
(2011) 03 DEL CK 0380
In the Delhi High Court
Case No : F.A.O. 166 of 1993

Satya Nirmata

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 21-03-2011

Acts Referred:

Arbitration Act, 1940 — Section 20, 30, 33, 8
Partnership Act, 1932 — Section 19, 69

Citation : (2011) 179 DLT 747 : (2011) 6 RCR(Civil) 694

Hon'ble Judges : Mool Chand Garg, J

Bench : Single Bench

Advocate : Dinesh Kumar Gupta and Vikas Mishra, for the Appellant; B.V. Niren, for R-1, for the Respondent

Final Decision : Allowed

Judgement

Mool Chand Garg, J.

CM No. 2183/1993

Delay in re-filing is condoned.

Application stands disposed of.

FAO166/1993

1. The Appellant had entered into a contract/agreement with the first Respondent for some supply work vide agreement No. 73/EE/PWD-22(DA)/86-87. In this regard, they entered into an agreement and executed various documents in favour of the first Respondent. The said agreement contained an arbitration clause whereby the disputes between the parties were to be settled through the arbitrator. After the completion of the work certain disputes were raised by the Petitioner on account of some claims which they found were not settled by the first Respondent. Consequently, the Appellant served a notice dated 07.12.1988 upon the Chief Engineer (Zone II), Public Works Department to refer the disputes

raised by him to the Arbitrator.

2. Pursuant thereto, the matter was referred to the sole arbitrator, namely, Sh. N.H. Chandwani, Respondent No. 2. The said Respondent made and published his award on 30.10.1990 and informed the same to the Appellant by sending a copy of the said award. After the notice of filing of award was issued to the first Respondent, the said Respondent filed objections u/s 30-33 of the Arbitration Act against the aforesaid award.

3. The first Respondent filed objections stating that the Arbitrator has mis-conducted himself while passing the impugned award in unilateral declaration. It was alleged that it was vitiated and was without any application of judicial mind. It suffers from various lacunae and it was therefore prayed that the award of arbitrator be set aside.

4. According to the Appellant, the award was a non-speaking award. The Appellant objected to the reply to the objections and submitted that the award being a non-speaking award ought not to have been interfered with by the court of the Additional District Judge.

5. On the basis of the aforesaid, following issues were framed by the Additional District Judge:

(i) Whether the award of the Arbitrator is liable to be set aside on the objections filed by the objector? OPR

(ii) Relief.

6. The Additional District Judge vide order dated 17.04.1993 set aside the award primarily on three counts i.e.

(i) The Petitioner firm filed its claim before the Arbitrator in the capacity of a partnership firm, however, the said partnership firm was not registered inasmuch as, no proof regarding the existence of partnership firm was filed before the Arbitrator and, therefore, in view of Section 19(2)(e) of the Indian Partnership Act, the claim filed by the Appellant was not sustainable and, therefore, the findings of the Arbitrator on this point was without jurisdiction and lacking material particulars.

(ii) The 2nd objection taken by the first Respondent as accepted by the Additional District judge was that the award given by the Arbitrator was beyond limitation inasmuch as, the final bill for an amount of Rs. 74,623/- was paid by cheque dated 22.09.1988 whereas the disputed was raised by the Appellant on 31.10.1989, which was beyond the period of 90 days after receiving intimation from the Government and, therefore, the claim was beyond the period of limitation. In this regard, the Additional District Judge extracted Clause 25 of the agreement arrived at between the parties, which reads as under:

It is also a term of the contract that if the contractor(s) do/does not make any demand for arbitration in respect of any claim(s) in writing within 90 days of

receiving the intimation from the Government that the bill is ready for payment, the claim of the contractor(s) will be deemed to have been waived and absolutely barred and the Govt. shall be discharged and released of all liabilities under the contract in respect of these claims.

Holding that the claim of the Appellant was beyond limitation, the award on that aspect was also set aside.

(iii) The third point on which the Additional District Judge based his decision in having set aside the award was that the arbitration agreement specifically provided that in case the claim is sent in excess of certain amount i.e. Rs. 75,000/- the Arbitrator shall give the reasons and in case the Arbitrator failed to give reasons and the amount awarded was in excess of the stipulated award, the award shall be liable to be set aside. In this case, the estimated cost was Rs. 81,032/- and the amount tendered was Rs. 1,08,583/-. The actual final bill paid to the claimant was Rs. 74,623/-. The Appellant claims Rs. 39,986.61 and if this amount is included with the actual payment already made then it is beyond the sum of Rs. 75,000/- and in that case the Arbitrator should have given a speaking order.

7. According to the Appellant, all the aforesaid three contentions relied upon by the Additional District Judge while setting aside the award given in their favour are not sustainable in law. None of the aforesaid pleas has been raised by the first Respondent in their objections. This is apparent from the reading of the objections as are available in the record of the Additional District Judge.

