
(2013) 02 DEL CK 0192
In the Delhi High Court
Case No : FAO (OS) No. 312 of 2008

Naresh Kumar Gupta

APPELLANT

Vs

M.C.D. and Another

RESPONDENT

Date of Decision : 12-02-2013

Acts Referred:

Citation : (2013) 199 DLT 279

Hon'ble Judges : Sanjay Kishan Kaul, J; Indermeet Kaur, J

Bench : Division Bench

Advocate : N.K. Khetrapal, for the Appellant; Maninder Acharya, for the Respondent

Final Decision : Dismissed

Judgement

Sanjay Kishan Kaul, J.—The appellant, a contractor, participated in the tender for construction of Municipal Staff Quarters floated in June, 1991 and was successful. Subsequently, a work order dated 16.01.1992 was issued in favour of the appellant for an estimated cost of Rs. 1,20,77,499/-. The work had to commence on 25.01.1992 and was required to be completed within a period of 18 months. The work actually commenced only on 08.01.1993 and was completed on 10.01.1997. It is relevant to note that the time for completion of the contract was extended till the aforementioned date without levy of any penalty. The appellant was required to submit a final bill in terms of clause 7 of the agreement but the undisputed fact is that no such final bill was submitted. On the other hand, the appellant claimed that it was addressing various communications to the respondent for payment of the amount, but to no avail (these letters are disputed by the respondent). The fact, however, remains that on 12.12.2001 a payment of Rs. 18,72,839/- was made to the appellant. The appellant called upon the MCD vide its letter dated 15.01.2002 requesting payments alleged to be outstanding to be released within 15 days and upon failure of the same, invoked the arbitration clause on 18.02.2002. In view of the failure in appointment of an arbitrator, the appellant filed an application u/s 11 of

the Arbitration and Conciliation Act, 1996 ("the said Act" for short) and in those proceedings, by an order dated 25.03.2003, the learned single Judge of this Court (as he then was) appointed Justice H.C. Goel (Retired) as the sole arbitrator.

2. The learned arbitrator commenced arbitration proceedings and made and published an award dated 27.03.2006. The case placed by the appellant before the learned arbitrator was that there were defaults on the part of respondent which resulted in delay of the work. The burden to prepare the final bill was sought to be put on the respondent and the appellant claimed further escalation charges as per clause 10CC of the agreement for work done beyond the original stipulated date of the contract.

3. A preliminary objection was sought to be raised on account of the bar of limitation on which decision was sought to be invited first. The respondent claimed that the application u/s 11 of the said Act itself was filed beyond the period of three years from the date of accrual of the cause of action. It is, however, pleaded that the respondent had made payments of all the bills as raised by the appellant which had been accepted in full and final settlement of its dues.

4. The parties led their evidence before the learned arbitrator and on behalf of the appellant the sole proprietor alone tendered an affidavit annexing a number of documents.

5. The material aspect for consideration is certain communications stated to have been addressed periodically by the appellant to the respondent raising the issue of the amounts outstanding to the appellant. However, the evidence on behalf of the respondents seeks to rebut the same and it has been deposed (in the affidavit of the Executive Engineer, MCD) that no such letters have been found in the records of the respondents.

6. The learned arbitrator in the award opined that as per clause 7 of the agreement, the contractor gets a period of one month for submission of the final bill and though no time period has been fixed for passing of the final bill by the Engineer In Charge, a period of one month can be taken as a reasonable period. The learned arbitrator has rejected all the claims primarily on account of them being barred by limitation though there is some discussion qua some of the claims on merits and thus in terms of the award dated 27.03.2006 all claims of the appellant stand rejected.

7. The appellant thereafter filed objections u/s 34 of the said Act. These objections have been dismissed by the learned single Judge in terms of the impugned order dated 11.03.2008. The learned single Judge has noticed that the only ground taken to assail the findings of the learned arbitrator are on the issue of the claims being barred by time and that the decision is patently illegal and contrary to the provisions of law. The learned single Judge thereafter proceeded to extract the findings of the learned arbitrator on the crucial question of whether

the cause of action to sue for the balance price arose on 10.03.1997, upon completion of the work, or when the last payment was made on 12.12.2001 and has ultimately concurred with the view of the learned arbitrator. The learned single Judge opined that even if for the sake of argument it was taken that the last payment could trigger off limitation, in the present case even such last payment was made more than three years after the previous payment was made on 31.03.1998. Thus the payment made beyond the period of limitation of three years could not trigger off the initial cause of action. [Reliance on J.C. Budhraj Vs. Chairman, Orissa Mining Corporation Ltd. and Another, , Birat Chandra Dagara Vs. State of Jharkhand and Others,]

8. The view of the learned single Judge is also that the power of construing the terms of a document are within the domain of an arbitrator. The view taken by the learned arbitrator is based on a reading of clause 7 that it was for the appellant to submit the final bill. Thus the cause of action arose when the claimant acquired the right to require arbitration in view of the various pronouncements of the Supreme Court. The demand for arbitration having been made more than four years after the work was completed, the correspondence inter se the parties, even if considered, was held not to extend limitation. The claimant was held to have waited for an extraordinarily long time and thus the claim was held to be barred by limitation.

