(2014) 05 DEL CK 0073

In the Delhi High Court

Case No : FAO No. 132/2014

North Delhi Municipal Corporation — APPELLANT

Vs

Ashok Kumar Gupta — RESPONDENT

Date of Decision : 05-05-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34, 37
Interest Act, 1978 — Section 3

Citation : (2014) 05 DEL CK 0073

Hon'ble Judges : Valmiki J. Mehta, J

Bench : Single Bench

Advocate : Sunil Goel, Advocate for the Appellant

Final Decision : Dismissed

Judgement

Valmiki J Mehta, J.

C.M. No. 7893/2014 (exemption)

1. Exemption allowed subject to just exceptions. C.M. stands disposed of.

C.M. No. 7894/2014 (condonation of delay)

2. For the reasons stated in the application, delay of 51 days in filing the appeal is condoned.

C.M. stands disposed of.

FAO No. 132/2014 and C.M. No. 7892/2014 (stay)

3. This first appeal is filed u/s 37 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as ''the Act'') impugning the judgment of the court below dated 26.11.2013 by which the objections filed by the appellant u/s 34 of the Act have been dismissed.

4. The respondent was awarded a work order dated 7.10.2005 for improvement

of a drain in Lawrence Road, Industrial Area, Delhi. The work was completed on 22.9.2006 and the respondent submitted five running bills on 29.3.2006, 30.6.2006, 31.7.2006, 28.9.2006 and 27.11.2006. Out of these five bills, payments of three bills were however made on 14.7.2007 i.e. after over a year and after about 7 to 9 months of the other two bills. Respondent invoked the arbitration clause and raised various claims including the claim for interest on account of delayed payment.

5. The arbitrator passed his Award dated 22.5.2009 awarding claim of interest for the delayed payment. For the purpose of awarding interest, arbitrator has arrived at a finding of the fact that the appellant, in fact, has delayed the payment of the bills and consequently 10% interest on delayed payment was granted at Rs. 3,15,259/- i.e. upto 14.7.2007 when the payments of bills were made. The arbitrator notes the fact that appellant in fact took up a stand that it was because of paucity of funds that the payment was delayed. These aspects are also noted in para 3 of the impugned judgment and which has rejected the contention for disallowing the claim with respect to interest and which para 3 reads as under:-

3. The counsel for the petitioner has contended that in the absence of any clause making provision for interest, the grant of interest by the arbitrator was ex facie bad in law. I find no merit in the above contention. It is trite that the arbitrator has power to award interest at all the three stages, namely, pre-reference, pendent lite and post award period provided there is no provision to the contrary in the arbitration agreement and the rate of interest is not unreasonable. (See: Manalal Prabhudayal Vs. Oriental Insurance Co. Ltd.,). In the case on hand, even though there is no explicit clause for payment of interest by MCD to the contractor on the delayed payment, the agreement also does not contain any clause prohibiting the same. Further, considering the commercial nature of transaction between the parties, the rate of interest as awarded by the arbitrator can not be side to be unreasonable.

The counsel for the petitioner has next contended that since no notice under the Interest Act was served, the award of interest to the respondent No. 1 was not sustainable. In para No. 55 of the award, the arbitrator has referred to various letters of the respondent No. 1 whereby he claimed interest for the petitioner on the delayed payment. Thus the assertion of the petitioner regarding the non-service of notice under the Interest Act is contrary to the record.

The counsel for the petitioner has further contended that since the delay in the payment of running bills occurred due to paucity of funds, the arbitrator should not have awarded interest. The argument is devoid of any substance. Clause 7 of the detailed terms and conditions of contract provides that payment of interim/ running bill shall be made to the contractor within 10 days of presentation of the bill. Considering the same, the learned arbitrator rightly awarded interest to the respondent No. 1 for the delayed period by holding that the ground of non availability of funds was not tenable. In this regard, reference may also be made to M/s. Abhishek Enterprises v. Municipal Corporation of Delhi, 2007 (4) R.A.J. 252 (Delhi).

