
(2011) 11 DEL CK 0122
In the Delhi High Court
Case No : FAO (OS) 40 of 2008

M/s Desh Bandhu Chittaranjan Memorial Society	APPELLANT
Vs	
M/s. Milan Kumar Mondal and Others	RESPONDENT

Date of Decision : 28-11-2011

Acts Referred:

Arbitration Act, 1940 — Section 14, 17, 20, 28

Citation : (2011) 11 DEL CK 0122

Hon'ble Judges : S.P. Garg, J; Pradeep Nandrajog, J

Bench : Division Bench

Advocate : D.P. Mukherjee, for the Appellant; Sunita Malhotra, for the Respondent

Final Decision : Dismissed

Judgement

Pradeep Nandrajog, J.—A petty sum of Rs. 1,37,020/-+ Rs. 1,53,482.59 + Rs. 21,159.36 = Rs. 3,11,661.95 has been troubling the appellant and the respondents are anxiously waiting for the appellant's troubles to be over, not by relief being granted but by telling the appellant to stop litigating any further. The first respondent M/s.Milan Kumar Mondal was the sole proprietary firm of late Milan Kumar Mondal, whose wife, son and daughter, impleaded as respondents No.2, 3 and 4 was awarded a work contract by the appellant. Execution of the work got delayed and as per the award the delay was attributable to the appellant. Milan Kumar Mondal was a petty contractor and after completing the works submitted a final bill and also sought compensation for escalation in the price of labour and material, idle tools, plant and machinery and idle labour. The bill not being settled he sought for arbitration as per the arbitration clause. The appellant refused to appoint an arbitrator. Milan Kumar Mondal filed a petition u/s 20 of the Arbitration Act 1940. Sh.Parijat Sinha Advocate was appointed as an arbitrator who refused to enter upon reference. He was replaced by Sh.N.N.Chakravorty who published the award on 9th July 2003 and thereafter filed the award in Court since neither party took steps contemplated by Section

14/17 of the Arbitration Act 1940. But, before he did so, the appellant on its own filed objections to the award by and under an interim application in the petition filed by Milan Kumar Mondal u/s 20 of the Arbitration Act 1940 which had already been disposed of.

2. Be that as it may, the objections were segregated and numbered as a suit and vide impugned order dated 1.11.2007 the objections have been dismissed.

3. The first objection to the award was that the learned arbitrator had published the same after 4 months of having entered upon reference. We note that the appellant participated in the arbitration proceedings till final arguments. The learned Single Judge has held that even ex post facto time for pronouncing the award can be extended by a Court in exercise of the power u/s 28 of the Arbitration Act 1940.

4. We agree. A party having participated without demur before an arbitrator and having taken a chance cannot turn around and question the award on the ground of delay.

5. Second objection is that the arbitrator could not have suo moto filed the award in this Court. From where is this law developing? We do not know. Law gives a right to either party to a reference to seek a direction to the arbitrator to file the award in Court. Law equally permits an arbitrator to suo moto file the award in Court. We clarify. We are speaking of arbitration under the Arbitration Act 1940.

6. On merits, we note that the arbitrator has allowed claim in sum of Rs. 1,37,020/- as against Rs. 1,52,180.40 claimed by the contractor for balance amount due for work done as per contract.

7. The learned arbitrator has found that as per the 13th running bill work executed was in sum of Rs. 17,36,201.13 and noting that work finally executed was in sum of Rs. 18,73,221.13 has held that amount due would be Rs. 18,73,221.13 - Rs. 17,36,201.13 = Rs. 1,37,020/-. The learned Single Judge has upheld the award. Except for repeatedly urging before us that the finding is wrong, learned counsel for the appellant could take the argument no further.

8. We find that the arbitrator has discussed the contractor's letter dated 25.2.1992 (C-23) under which final bill was submitted and has noted that the appellant had queried whether this was the final bill. Contractor sent reminders on 30.3.1992 (C-24B) and 20.6.1992 as also on 30.6.1992 (R-2 and P-165). The learned arbitrator has found that there was no evidence to suggest further work not being done after the 13th running bill.

9. The findings returned are a finding of fact and cannot be interfered. We highlight that neither a perversity nor a material evidence being ignored by the arbitrator is the plea urged.

10. Claim No.2 in sum of Rs. 1,92,000/- has been allowed in sum of Rs. 1,53,482.59 on the ground that the appellant delayed execution of the work

evidenced by C-23 and R-2. RBI cost indices have been taken into account to determine escalation.

11. Delay is a matter of fact and thus said finding binds the parties. We highlight that learned counsel for the appellant has not questioned the said factual finding. Learned counsel urges that there is no stipulation in the contract to pay escalation.

12. Learned counsel concedes that there is no prohibition in the contract to claim escalation. Learned counsel concedes that there is no clause in the contract which recompenses escalation as per agreed formula. Law is clear. If contract between the parties does not prohibit a claim for escalation and if there is delay by the owner of the works, the contractor would be entitled to escalation.

13. Claim No.3 in sum of Rs. 60,000/-for idle tools and plants has been allowed in sum of Rs. 21,159.36 disallowing the balance for the 9 months period of delay when work had totally stopped. The reason given by the arbitrator for denying the same to the contractor is his opinion that nobody would keep idle plant and machinery for such a long period. But, for such period when work progressed, albeit slowly, and the same being attributable to the appellant, the claim has been allowed.

14. It is settled law that damages on account of delay requiring recompense for tools, plant and machinery can be entertained in a work's contract dispute.

15. We find no merit in the appeal which is dismissed. We do not impose any cost, which we would otherwise have for the reason the appellant has deposited in this Court the decretal amount, and we highlight that since the award was made a rule of the Court, a decree was prepared. We direct said amount to be paid by means of a cheque drawn in the name of the second respondent Smt.Bansuri Mondal, the wife of deceased Milan Kumar Mondal since learned counsel for the respondents states that she has been so instructed by all respondents. It would be no use to award costs as the respondents would have to further litigate to recover the same. Needless to state interest accrued on the deposit made by the appellant shall be to the benefits of the respondent and would be included in the cheque drawn in the name of Smt.Bansuri Mondal.

16. The appeal is dismissed. Registry is directed to comply with the directions in para 15 above.

17. No costs.