Court by moving an application u/s 14 of the said Act and the Arbitrator having suo moto filed the Award in Court on 06.10.2005.

16. Learned Counsel for respondent no.1 submits that such a course of action has not been conceived in the said Act and has referred to the judgment of the Supreme Court in Patel Motibhai Naranbhai and another Vs. Dinubhai Motibhai Patel and others, in this regard. In view of the facts of that case, none of the parties took steps to move an application u/s 14 of the said Act and after a lapse of six years, one of the parties requested the arbitrator to file the Award in Court. On such a request being made, the arbitrator filed the award in Court and also moved an application u/s 14 of the said Act to make the award Rule of the Court. Such a course of action was frowned upon by the Supreme Court as it showed undue interest taken by the arbitrator. The most important aspect is contained in para 9 of the said Judgment where it has been observed that Article 137 of the Limitation Act, 1963 would come in the way of any action in pursuance to such an Award since the Award has been filed beyond the period of three years from the date of making of the award.

17. In the facts of the present case, the arbitrator has suo moto filed the Award. There is no prohibition in law in doing so. The Award has not been filed at the behest of any party. The Award has been filed within a period of three years from the date of making of the Award. I am thus of the considered view that no legal infirmity can be found in the same.

18. Now coming to the aspect of the merits of the Award, it will be seen that the petitioners made various claims but only Claim no.1 for the balance price, Claim no.2 on account of escalation of building materials and labour during the contract period, Claim no.3 on account of idle charges for centering materials, other tools, plant and machinery and the Claim no.8 for interest were allowed.

19. Insofar as Claim no.1 is concerned, the Award is based on the differential between the gross value of the work done by the petitioners up to the 13th running bill and the amount found due to the petitioners in the 14th running bill, being an amount of Rs.1,37,020/-. This amount has thus been awarded on the basis of the running bills themselves and can hardly be faulted.

20. Insofar as Claim no.2 is concerned, the grievance of learned Counsel for defendant no.1 is that there was no provision for escalation and, in fact, such escalation was specifically prohibited.

21. A perusal of the reasoning for the Award of the said claim would show that there is a finding reached that the work was held up due to the delay on the part of respondent no.1 in releasing structural drawings, non availability of funds, electrical layout, issue of cement and steel. Respondent no.1 in May, 1990 had admitted vide a document that they were not in a position to clear the dues of the petitioners to the extent of Rs 4 lakh. The arbitrator found that even in the absence of any provision in the agreement for such reimbursement, if the petitioners were pushed to face the price escalation due to delays and lapses on the part of respondent no.1, the amount must be so awarded.

22. Once again, I find the reasoning not faulty as the opposite party cannot be

permitted to suffer as a consequence of the party at fault. Once there are deficiencies and delays in the compliance of obligations by respondent no.1, the petitioners have to be compensated for the consequences thereof irrespective of the absence of any clause for escalation.

23. Claim no.3 has been awarded partially for an amount of Rs 21,159.36. Award of this claim is based on the notice of the petitioners that the shuttering was lying idle due to delays on the part of respondent no.1 for the specific period mentioned therein and only to that extent the Award has been made.

24. Insofar as claim no.8 is concerned, the Award is at the rate of 12 per cent from the date of appointment of the arbitrator i.e. 09.09.1998 till the date of actual payment. The interest cannot be said to be unreasonable.

25. Further, it cannot be lost sight of that this Court does not sit as a court of appeal to go into the findings arrived at by the arbitrator. It is not for this Court to interfere with an award merely on the ground that it would have come to a different conclusion than the one arrived at by the arbitrator as reasonableness is not a matter to be considered by the Court nor is appraisal of evidence. In this behalf, the observations of the Supreme Court in Food Corporation of India Vs. Joginderpal Mohinderpal, and Gujarat Water Supply and Sewerage Board Vs. Unique Erectors (Gujarat) (P) Ltd. and Another, can be usefully referred to. The Supreme Court has, in fact, observed that even in respect of interpretation of a contract, the Court cannot substitute its own mind with that of an arbitrator as observed in Sudarsan Trading Co. Vs. Government of Kerala and Another, .

26. It is pointed out learned Counsel for the petitioners that the arbitrator is a retired Chief Engineer from MTNL. The arbitrator is a technical person. It has been held in DDA v. Bhagat Construction Co. (P) Ltd. and Anr. 2004 (3) Arb.LR 548 that where a technical member goes into the matter of such a dispute, the Court should not substitute its own view with that of an arbitrator.

27. For all the aforesaid reasons, I find no merit in the application and the same is dismissed. CS(OS) No.1575A/2005

(1) In view of is No.11088/2003 being dismissed, the Award dated 09.07.2003 of the sole arbitrator Mr. N.N. Chakraborty is made Rule of the Court. The petitioners shall also be entitled to costs of the suit proceedings quantified at Rs7,500/-.

(2) Decree sheet be drawn up accordingly.