8. As far as first point is concerned, even though the learned Counsel for the Appellant has drawn my attention to a certificate issued by the Registrar showing that the Appellant firm was registered under the Partnership Act at the relevant time, however this document which was filed on record in 2003 may not be taken into consideration. The Appellant also relies upon a judgment delivered by this Court in the case of M/s Ninan and Co. Vs. National Projects Construction Corporation Ltd., . The applicability of Section 69 of the Partnership Act has been considered in relation to the proceedings under the Arbitration Act. Some observation made by the learned Single Judge of this Court in this regard are reproduced hereunder:

6. I am of the view that the learned Arbitrator has rightly described the legal position in law on this aspect. Section 69 of the Partnership Act puts an embargo on a partnership firm which is an unregistered firm from approaching the Court or filing other proceedings. However, such a provision would not come into play when intervention of the Court is not sought. Under the scheme of Arbitration Act, 1940, by which statute the present case is governed, the reference to the Arbitrator could be made with or without the intervention of the Court. It is only when the intervention of the Court is sought and a firm wants to file a petition u/s 20 of the Arbitration Act for this purpose that such a registration is compulsorily required. However, when the appointment of the Arbitrator is

without the intervention of the Court, as provided in Section 8(2) of the said Act, obviously there are no legal proceedings instituted by the partnership firm and in such a case bar u/s 69 of the Act would not come into play. This issue stands concluded by the judgment of the Supreme Court as well as of this Court in *Kamal Pushp Enterprises Vs. D.R. Construction Company*, . The Supreme Court answered precisely very this question in the following manner:

"The prohibition contained in Section 69 is in respect of instituting a proceeding to enforce a right arising from a contract in any court by an unregistered firm, and it had no application to the proceedings before an arbitrator and that too when the reference to the arbitrator was at the instance of the Appellant itself. If the said bar engrafted in Section 69 is absolute in its terms and is destructive of any and every right arising under the contract itself and not confined merely to enforcement of a right arising from a contract by an unregistered firm by instituting a suit or other proceedings in Court only, it would become a jurisdictional issue in respect of the arbitrator's power, authority and competency itself, undermining thereby the legal efficacy of the very award, and consequently furnish a ground by itself to challenge the award when it is sought to be made a rule of court. The case before us cannot be said to be one such and the learned Counsel for the Appellant though was fully conscious of this fact, yet tried to assert that it is open to the Appellant to take up the objection based upon Section 69 of the Partnership Act, at any stage - even during the post-award proceedings to enforce the award passed. The award in this case cannot either rightly or legitimately be said to be vitiated on account of the prohibition contained in Section 69 of the Partnership Act, 1932 since the same has no application to proceedings before an arbitrator. At the stage of enforcement of the award by passing a decree in terms thereof what is enforced is the award by passing a decree in terms thereof what is enforced is the award itself which crystallises the rights of parties under the Indian Contract Act and the general law to be paid for the work executed and not any right arising only from the objectionable contract. It is useful in this connection to refer to the decision of this Court in *Satish Kumar v. Surinder Kumar* wherein it has been stated in unmistakable terms that an award is not a mere waste paper but does create rights and has some legal effect besides being final and binding on the parties. It has also been held that the award is, in fact, a final adjudication of a Court of the parties' own choice and until impeached upon sufficient grounds in an appropriate proceeding, an award which is on the fact of it regular, is conclusive upon the merits of the controversy submitted for arbitration. Consequently, the post award proceedings cannot be considered by any means to be a suit or other proceedings to enforce any rights arising under a contract. All the more so when, as in this case, at all stages the Respondent was only on the defence and has not itself instituted any proceedings to enforce any rights of the nature prohibited u/s 69 of the Partnership Act before any court as such. We see no infirmity or error whatsoever in the decision of the courts below to call for our interference in this appeal. The appeal fails and shall stand dismissed.

7. In the case of Noida Toll Bridge Company Ltd. Vs. Mitsui Marubeni Corporation, this Court followed the aforesaid judgments and also referred to various other judgments in arriving at the same conclusion. Likewise, Calcutta High Court in Babulal Dhandania v. Messrs. Gauttam and Co. AIR (37) 1950 391 held that the expression "proceeding" occurring in Section 69(3) would mean something in the nature of a suit, i.e., proceeding which is instituted or initiated in a Court and does not refer to an arbitration aliunde the Court. Hence Section 69 could not preclude a party from making a reference to arbitration without the intervention of the Court, in pursuance of an arbitration clause in a contract with an unregistered firm. I, therefore, do not find any substance in this objection."

9. In view of the aforesaid the objection with regard to partnership firm was of no consequence and therefore the first objection on the basis of which the award has been set aside by the Addl. District Judge is not sustainable.