The counsel for the petitioner has further contended that after awarding a sum of Rs. 3,15,259/- towards interest on the delayed payment of running bills, the arbitrator not only granted further interest on the said amount of Rs. 3,15,259/- till the passing of award but also future interest till the date of its payment which is not permissible as it amounts to ward of interest on interest. I am unable to agree. In Oil and Natural Gas Commission Vs. M.C. Clelland Engineers S.A., , the Apex Court held that the grant of interest on the amount of interest may be termed as interest on damages or compensation for delayed payment which would also become part of the principal amount and as such, Section 3 of the Interest Act does not come into play to forbid the payment of such interest. Relying upon the above judgment, the Delhi High Court in Saraswati Construction Co. Vs. Delhi Development Authrority, , has held that after passing a decree, not only the claim upheld but the pre-suit and pendent lite interest awarded in favour of the decree holder crystallizes into the decreetal amount and the future interest becomes payable on the entire amount. In view of the law laid down in above judgments, I find no infirmity in the recourse adopted by the learned arbitrator.

The counsel for the petitioner has lastly argued that the arbitrator committed a grave error by not permitting the petitioner to cross-examine the claimant/ Respondent No. 1 and thus the impugned award deserves to be set aside. It is seen from the arbitral record that no request for cross-examination was made by the petitioner on 28.08.2008 when the copy of affidavit of the respondent No. 1 was supplied and it made a belated request for the same after the submission of written arguments by the respondent No. 1 which was declined by the arbitrator wide order dated 10.10.2008. Needless to say, if the petitioner seriously intended to cross-examine the claimant/respondent No. 1, it would have pressed for the same at the appropriate stage. Even otherwise, considering the fact that the award has been assailed mainly on the point of interest, it can not be said that the defence of the petitioner was adversely affected by the rejection of its request for cross-examination of the claimant/respondent No. 1.

In view of the above discussion, the petition u/s 34 of the Act is dismissed.

File be consigned to the record room.

(underlining added)

6. No fault can be found with the reasoning contained in the aforesaid para 3 of the impugned judgment because the court below has rightly relied upon the judgment of the Supreme Court in the case of Oil and Natural Gas Commission Vs. M.C. Clelland Engineers S.A., for grant of interest upon the amount of interest because ultimately when there is a delay in payment of principal amount, the interest which is claimed thereof really becomes a principal amount and consequently interest can be further awarded on this claim.

7. Though counsel for the appellant sought to place reliance upon clause 7 of the contract to argue that if the contractor does not prepare the bills, then the engineer shall prepare the bills and in case of any delay no interest would be payable, but the argument raised on the basis of clause 7 has no merit because the interest which was claimed by the respondent in the arbitration proceedings pertain to the period of delay after the bills were submitted by the respondent/ contractor himself, and once this period of delay was found on the account of the appellant accordingly the arbitrator has awarded interest. The condition contained under clause 7 does not come in because in the facts of the present case the relevant portion of the clause only talks of delay for difference of time when the contractor ought to have submitted the bills and the engineer of the appellant thereafter prepared the bills. The issue in this case however is not with respect to difference of the time between the date when contractor should have prepared the bills which were not prepared and thereafter when the engineer prepared the same but the issue is that after submitting of bills by the contractor/ respondent if the bills are not paid, then, whether interest is payable for this delayed period.

8. The scope of hearing an objection petition u/s 34 of the Act is limited. Courts do not interfere with the Award u/s 34 sitting as an appellate court. Once from the appreciation of evidence, two views are possible, courts do not interfere with the finding of fact arrived at by the arbitrator. In the present case, besides the arbitrator arriving at a finding of fact of delay of between 7 months to 12 months for payment of the bills, the appellant was clearly guilty because appellant itself submitted in the arbitration proceedings that delay in release of the fund was on account of paucity of funds with the appellant. Therefore, neither objections u/s 34 had any substance and nor does this appeal has any merit.

9. In view of the above, the appeal is dismissed, leaving the parties to bear their own costs.