

(2005) 12 DEL CK 0137

In the Delhi High Court

Case No : IA No. 1010 of 1995 and CS (OS) No. 1968 of 1994

Shri N.K. Agarwal

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 02-12-2005

Acts Referred:

Arbitration Act, 1940 — Section 30, 33

Citation : (2005) 12 DEL CK 0137

Hon'ble Judges : Sanjay Kishan Kaul, J

Bench : Single Bench

Advocate : Raman Kapoor, for the Appellant; Jagjit Singh, for the Respondent

Final Decision : Allowed

Judgement

Sanjay Kishan Kaul, J.

IA No. 1010/1995 (under/Section 30 and 33 of the Arbitration Act, 1940) IN CS (OS) No. 1968/1994

1. This is an application filed by the petitioner seeking to set aside the award published by the arbitral tribunal on 17.06.1994 awarding a sum of Rs 5 lacs as damages to the respondent.

2. A tender was floated on 31.01.90 for supply of stacking of stone ballast. The petitioner being the contractors submitted the tender which was accepted on 29/30.03.1990. The stipulated date for completion of work was 28.12.1990. The formal agreement was signed on 31.07.1990 containing an arbitration clause.

3. The petitioner failed to complete the work and in fact requested for increased in the amount payable to the petitioner on account of unforeseen circumstances including the gulf war which increased the fuel prices. The arbitrators' record in the recital portion of the award as under:

vii) However, the steep increase of 44% in the diesel prices on 15.10.90 because of Gulf War was a factor which the claimant could not have foreseen when he

quoted against the tender in January, 1990. As he did not start the work till that day, commencing and finishing the work before 31.12.90 would have been very unprofitable for the claimant.

4. Despite the aforesaid finding, arbitrators have recorded one paragraph conclusion as under:

a) That the Claimant, N.K. Aggarwal, 5-C/51, New Rohtak Road, New Delhi - 110005 shall pay to the Respondents, the Union of India represented through Deputy Chief Engineer/Construction, Northern Railway, Patel Nagar, New Delhi a sum of Rs 5 lac (Rupees five lacs only) in full and final settlement of all the claims/disputes referred to us for arbitration by the General Manager, Northern Railway. This amount constitutes 60% of the loss of Rs. 8,32,000/- suffered by the respondents and is so awarded because we are of the view that the Claimant should have finished at least 60% of the work as per schedule before it became quite unprofitable.

5. Learned counsel for the petitioner submits that the arbitrators had become functus officio as there was no extension of time granted by the parties nor obtained from the court and the three claims and one counter claim have been put together and a lumpsum award granted without deciding the matter claim wise. It may however be noticed that the respondent has filed an OMP 116/1995 for grant of extension of time to make and publish the award.

6. Learned counsel for the petitioner further contends that in fact no hearing really took place in the arbitration proceedings and for this purpose learned counsel has set out the relevant dates before the arbitrators. It is submitted that the statement of claim was filed on 09.11.1993 and the first hearing was fixed on 28.12.1993 when the respondent requested for an adjournment. The date was fixed as 04.02.1994 which was changed by the arbitrators on account of their inability to hold sittings on the said date to 22.02.1994. On the said date of 22.02.1994 petitioners' counsel requested for time as the reply had been filed by the respondent only on 29.01.2004 and the matter was adjourned to 03.03.1994. It is submitted that on 03.03.1994 no sitting was held and the award has been pronounced on 17.06.1994. It is thus submitted that there has been no opportunity granted to the petitioner of a fair hearing and there has been total non application of mind on the part of the arbitrators in making the award. The arbitration proceedings have been referred to show that in fact all that the arbitrators did was to call for two other awards made by the Railways by some other arbitrators in some other proceedings only to see as to how award has to be made and thereafter award has been so made.

7. In my considered view, insofar as issues about the extension of time and non appointment of an umpire are concerned, same do not go to the root of the arbitration proceedings as time period can always be extended. The award of the arbitrators is unanimous. Similarly it is not required that a matter must be decided claim wise especially when the controversy is very limited. In the

present case it arises only from the stated failure of the petitioner to complete the contract and the award of the contract to a third party.

8. In my considered view, what is material is the manner of conduct of proceedings in the present case and the way award has been made. The respondents filed their reply/counter claim on 29.01.1994 and immediate proceedings thereafter were fixed on 22.02.1994. That is the first time when an adjournment was sought by the petitioner to put forth its stand. No evidence has been recorded of either of the parties. Learned counsel for the respondent states that he has in his possession some recorded minutes of the meeting on 22.02.1994 whereby the petitioner was not to be given any further opportunity. The counsels were asked to point out from the proceedings filed before the court whether any such proceedings are on record. Learned counsels are unable to point out the same. I have failed to appreciate how the issue of damages could have been determined without giving a fair opportunity to the parties to lead evidence. The conclusion of the arbitrators is based on the presumption as if what is stated by the respondent is a gospel truth and the losses must be presumed to what the respondent has stated. Since the petitioner had to complete 60 per cent of the contract by the time it became unprofitable, 60 per cent of the alleged loss has been awarded. The arbitrators have noticed that the petitioner could not have taken into account the unforeseen increase in diesel prices on account of gulf war. Despite that there is no discussion as to the consequences of that finding.

9. The first proceedings to be held after pleadings were complete was on 22.02.1994. In assessment of damages, the respondent was required to prove what damages had actually been suffered on account of the contract being awarded to a third party and whether the petitioner was liable to compensate for the same. Neither the process to assess these damages has been followed nor is there any discussion on this aspect.

10. The presence of the draft awards in two other matters tends to give an impression as if the arbitrators were only finding out how some other arbitrators may have dealt with the matter to frame their award in the same manner. This can hardly be said to be an impartial application of mind to the matter in issue.

11. In view of the aforesaid position, I am of the considered view that the arbitrators have misconducted in the matter of holding of the proceedings and thus the grounds as set out in section 30 of the Arbitration Act, 1940 are satisfied for setting aside such an award. The award is accordingly set aside leaving parties to bear their own costs.

CS (OS) No. 1968/1994

12. In view of the award having been set aside, the respondents are directed to appoint fresh arbitrator/arbitrators in terms of the arbitration clause within a maximum period of one month from today. Suit stands disposed of.

13. dusty.