

(2001) 03 DEL CK 0067

In the Delhi High Court

Case No : IA 3310/98 and Suit No. 900-A/97

M/s Enkay Construction Company

APPELLANT

Vs

Delhi Development Authority and Another

RESPONDENT

Date of Decision : 16-03-2001

Acts Referred:

Citation : (2001) 4 AD 407 : (2002) 1 RAJ 407

Hon'ble Judges : Jiwan Dass Kapoor, J

Bench : Single Bench

Advocate : Mr. Debasish Moitra, for the Appellant; Mr. V.K. Sharma, for the Respondent

Judgement

J.D. Kapoor, J.—Through is No. 3310/98 objections have been filed by the respondent against making the award dated 23rd March, 1997 Rule of the Court.

2. Broad principles governing the acceptance, rejection, remittance of the award have been laid down by the Supreme Court in some of the following cases :-

In Himachal Pradesh State Electricity Board Vs. R.J. Shah and Company, where the dispute before the Arbitrators clearly related to the interpretation of the terms of the contract it was held to be not a ground for getting aside the award or remitting the same. It was observed that when the Arbitrator is required to construe a contract then merely because another view may be possible the Court would not be justified in construing the contract in a different manner and then to set aside the award by observing that the arbitrator has exceeded the jurisdiction in making the award. To determine whether the arbitrator has acted in excess of jurisdiction or not the Supreme Court has laid the criteria that what has to be seen is whether the claimant could raise a particular dispute or claim before an arbitrator and if the answer is in the affirmative then it is clear that the arbitrator would have the jurisdiction to deal with such a claim and on the other hand if the arbitration clause or a specific term in the contract or the law does not permit or give the arbitrator the power to decide or to adjudicate on a

dispute raised by the claimant or there is a specific bar to the raising of a particular dispute or claim then any decision given by the arbitrator in respect thereof would clearly be in excess of jurisdiction.

3. In *Goa, Daman and Diu Housing Board Vs. Ramakant V.P. Darvotkar*, it was held that Section 16 empowers the Court to remit the award to the Arbitrator for reconsideration only in three cases specified therein. Clause(c) of Section 16(1) provides that the award shall be remitted to the Arbitrator by the Court where an objection to the legality of the award is apparent on the face of it. Unless the Arbitrator is guilty of misconduct for his failure to give reasons or there is anything to show that the awards have been improperly procured and there is allegation on the finding that the arbitrator was biased or unfair or he has not heard both the parties or he has not fairly considered the submissions of the parties in making the awards in question, the award cannot be set aside or remitted.

4. In a recently decided case *M/s. Arosan Enterprises Ltd. Vs. Union of India and Another*, the Supreme Court has taken into consideration almost every possible eventuality and has held that reappraisal of evidence by the Court is not permissible and as a matter of fact exercise of power by the Court to reappraise the evidence is unknown to proceedings u/s 30 of the Arbitration Act. In the event of there being no reasons in the award, question of interference of the Court would not arise at all. In the event, however, there are reasons, the interference would still be not available within the jurisdiction of the Court unless of course, there exists a total perversity in the award or the judgment is based on a wrong proposition of law. In the event however two views are possible on a question of law as well, the Court would not be justified in interfering with the award. The common phraseology "error apparent on the face of the record" does not itself, however, mean and imply closer scrutiny of the merits of documents and materials on record. The Court as a matter of fact, cannot substitute its evaluation and come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. If the view of the arbitrator is a possible view the award or the reasoning contained therein cannot be examined.

5. In *Rajasthan State Mines and Minerals Limited Vs. Eastern Engineering Enterprises and Another*, it was held that in a case of non-speaking award, the jurisdiction of the Court is limited and the award can be set aside if the arbitrator acts beyond his jurisdiction.

6. Main gravamen of the contentions of the counsel for the respondent is that the award is based on non-evidence, is without jurisdiction being beyond the terms of agreement and is, Therefore, liable to be set aside. Let us examine the award in respect of these claims that have been agitated on the ground of non-jurisdiction or non-evidence.

7. CLAIM NO.1.

This claim is on account of refund of rebate deducted. There are three categories

of rebate claimed by the petitioner. One is @ 1 1/2% on estimated cost if the payment of the running bills is made every month regularly. The second is 1 1/2% of rebate on estimated cost if the final bill is paid within 6 months from the date of completion of the work and the last is @ 2% rebate on account of extra/substitute if it is passed and paid within 90 days from the date of execution.

8. The learned counsel has pointed out an error of fact in the finding of the arbitrator with regard to the bill Exhibit R-1 out of the 48 bills for the period from 7.4.1981 to 11.6.1987. According to the Arbitrator there was no monthly payment on March, 1983, May, 1983, December, 1984, February, 1985, April, 1985, May, 1985, July, 1985 & September, 1985 i.e. up to the 47th bill whereas there were no monthly payments for nine months and secondly between 47th & 48th bills no payments were given. The payment made is only for Rs.1,30,822/-. After calculating the rebate by mathematical process the Arbitrator came to the conclusion that the respondent was liable to pay Rs.21,407.15. Similar calculations were made in respect of other kinds of rebate.

