

(2002) 01 DEL CK 0143
In the Delhi High Court
Case No : Suit No. 2171A of 1997

Northern Sanitations (P) Ltd.

APPELLANT

Vs

Delhi Chartered Accountants Co-operative Group Housing
Society Ltd.

RESPONDENT

Date of Decision : 16-01-2002

Acts Referred:

Citation : (2002) 64 DRJ 229

Hon'ble Judges : Dr. M.K. Sharma, J

Bench : Single Bench

Advocate : D.P. Sharma, Sandeep Sharma and Alka Srivastava, for the Appellant; Sumant Batra and Asha Batra, for the Respondent

Judgement

Mukundakam Sharma, J.—Disputes having arisen between the parties while executing the work of Sanitation, Water Supply Installation in the flats constructed in phase-II an phase-III of Delhi Chartered Accountants Co-operative Group Housing Society Ltd., Paschim Vihar, New Delhi, the said disputes were referred to the arbitration of Shri Swami Dial, Retired Chief Engineer (CPWD) and Shri S.S.K. Bhagat, Chief Engineer (NDMC) in terms of Clause 35 of the Agreement. The aforesaid tow Arbitrators entered into the Reference and mutually agreed in a preliminary meeting held on 13.3.1996 to appoint Shri C. Rama Rao, Retired Director General of Works (CPWD) as Umpire after obtaining his consent. The two Arbitrators thereafter proceeded to hear the arbitration proceedings and received the evidence on record and thereafter passed an Award on 9.8.1997.

2. Being aggrieved by the aforesaid Award passed by the Arbitrators the petitioner herein has filed objections, to which reply also stands filed. The aforesaid objections filed by the petitioner as also the Award passed by the Arbitrators were placed before me for my consideration Along with the connected records and I have perused the same and also have heard the learned counsel appearing for the parties.

3. Counsel appearing for the petitioner at the initial stage raised a preliminary objection to the Award passed the Arbitrator on the ground that the arbitration proceeding was conducted in accordance with the provisions of the new Arbitration and Conciliation Act and, Therefore, the Award passed by the Arbitrator under the old Act cannot be sustained and is liable to be set aside and quashed. In support of the said contention the counsel drew my attention to the contents of the Award wherein the Arbitrators have recorded in the following manner :-

"The appointment of these Arbitrators is deemed to be under the new Arbitration and Conciliation Law."

4. The cause of action for the arbitration admittedly had arisen prior to coming in force of the new Arbitration and Conciliation Act and the Reference to the Arbitrator was also made in accordance with the provisions of Clause 25 of the Contract and the said Reference was also under the provisions of the old Act as the new Act was not enacted till then. The records placed before me also indicate that the Arbitrators were appointed before 13.3.1996, the crucial date. Besides the Minutes of the proceedings dated 22.3.1996 of the arbitration make it crystal clear that the entire proceedings was conducted under the Arbitration Act of 1940. Even, otherwise, in terms of the arbitration clause between the parties each party was required to nominate its Arbitrator pursuant to which the petitioner nominated Shri Swami Dial as its nominee - Arbitrator and also by letter dated 10.6.1995 requested the respondent to nominate its Arbitrator. However, the respondent failed to nominate their Arbitrator. However, pursuant to the orders of this Court passed in OMP No. 136/95 the respondent appointed Shri S.S.K. Bhagat, as Arbitrator. Considering the records, I am satisfied that the entire proceedings of the arbitration between the parties were conducted under the old Arbitration Act of 1940 and, Therefore, the contention that the new Arbitration Act was agreed to be made applicable to the facts and circumstances of the present case cannot be accepted. It is true that under the provisions of the new Arbitration Act of 1996 an arbitration proceedings although had commenced prior to the commencement of the new Act could be conducted in accordance with the new Arbitration Act provided the parties to the arbitration proceedings mutually agree upon the same. In the present case, no such agreement between the parties to conduct the proceedings according to the new Arbitration Act could be brought to my notice by the counsel appearing for the petitioner and, Therefore, the said contention stands rejected.