9. The submissions made before us by learned counsel for the parties are more or less on the same pattern as before the learned single Judge. On behalf of the appellant, it is contended that the cause of action arose from the last date of payment of 12.12.2001 while learned counsel for R-1/MCD contended that it arose on 10.02.1997, one month from the date of completion of the work on 10.01.1997. Linked to this question was whether any final bill was prepared and if so when. In this behalf, clause 7 put the burden on the contractor to prepare the final bill which had not been prepared. Clause 8(A) further provides for bills to be submitted on a monthly basis. A plethora of judgments have been referred to by learned counsel for the appellant in the synopsis which we enlist as under:

1. R.K. Aneja Vs. Delhi Development Authority and Others,
2. Union of India Vs. M/s. Momin Construction Company,
3. Anant Raj Agencies Vs. D.D.A. and Another,
4. Shri Satya Prakash Vs. MCD and Another,
5. Oriental Structural Engineers Ltd. Vs. Rites and Another,
6. Puran Chand Nagia Vs. The Aviation Employees Cooperative House Building Society,
7. Swaran Singh Vs. Union of India and another,
8. Shri Satya Prakash Vs. MCD and Another,

9. Shri Satya Prakash Vs. MCD and Another,
10. Shri J.K. Anand Vs. Delhi Development Authority and Another,
11. Unity Engineers Vs. I.T.P.O.,
12. Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd.,
13. Union of India (UOI) and Another Vs. L.K. Ahuja and Co.,
14. Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority,

10. The common thread which runs through all these judgments is that the limitation commences from the date of intimation of the preparation of the final bill or the final bill being ready for payment. There is also a view that the starting point for commencement of limitation would arise when the final bill is passed and where the final bill has not been prepared, the cause of action would arise from the assertion of the claim. Learned counsel also sought to canvass a proposition that even if a contractor does not prepare the final bill, it was open to the department to prepare the final bill.

11. On the other hand, learned counsel for respondent No. 1 once again sought to rely upon the judgments primarily relied upon by the learned single Judge for the proposition that the power to construe the terms of a documents are within the domain of an arbitrator and the period of limitation would start from the date on which cause of action for arbitration accrued. The relevant judgments in this behalf are as under:

1. State of Orissa and another etc. Vs. Sri Damodar Das,
2. Panchu Gopal Bose Vs. Board of Trustees for Port of Calcutta,
3. M/s. Ispat Engineering and Foundry Works, B.S. City, Bokaro Vs. M/s. steel Authority of India Ltd., B.S. City, Bokaro,
4. BOC India Ltd. Vs. Bhagwati Oxygen Ltd.,
5. State of U.P. Vs. Allied Constructions,

12. In our view, the crucial aspect to be noticed is that the contractor did not prepare the final bill. Not only that, the appellant continued to write letters as claimed by it which do not form part of the record of respondent No. 1 and all these communications are disputed by the respondent except the communications made post the payment made on 12.12.2001. The payment made thus seem to show that there were outstandings to the appellant as otherwise there would have been no occasion to make the payment. However, if these payments had not been forthcoming, it was the bounden duty of the appellant to have invoked the arbitration clause as the appellant was claiming much larger amounts.

13. The question of the last payment of 12.12.2001 triggering off limitation

cannot be answered in favour of the appellant for the reason that this payment is actually beyond the period of three years from which the cause of action arose, which would actually be the expiry of one month period from the date of completion of the contract on 10.02.1997 in view of the terms of the contract.

14. There is also another aspect to the matter arising from these proceedings i.e. under the said Act the power of interpreting the clauses of the contract is an aspect which is wholly within the domain of the arbitrator. The learned single Judge rightly opined that there is no such absurdity in the interpretation of the learned arbitrator as could have called for the intervention of the learned single Judge. The appellant having waited for such a long period of time without taking recourse to the legal remedy available, has to suffer the consequences of the same. We find no merit in the appeal and accordingly dismiss the same leaving the parties to bear their own costs.