9. The counsel for the respondent wants this Court to re-appraise, re-assess and re-evaluate the calculations as well as the findings of the fact, in as much as the Arbitrator has in the award indicated that up to 47th bill payments were not made for certain months. The number of these months comes to eight months whereas immediately two payments were made on October, 1982 and thus payments for the nine months were not made. Again the mathematical calculation by the Arbitrator by way of multiplying these amounts of the rebate payable for 47th bill by nine months and dividing the same by 47 months has also been questioned.

10. As is apparent the Court does not sit in Appeal nor is it required to re-appraise or re-evaluate the evidence or the mathematical calculation etc. It is not such an act which is either beyond the terms of the agreement or which amounts to misconduct. Though the claim of the petitioner in this regard was Rs. 2,25,000/- but the Arbitrator has awarded only Rs.1,27,301/- which itself shows that the Arbitrator had applied his mind and based the findings on the material and the evidence available with him.

11. The Court is not supposed to go into such ambiguities nor to scrutinise the award as precisely as mathematical precision, otherwise the very object of the provisions of the Arbitration Act would stand frustrated. Again the objection that on the one hand the Arbitrator has referred to the term of the agreement to the effect that there would be no cutting if the work is less than Rs.25,000/- in a particular month and on the other hand has observed that between 47th & 48th bill for 1 1/2 year there was no payment where the work done was for Rs.1,30,822/- and, Therefore, the average monthly bill was less than Rs.25,000/- and as such the respondent was entitled to release the payment. I am afraid this contention is again of no avail. These are such details which are beyond the purview of the Court while scrutinising the award. I, Therefore, find no merit in the objection with regard to this claim and hereby affirm it.

12. CLAIM NO.2.

This claim was on account of payment of soft soil instead of hard soil. According to the respondent the Arbitrator has committed an error by allowing the award in this regard as he has not given any reasons for rejecting the report submitted by the respondent as to the soil profile. According to this report the soil was soft and loose by and large. The Arbitrator has observed that the respondent's witness states that the site was inspected by the Executive Engineer Along with the contractor and the site soil was found ordinary soil only. It was on this statement of the witness of the respondent that the Arbitrator observed that in the agreement the item 1.1 was for earth work in (a) soft/loose soil only and it does not say ordinary soil. The Arbitrator has interestingly based the award upon the record of the respondent (R-47) which states that the sub-strata consists of yellowish silty and loose to medium dense state up to the depth of exploration. Presence of "kankar" was also observed in certain spots. Term of the agreement was rightly construed by the Arbitrator and that too on the basis of the report submitted by the respondent. Again the finding of fact does not project any misconduct on the part of the Arbitrator having gone beyond the terms of the agreement. The objection appears to be frivolous and wholly untenable. this claim affirmed.

13. CLAIM NO.3:

Under this claim the petitioner/claimant has claimed a sum of Rs.4.5 lacs on account of payment for damage due to disallowing payment of secured advances after two months. It is contended by the learned counsel of respondent that one of the components is "Development - in the sum of Rs.9,422/-" and such an item could not be considered for secured advance but the learned Arbitrator has worked out the claim to the sum of Rs.4.5 lacs. It is further contended that the procedure adopted by the Arbitrator with regard to this item is unintelligible and is difficult to accept. Still the fact remains that the claim of the petitioner on this count has not been included as the amount towards this item if added in the claim of the petitioner would exceed the total amount awarded by the Arbitrator on this count. Even if the Arbitrator had not been clear on this aspect of the claim this Court cannot go into such details. Moreover the claim awarded by the Arbitrator is less than the claim preferred by the petitioner which included this claim on this count. As such it would be an exercise in futility and no useful purpose would be served to go into minute details of the calculations undertaken by the Arbitrator in its award regarding this item. However the contention that the reasons are not discernible from the award is also of no avail as the finding of fact even erroneous or based on erroneous reasoning is not open to challenge before the Court. By no stretch of imagination such act of the Arbitrator can come within the purview of misconduct.

14. The perusal of the award shows that while allowing the item viz. "stone aggregate" whereas claim in respect of the "Development" was declined, the Arbitrator has undergone an exercise of calculation which does not suffer from

any infirmity or ambiguity. Thus the objections meaningless has no force and the award under this claim is hereby confirmed.

15. CLAIM NO. 5-B

The sole objection as to this award is that the Arbitrator has given his finding as to the claim of the petitioner without any evidence and merely on the surmise and conjecture of the claim that due to the delay in supply of the doors and windows by the respondent he has suffered losses on account of increase in the price of the glass panes.

16. However the perusal of the award shows that the Arbitrator has relied upon the date of start of the work which was 22nd March, 1981 and the date of completion which was 21st March, 1982 whereby the shutters were to be fixed by 70% of 12 months say 8.5 months from 22nd March, 1981 say by December, 1981 and the contractor should have been asked to take all the doors and windows so that he could have also purchased glass but this is not so. Even if it is assumed that the respondent had given the final bill and had caused delay but it was again incumbent upon the petitioner to show as to the amount of losses he suffered for the delay in supplying the doors and windows on the part of the respondent. It was also required by the Arbitrator to call upon the petitioner to produce the evidence. Award in this regard seems to have been made on surmises and conjectures. Since this award is based upon non-evidence the same cannot be upheld and is set aside.