5. Relying on the contents of the arbitration clause it was also sought to be submitted by the counsel appearing for the petitioner that an Award having been passed by the Architect in favor of the petitioner no Arbitrator could have been appointed and, Therefore, the entire proceeding conducted by the Arbitrators and the Award passed by them are vitiated. In order to appreciate the said contention I have perused the records and on perusal thereof I find that although the respondent sought for the assistance of the Architect for taking up some of

the disputes raised by the respondent the Architect did not act at all and whereas as against the request of the petitioner immediately some disputes were taken up for consideration by the said Architect and the said Architect proceeded to pass certain orders ex parte. Subsequently, however, the parties agreed to get the disputes settled through the process of arbitration in terms of Clause 35 of the Arbitration Clause and acted pursuant thereto, appointed their respective Arbitrators, adduce evidence before them and also obtained an Award. In the earlier round of litigation namely in OMP No. 136/95 no such contention is sought to be raised by the petitioner at that stage. The High Court having ordered for appointment of the Arbitrator to adjudicate upon the matter, the said order has become final and binding and the petitioner cannot now turn back and contend that the arbitration proceeding is without jurisdiction and vitiated. The said contention of the learned counsel appearing for the petitioner also stands rejected,

6. It was also submitted by the counsel appearing for the petitioner that although the two Arbitrators appointed the Umpire, the said Umpire was not allowed to exercise his powers. It is provided in the New Arbitration Act that the parties are free to determine the number of Arbitrators but their numbers have to be uneven whereas under the provision of the old Act, the parties can appoint their own Arbitrator and if there is nay difference of opinion amongst the Arbitrators, the Umpire could exercise his power and jurisdiction. In the new Act, the office of the Umpire has been done away with it. In the present case, the Award of the two Arbitrators being unanimous, there was no scope of the Umpire exercising his power and jurisdiction. The aforesaid contention of the learned counsel appearing of the petitioner also stands rejected.

7. With aforesaid conclusions, I may now proceed to examine the merit of the contention of the counsel appearing for the parties in respect of the Award passed against various claims. Objection was filed by the respondent in respect of the Claim No. 2, which was a claim for payment of Rs. 48,397/- paid as security deposit by the petitioner. The Arbitrator after going through the claims and the evidence on record held that the petitioner is entitled to be paid Rs. 17,804/- as against the aforesaid claim which was awarded in favor of the petitioner. The aforesaid amount of Rs. 48,397/- claimed by the petitioner in the arbitration proceedings pertains to the balance of security deposit including the earnest money in respect of Blocks A-2, A-5 & A-6 of Phase-III. It is disclosed from the records that the security deposits furnished by the petitioner in respect of earlier works have since been released by the Respondent whereas the said amount of Rs. 48,397/- was allegedly adjusted by the Society on the ground that the respondents have counter claims towards expenditure incurred by the Society in getting the effective works completed. The Arbitrators examined the records and on such consideration found that an amount of Rs. 17,804/- should be released to the petitioner out of the amount of Rs. 48,397/- after deducting Rs. 30,593/- towards expenditure incurred by the Society in rectification of defects. The aforesaid conclusions have been arrived at by the Arbitrators on

consideration of the evidence on record and there is no ground to upset the said findings and the conclusions. The said Award is found to be legal and valid and the same stands upheld.

8. So far Claim No. 3 is concerned, the amount of Rs. 9,45,795/- was claimed by the petitioner due to escalation during the course of work in respect of materials. The Arbitrators considered the aforesaid claim and came to the conclusion that the aforesaid claim of the petitioner is justified to an extent of Rs. 3,42,373/-. The respondent denied the admissibility of the aforesaid claim being untenable in law and against the terms of the contract. The learned counsel appearing for the respondent in support of his contention relies upon Clause 32 of the Agreement wherein it is provided that the Contractor would be allowed only statutory escalation so far labour is concerned and that no statutory increase in the rates of materials except Cement and Steel supplied by the Society would be allowed. The respondent also relied upon Clause 13 of the Letter of Intent dated 4.6.1987 which provides as follows:-

"The Society will not be liable for any type of escalation whether statutory or otherwise on material for a period of 24 months, from the date of commencement of work. However, after expiry of 24 months, if there is any extra-ordinary increase in rates of material the matter will be referred to the Architects and his decision in the matter will be final."

