
(2009) 03 DEL CK 0288
In the Delhi High Court
Case No : O.M.P. No. 92 of 2009

National Installation Co.

APPELLANT

Vs

New Delhi Municipal Council

RESPONDENT

Date of Decision : 23-03-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 13(5), 16(6), 34, 34(2)

Citation : (2009) 03 DEL CK 0288

Hon'ble Judges : S.N. Dhingra, J

Bench : Single Bench

Advocate : Manoj K. Das, for the Appellant;

Final Decision : Dismissed

Judgement

Shiv Narayan Dhingra, J.—By this petition, the petitioner has assailed an award dated 8.10.2008/17.11.2008 passed by the Arbitrator in favour of the petitioner on the ground that the learned Arbitrator failed to award the amount as claimed by the petitioner and awarded lesser amount. The petitioner had made 08 claims against the respondent. The learned Arbitrator considered all the claims one by one, gave its reasons to what extent each claim was admissible and passed the award. The contention of the petitioner is that the petitioner in its claim No. 1 had claimed damages for loss of profit to the tune of Rs. 9,93,118/- whereas the learned Arbitrator awarded only Rs. 1,94,184/-. It is submitted that the learned Arbitrator committed patent error in calculating the loss of profit @ 5% of the cost of unexecuted work instead of 10% and therefore, the award was bad in law as laid down by the Supreme Court in various judgments. It is also submitted that this was an error apparent on the face of the award. The other ground taken is that the learned Arbitrator while dealing with claim No. 1 made contradictory observation that the petitioner had not been able to establish that it had arranged men, machinery and equipments to carry out the unexecuted work, which they could not do because of termination/rescission of the contract. It is stated that this observation was perverse. The learned Arbitrator despite making

this observation had allowed the petitioner a part of claim No. 6 and awarded Rs. 42,000/- as compensation/loss due to idle machinery. The other ground for challenge of award is that the learned Arbitrator committed an error in rejecting the claim No. 4 of Rs. 1,04,338/- towards extra cost of material. The learned Arbitrator did not consider the evidence and documents while dealing with claim No. 4.

2. It is settled law that while considering a challenge to the award u/s 34 of the Arbitration and Conciliation Act, the Court does not act as a Court of appeal and does not appreciate or re-appreciate the evidence to come to a conclusion, if the award passed by the learned Arbitrator was a good award on merits or not. The challenge to an award u/s 34 can be only on limited grounds.

3. The Hon^{ble} Supreme Court in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., after elaborate discussion gave the following conclusion:

74. In the result, it is held that:

(A)(1) The court can set aside the arbitral award u/s 34(2) of the Act if the party making the application furnishes proof that:

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.

(2) The court may set aside the award:

(i)(a) if the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties,

(b) failing such agreement, the composition of the Arbitral Tribunal was not in accordance with Part I of the Act.

(ii) if the arbitral procedure was not in accordance with:

(a) the agreement of the parties, or

(b) failing such agreement, the arbitral procedure was not in accordance with Part I of the Act. However, exception for setting aside the award on the ground of composition of Arbitral Tribunal or illegality of arbitral procedure is that the agreement should not be in conflict with the provisions of Part I of the Act from

which parties cannot derogate.

(c) If the award passed by the Arbitral Tribunal is in contravention of the provisions of the Act or any other substantive law governing the parties or is against the terms of the contract.

(3) The award could be set aside if it is against the public policy of India, that is to say, if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality; or

(d) if it is patently illegal.

(4) It could be challenged:

(a) as provided u/s 13(5); and

(b) Section 16(6) of the Act.

4. The petitioner has failed to show as to how the award falls within the mischief of Section 34. An Arbitrator is a judge chosen by the parties to adjudicate the disputes between the parties. An Arbitrator has a right to give his findings on the question of law and facts both and he is the final arbiter on both the questions. An award can be set aside only in those exceptional cases where the award falls in the mischief of Section 34 of the Arbitration and Conciliation Act. Merely, because the learned Arbitrator has granted profit @ 5% in respect of the unexecuted work is no ground to challenge the award. Moreover, a perusal of award would show that the contract was rescinded and the claimant had claimed compensation in respect of rescinding of contract under three heads, one - loss of profit, second - damages and third - compensation/loss due to idle machinery. The Arbitrator has been quite generous in this case and considered all the three counts separately while all these counts arise out of one single fact that the contract was rescinded. When a person's contract is rescinded and a claim of loss of profit is considered, the earning of profit can be arrived at only when machinery and material is used by the contractor. No separate compensation can be awarded for non use of the machinery which remained idle, or claim of damages because of rescission of contract can be considered where the claim for the loss of profit is considered and awarded. The petitioner had got claims under all the three heads still the petitioner seems to be unsatisfied, without any reason.

5. The Court cannot set aside an award or award under a claim because petitioner is not satisfied by what has been awarded. The Court can set aside an award only under the circumstances as mentioned in Section 34 of the Arbitration & Conciliation Act. I find that no merits in petition and this petition is liable to be dismissed.