17. CLAIM NO.5(D):

Same is the position with regard to this claim as the learned Arbitrator allowed this claim without production of any of the receipts vide which the extra or increased cartage for bricks and tiles was paid. Even otherwise no reasons have been furnished by the Arbitrator while granting this award. Rather the reasons for this award are that brick tiles were required later and even earlier bricks which were more in number had to be taken by the claimant. Therefore 75% of the total bricks and the 100% of the total tiles were there. This observation of the learned Arbitrator is highly unintelligible and does not lead anywhere. The award with respect to this claim is without any basis and is accordingly set aside.

18. CLAIM NO.5(E):

The petitioner claimed Rs.70,000/- due to increase in the rates of coarse sand. The petitioner had been requesting the respondent by sending several communications to supply the coarse sand in time but the stand taken by the respondent is that the petitioner himself was responsible for the delay as he had given undertaking not to claim the damages. The respondent has relied on documents R-19, R-15, R-20 & R-14. However these documents nowhere suggest that the petitioner had right to claim the increase in rates of coarse sand due to non-supply of the same by the respondent within the stipulated period. I have perused the claim and find that the Arbitrator has not allowed the full claim of

the petitioner by observing that though the petitioner has claimed the amount on account of delay on the part of the respondent from March, 1983 whereas he was entitled to claim the same from July, 1983. I do not find any error of infirmity in respect of this claim. The objection is groundless. The award in this regard is confirmed.

19. CLAIM NO.5(G), (H) & 6:

As regards these claims the perusal of the award shows that the petitioner has relied upon certain documents namely C-132, 135, 136 and the respondent has relied upon the documents R-18, 15, 20 & 14 by coming to the conclusion as to the difference of rates of bricks in market and as per the rates in Delhi Administration. So far as claim No.6 is concerned it is the nature of work which was in question and not the rates of bricks etc. The claimant that he was entitled to difference in market rate and Delhi administration rates during the period of contract. The petitioner was awarded the damages payable due to market rates of the work executed after stipulated date of completion. This claim was awarded for the failure of the obligation cast upon the respondent to get stipulated material in time, delay in decision and drawings and failure to make regular payments. Rather the respondent granted extension of time and his contention that revision of rates was not permissible under the terms of the agreement is devoid of merit as calculations made by the Arbitrator with regard to this claim do not involve the difference of rates of bricks and pertain to overall work executed after stipulated date of completion.

20. Since these are two distinguishable and different items so there is no question of duplication. The objection is groundless.

21. As regards claim No.5(G) again the Arbitrator has awarded the amount on account of increase in rates of flooring due to increase in prices of material. However the same is the contention with regard to 5(G) as it pertains to different item namely the flooring. The Arbitrator has based his finding on the basis of the documents namely C-50 and Annexure-019.

22. CLAIM NO.21:

It is contended that the amount awarded under this claim is again a duplication of the claims awarded under claim No.6, as also under claim No.5(B), D,E,G & H. The above contention has been repelled by the counsel for the petitioner.

23. The claim under claim No.21 is distinguishable from the other claims and has no duplication of claims 3, 5(B,D,E,G & H) and no fault can be found with the findings of the Arbitrator in this regard as damages or loss on account of individual item which is required for construction is distinguishable from the loss or damage incurred by the parties on account of fixed overheads and profits. The petitioner was not expected to dispense with the services of the persons merely the project was delayed or the material etc. was not supplied in time. So this objection does not hold water and is hereby dismissed.

24. REMAINING CLAIMS:

The objections as to the remaining claims are only with regard to the incorrect conclusion arrived by the Arbitrator and his failure to appreciate the facts and the material on the record. The very fact that the award is reasoned on e and all the documents/material produced by the parties have been taken into consideration merely because there is some error either in calculations or conclusion is not a ground for remitting or setting aside the award. In Hindustan Tea Co. Vs. K. Sashikant Co. and Another, the Supreme Court has made the observations that where the award is a reasoned one and the objections raised against the award are such that that they cannot indeed be taken into consideration within the limited ambit of challenge admissible under the scheme of the Arbitration Act, the award is not open to challenge on the ground that the Arbitrator has reached a wrong conclusion or has failed to appreciate facts. Since under the law the Arbitrator is made the final arbiter of the dispute between the parties to challenge or reopen the findings of facts is not permissible unless the Arbitrator has completely gone beyond the terms of agreement or travelled beyond its parameters.

25. As regards the interest, the Arbitrator has awarded a lump sum amount of Rs.10,000/- for pendente lite interest. The petitioner has not challenged this by way of filing of objections. No interference is called for in this regard.

26. In the result, objections are dismissed and award is made rule of the Court in respect of all the claims except claim No. 5(D) and suit is decreed accordingly with future interest @ 18% till realisation.

27. The suit & the application stand disposed of.