9. It was contended by the learned counsel for the respondent that since there was a prohibitions in the Agreement itself against claiming escalation in materials, no such amount against the said Head could be awarded by the Arbitrator. In support of the aforesaid contention, the counsel relied upon the decision in Associated Engineering Co. Vs. Government of Andhra Pradesh and another, , Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa, Vs. N.C. Budharaj (Dead) by Lrs. etc. etc., and in Rajasthan State Mines and Minerals Limited Vs. Eastern Engineering Enterprises and Another, . While refuting the aforesaid contention the counsel appearing for the petitioner, however, submitted that so far the decision of Associated Engineering Co. v. Government of Andhra Pradesh and Anr. (supra) is concerned, the said decision cannot be relied upon in view of the decision of the Supreme Court in Sudarsan Trading Co. Vs. Government of Kerala and Another, and in M/s. Shyama Charan Agarwala & sons v. Union of India reported in 1999 (1) Arb LR 483.

10. In Associated Engineering Company v. Government of Andhra Pradesh and Anr. (supra) it was held by the Supreme Court that if the Arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction but he cannot widen his jurisdiction by deciding a question not referred to him by the parties or by deciding a question otherwise than in accordance with the contract. It is also held that a deliberate departure from contract amounts to not only manifest disregard of his authority or a misconduct on his part, but it may tantamount to a mala fide action and a conscious disregard of the law or the provisions of the contract form which he has derived his authority which vitiates

the award.

11. In Executive Eng. Dhenkanal Minor Irrigation Division (supra) the Constitution Bench of the Supreme Court has held that the position is well-settled that the Arbitrator is a creature of agreement between the parties and that he is vested with the power of adjudication of disputes in terms of such agreement and that he has to act in accordance with law. It was further held that it is necessary that in judging the claim of interest for the pre-reference period the Arbitrator should ascertain whether such claim is permitted in the terms of the Contract between the parties or there is a usage of trade having force of law in support of such claim or there is any other provision in the respective law enabling the Award of such interest. In Rajasthan State Mines & Minerals Ltd. (supra) the Supreme Court referred to earlier decisions rendered by the Supreme Court and thereafter laid down certain principles of law. paragraphs (f) & (g) thereof are relevant for the purpose of my discussions and, Therefore, the same are extracted below, which read as under:

"(f) To find out whether the arbitrator has travelled beyond his jurisdiction, it would be necessary to consider the agreement between the parties containing the arbitration clause. The arbitrator acting beyond his jurisdiction is a different ground from the error apparent on the face of the award.

(g) In order to determine whether the arbitrator has acted in excess of his jurisdiction what has to be seen is whether the claimant could raise a particular claim before the arbitrator. If there is a specific terms in the contract or the law which does not permit or give the arbitrator the power to decide the dispute raise by the claimant of there is a specific bar in the contract to the raising of the particular claim then the award passed by the arbitrator in respect thereof would be in excess of jurisdiction.

12. In M/s. Sudarshan Trading Company (supra) it was held by the Supreme Court that once there is no dispute as to the contract, what is the interpretation of the at contract, is a matter for the arbitrator and the court cannot substitute its own decision. It was also held that if on a view taken of a contract, the decision of the arbitrator on certain amounts awarded is a possible view though perhaps no the only correct view, the award cannot be examined by the Court. It was further held in the said decision that the High Court has no jurisdiction to examine the different items awarded clause by clause by the Arbitrator and to hold that under the contract these are not sustainable in the facts found by the arbitrator. The aforesaid principle of law was also accepted by the three Judges Bench of the Supreme Court in K.R. Raveendranathan v. State of Kerala and Anr. (supra). To the same effect is the other decision relied upon by the learned counsel appearing for the petitioner.