10. It has also been contended that in terms of Clause 25 of the agreement entered into between the parties, both the second and third point are not sustainable inasmuch as, firstly, the request for appointing an arbitrator and referring the dispute to Arbitrator was raised by the Appellant vide their letter dated 07.12.1988 which was within 90 days of the decision taken by the first Respondent regarding preparation of final bill and the payment thereof. The payment was made on 22.09.1988 and the dispute was referred on 07.12.1988 as such, the claim made by the Appellant for balance item as stipulated in the list of claims/disputes was within limitation.

11. In this regard, reference has also been made to the letter of reference issued by the office of the Chief Engineer Annexure P-3, which clearly shows that there is reference about the invocation of the arbitration clause in letter dated 07.12.1988 by the Appellant. The said letter is reproduced for the sake of reference:

N15/34/88-A&C/DA.II/1527

OFFICE OF THE CHIEF ENGINEER PWD DAZ.II

MSO BLDG., IP ESTATE:

NEW DELHI-110002

New Delhi Dated 18/8/89.

Subject: In the matter of arbitration between M/s Satya Nirmata v. UOI for the work providing storm water drainage system including C/o underground tank and pump house on the campus of D.A. staff Qrs. At Karkardooma. Agmt. No. 73/EE/PWD-22(DA)/86-87.

WHEREAS M/s Staya Nirmata Engineers/Contractor written to me vide their letter No. Nil dated 7.12.88 that certain disputes have arisen between the contractor and the UOI in respect of the above noted work, I, S.R. Goyal, Chief Engineer, PWD DAZ.II in exercise of the said agreement hereby appoint Shri N.H.

Chandwani, Arbitrator, Min. of Urban Development, New Delhi as the sole arbitrator to decide and make his award regarding the claims/disputes given by the contractor as shown in the statement enclosed and counter claims of the Government, if any, to follow subsequently subject always however to their admissibility under the Law and under Clause 25 of the aforesaid agreement.

As the amount of the claims/disputes is more than Rs. 75,000/- the arbitrator has to give a reasoned award, according to the Clause 25 of the agreement.

Sd/-

(S.R.GOYAL)

CHIEF ENGINEER

To

Shri N.H. Chandwani, Arbitrator

Min. of Urban Development, Nirman Bhawan,

New Delhi.

UPC/ M/s Satya Nirmata, Engineers and Contractors, B-2/269, Yamuna Vihar, Delhi-110053.

Note: The SE, PWD CIV(DA) New Delhi and the EE, PWD 22(DA), New Delhi are concerned with the case.

12. The Appellant further contended that the third reasons given by the Additional District Judge was again not sustainable because as per Clause 25 of the agreement, in case the claim is raised for more than Rs. 75,000/- , then the reasons are required to be given by the Arbitrator. However, in this case, the claim of the Appellant was only Rs. 39,986.61 and was not for an amount of more than Rs. 75,000/-. In this regard, reference has been made to Clause 25 of the agreement which has also been reproduced in the decision given by the Additional District Judge and reads as under:

In all cases where the amount of the claim in dispute is Rs. 75,000/- and above the arbitrator shall give reasons for the award.

13. The learned Additional District Judge after quoting the aforesaid clause, held as under:

13. In the instant case the claimant has already received a sum of Rs. 74,623/- and is further claiming a sum of Rs. 39,986.61. If both the amounts are included then it comes to more than Rs. 75,000/-. In case if the total claim comes above this amount, then the arbitrator is bound to give his speaking award. In the instant case the arbitrator has given a non speaking award. Therefore, on this ground also the award of the Arbitrator is liable to be set aside.

14. A bare reading of paragraph 13 of the impugned order shows that the claim

raised by the Appellant was for a sum of Rs. 39,986.61 and not for an amount of more than Rs. 75,000/- and as such, the contention of learned Counsel for the Appellant is right.

15. This being a award pertaining to the period when Arbitration Act, 1940 was applicable, the Arbitrator was not required to given reasoned award as is the requirement of the new Act as such, on this core also, the contentions of the Appellant are required to be affirmed.

16. Taking all these facts into consideration, I hold that the decision given by the learned Additional District Judge was not in accordance with the law and was against public policy and, therefore, the said decision of the Additional District Judge is not sustainable. The order of the Additional District Judge is, therefore, set aside. The award awarded in favour of the Appellant shall be released by first Respondent within 30 days from today along with interest @ 9% p.a. from the date of making of the award by the Arbitrator. Grant of such interest is also justified in the light of a judgment delivered by the Hon''ble Supreme Court in the case of D.D.A. and Others Vs. Joginder S. Monga and Others, . In case, the amount is not paid within stipulated time then the entire amount, including the accrued interest shall carry a further interest @ 9% per annum.

17. The appeal is allowed with no orders as to costs. Pending applications, if any, stand disposed of.

18. TCR be sent back forthwith along with a copy of this order.