13. The principle of law, Therefore, enunciated and established and settled by the Supreme Court is clear and unequivocal. If an interpretation to a particular clause of the agreement is given by the Arbitrator, such an interpretation

although may be erroneous is final and binding and the Court does not have the power to upset such findings and conclusions. However, in my considered opinion, the said decisions relied upon by the learned counsel appearing for the petitioner do not lay down the proposition that if there is a prohibition in the contract from making payment in respect of any amount and ignoring the said provision if an award is made contrary to the aforesaid prohibition and without making any reference to such clause of prohibition still the same cannot be examined and that such award passed ignoring the prohibition cannot be set aside by the Court. It was held in the decision of the Supreme Court in Rajasthan State Mines and Minerals Ltd. (supra) that if there is a specific term of the contract or the law which does not permit or give the Arbitrators the power to decide the dispute raised by the Claimant or if there be a specific bar in the contract to the raising of a claim then the Award passed by the Arbitrator in respect thereof would be in excess of jurisdiction. In paragraph 45 of the said judgment it was held by the Supreme Court that the Award passed by the Arbitrator is against the stipulations and prohibitions contained in the contract between the parties and if the Arbitrators passed an Award by ignoring the same, the Arbitrator travels beyond his jurisdiction which amounts to a deliberate departure from a contract.

14. Therefore, the Award passed by the Arbitrator in respect of the Claim No. 3 would be required to be examined in the light of the aforesaid settled position of law. On perusal of the present Award, I find that there is no total prohibition in respect of awarding such a claim. On the other hand, the agreement stipulated that after expiry of 24 months, if there be any extra-ordinary increase in rates of material, the matter would be referred to the Architects and the decision (SIC) of would be final. Therefore, the agreement envisaged that payment could be made considering the increase in rates of material. In that view of the matter, the Award passed by the Arbitrator awarding a sum of Rs. 3,42,373/- in respect of the aforesaid claim towards escalation] during the course of the work in respect of the materials cannot be set aside and quashed. The Arbitrator upon interpretation of the aforesaid clause and upon consideration of the fact that there has been increases in rates of material has awarded the aforesaid amount. Therefore, the said Award against Claim No. 3 also stands upheld.

15. So far the Award in respect of Claim No. 4 is concerned, the same relates to a claim on account of idling of labour force staff and other] expenses as per the statements submitted by the petitioner before the Arbitrators. The Arbitrators after considering the Claims has awarded an amount of Rs. 6,67,209/- as against the aforesaid claim. The contention before the Arbitrators on behalf of the petitioner was that the prolongation was caused because of the respondents failure to fulfill their contractual obligation whereas they had made all the arrangements and mobilised their resources for completing the work within the stipulated period. The Arbitrators awarded the aforesaid amount holding that the work prolonged for 64 months after extended period and the contract remain alive for 18+64 months that is 82 months and also because the petitioner whose

main purpose was to complete the work and to earn bonafide profits within the contract period had to maintain regular/temporary labour, administrative arrangement. Holding accordingly, the Arbitrators awarded cost of idle labour for 22 months, compensation on account of idle staff in administration for 22 months and compensation on account of delay in completion of work in the extended period. The aforesaid claim of the petitioner was refuted by the respondents relying mainly on Clause 21 of the Special Conditions of Contract, which reads as under:

"The Contractor shall not be entitled to any compensation for any loss suffered by him on account of delays in commencing or executing the work whatever the cause may be.... The employer shall not be liable for any claim in respect thereof. The employer does not accept liability for any sum besides the tender amount subject only to such variations as may be provided for herein."

16. The issue, Therefore, which arises for consideration in the present case is, whether in view of the aforesaid Clause 21 could the Arbitrators award the amount of Rs. 6,67,209/- as against the aforesaid Claim No. 3. The provisions of Clause 21 of the Special Conditions of Contract have been abstracted above, which in clear and unequivocal terms provide that no compensation could be awarded to the Contractor for any loss suffered by him on account of delay in commissioning the work, whatever the cause may be, and that the employer shall not be liable for any claim in respect thereof. The said clause conclusively proves and establishes that there is a total prohibition in making a claim of the nature for payment of any compensation for any loss suffered by the Contractor either on account of delays in commencing or executing the work for whatever reason. There is, Therefore, a specific term in the Agreement which does not permit or gave the contractor the power to claim any amount as compensation on account of delay in commencing or executing the work for whatever reason and that the employer would not be liable for payment on account thereof. The Award passed by the Arbitrator is against the aforesaid stipulation and prohibition contained in the Contract between the parties. In the present case the Arbitrators have not interpreted and considered Clause 21 of the Special Condition of Contract at all. Therefore, the Arbitrators have awarded the aforesaid amount in favor of the petitioner ignoring the stipulations and prohibitions contained in the Contract and, Therefore, the Award passed by the Arbitrator is illegal and in excess of jurisdiction which is required to be quashed and set aside which I hereby do. The arbitration proceedings and the Arbitrators are creature of the agreement and, Therefore, the Arbitrators cannot travel beyond the stipulation in the Contract. While awarding the aforesaid amount the Arbitrator has not stated as to why the aforesaid provision is not applicable nor any effort was made to consider the said provision and, Therefore, it is apparent that the said Arbitrators while awarding the aforesaid amount totally ignored the aforesaid provision contained in Clause 21 of the Agreement. The aforesaid Award, Therefore, stands set aside and quashed as the same is severable from the rest of the Award.

17. So far Claim No. 5 is concerned, the same was a claim for payment of Rs. 62,214/- on account of delay in payment of running bills. On consideration of the evidence on record, the Arbitrators have awarded an amount of Rs. 44,000/- on the ground that there was miserable delay in releasing the payment as per time schedule. The said conclusions of the Arbitrators are findings of fact and this Court cannot sit as an Appellate Authority over the aforesaid findings in order to come to a contrary findings. No plausible ground is made out by the Respondents for setting aside the said conclusions in the award and accordingly, the same is upheld.

18. So far Claim No. 6 is concerned, the same pertains to a claim of Rs. 3,85,386/- towards loss of profit due to prolongation of the contract beyond the contractual period. The aforesaid claim was refuted by the respondent on the ground that the said claim is imaginary and only paper calculation. Since the Arbitrators have awarded an amount of Rs. One Lakh to the petitioner upon consideration of the evidence on record and on satisfaction that such an amount is admissible to the petitioner. I am not inclined to interfere with the aforesaid conclusions of the Arbitrators.

19. So far Claim No. 7 is concerned, the same relates to payment of interest. I have considered the same at length and on consideration of the same, I uphold the Award of the Arbitrators for payment of simple interest @ 18% per annum for pre-suit and pendente lite for the Claims allowed in the present proceedings which shall be paid to the petitioner. Therefore, the Award passed by the Arbitrator in respect of Claims No. 1,2,3,5, & 6 stand upheld whereas the Award passed by the Arbitrator in respect of Claim No. 4 is set aside and quashed. It is further held that the petitioner shall be entitled to payment of simple interest @ 18% per annum for pre-suit and pendente lite in respect of the aforesaid amount awarded against Claim Nos. 1,2,3,5 and 6.

20. So far the Counter Claims of the respondents are concerned, the same was not agitated before this Court and, Therefore, I am not required to give my decision on the same. The objection filed by the respondent is decided accordingly and the petition stands disposed of in terms of the aforesaid observations and orders. There shall be no order as to cost.

21. In terms of the aforesaid observations and directions award passed by the Arbitrator to the extent indicated above is made a rule of the court. Let a decree be drawn up in terms of this order.