
(1995) 03 DEL CK 0026
In the Delhi High Court
Case No : Suit No. 3278 of 1992

Suraj Bhan Goel	Vs	APPELLANT
Delhi Development Authority and Another		RESPONDENT

Date of Decision : 23-03-1995

Acts Referred:

Citation : (1995) 33 DRJ 174

Hon'ble Judges : N.G. Nandi, J

Bench : Single Bench

Advocate : D.K. Kapur, F. Hasan and M.M. Chopra, for the Appellant;

Judgement

N.G. Nandi, J.

(1) This is an application u/s 20 of the Indian Arbitration Act, requiring respondent No.1 to file original arbitration agreement and appointment of the arbitrator and reference of the dispute with regard to the delay in completion of work narrated in paragraph 2.

(2) In the petition, it has been the say of the petitioner that the petitioner, a partnership firm, M/s. Suraj Bhan Goel, is a government contractor and engineer having its office at WZ-3, Kailash Park, Najafgarh Road, New Delhi. Respondent No.1/DDA invited tender rates for the work of M/O Central Store with Railway siding facilities at G.T.K. Road SH: A/R and M/O Roads. That the petitioner was given the contract for the said work. That the arbitrator was appointed and the parties filed their statements before the arbitrator and that the said proceedings are in progress. That on 29.6.1992, the Director(MM)/SE(Store) of respondent/DDA served a show cause notice No.EE(P)/D- IV/Store/SD-I/F.1(14)87/644 dated 29.6.1992 on the petitioner under clause 2 of the contract agreement informing the petitioner that under clause 2 of the agreement, the petitioner has rendered itself liable to pay compensation. That the petitioner filed reply to the show cause notice dated 13.7.1992. Director(MM)/SE of respondent No.1/DDA, vide its letter No. No.EE(P)/C- IV/Store/SD-I/F.1(14)87/DDA/827 dated 14.8.1992 has

imposed levy of compensation amounting to Rs.1,37,598.00 i.e. 10% on the estimated amount of Rs.13,75,980.00 under clause 2 of the contract agreement. That respondent No.1, in the past did not raise the issue of delay and compensation. That the arbitration agreement provides for reference of the disputes to the arbitrator. That for the dispute with regard to the delay in completion of the work is the dispute within the meaning of arbitration clause and is to be adjudicated upon by the arbitrator as to who was responsible for causing delay in completion of work. On these allegations, the petitioner prays for relief, aforesaid. 2.Respondent No.1/DDA filed reply to the suit contending that the suit in the present form is not maintainable. That the levy of compensation under clause 2 of the agreement is not arbitrable, and Therefore, the petition u/s 20 of the Arbitration Act, is not maintainable. It is denied that respondent is in any way responsible for the delay in execution of work by the petitioner and that it is the petitioner/contractor who is responsible for delay. 3.Following issues have been framed on April 22, 1994 :-

1 Whether the petition u/s 20 of the Arbitration Act is maintainable in view of Clause 2 of the Agreement ? 2. Whether the disputes raised in paragraphs 5 & 9 of the petition referable for arbitration ? 3. Relief.

(3) My findings on the above issues are as follows :-

ISSUENO.1In negative. Issue NO.2In negative. Issue NO.3Petition dismissed with no orders as to costs. 4.Affidavit by way of evidence is filed by the parties, as per order dated 22.4.1994. The objection raised in the written statement is with regard to the maintainability of the application under Sec.20 of the Act contending that the levy of compensation under clause 2 of agreement is not arbitrable.

(4) It has been the say of the petitioner that there is a delay on the part of the respondent and that the issue with regard to the delay is required to be referred under the agreement to the arbitrator. As pointed out earlier, it has been the say of the respondent that issue with regard to the compensation under clause 2 would not be arbitrable and the petition under Sec.20 of the Arbitration Act not maintainable. 5.It has been held in the decision reported in Vishwanath Sood Vs. Union of India (UOI) and Another, that "the opening words of the arbitration clause, viz. "except where otherwise provided in the contract" placed the question of awarding compensation outside the purview of the Arbitrator. The compensation, determined either by the Engineer-in-Charge or on further reference by the Superintending Engineer was not capable of being called in question before the arbitrator.". Thus it will be seen that clause in the contract stipulating compensation to be paid by the contractor for delay and the decision of the Superintending Engineer on amount of compensation made would be final under the clause and that the matter as to amount of compensation cannot be referred to arbitrator. Thus, it clearly follows from the above referred judgment of the Supreme Court that the question of awarding compensation under clause 2, which would be on account of delay in execution of the work by the contractor, is

outside the purview of the arbitrator and that the compensation determined under clause 2 of the agreement by the Superintending Engineer, is not capable of being called in question before the arbitrator. 6. In the instant case, the petitioner wants the reference of dispute on the basis of which the Superintending Engineer has awarded compensation of Rs.1,37,598.00 under clause 2 because of the contractor having delayed the execution of the work. In my opinion, the present case would clearly fall within the ambit of the above cited Supreme Court judgment and the dispute sought to be referred would not be arbitrable because in fact, the petitioner challenges the compensation awarded under clause 2 of the agreement, which he wants to be set aside by reference of dispute with regard to delay in completion of the work. In my opinion, the above referred Supreme Court judgment provides complete answer to the issue of maintainability of the petition u/s 20 of the Act, and Therefore, Issues No. 1 & 2 shall have to be answered in negative. 7. On behalf of the petitioner, reliance is placed on decision of this court reported in Drj 1992(23) page 403 (G.D.Rathi Steels Pvt. Ltd. versus Delhi Development Authority) wherein it has been held that "the arbitrator is the final judge to interpret and adjudicate the terms of the contract. No court can re-adjudicate the same. The arbitrator is last to decide the facts and that the courts are not supposed to interfere on the findings of facts. The findings of the arbitrator can only be challenged if the same are without any evidence and illegal per se".

(5) This decision would be of no relevance to the facts of the present case for the reason that the question involved in this suit relate to the maintainability of petition under Sec.20 of the Act on the ground that the determination of compensation under clause 2 of the agreement is not arbitrable. 8. The petitioner has next relied on the decision reported in (in the case of State of Karnataka versus Shree Rameshwara Rice Mills, Thirthahalli). The case before the Supreme Court was of awarding damages on the adjudication of the disputed question of breach. The term of contract before the Supreme Court did not empower the government to adjudicate upon the disputed question of breach and it has been held that "power to assess damages, is confined only to cases where breach is admitted". Here the question is altogether different. There is no question of breach by the contractor or the respondent adjudicating upon the disputed question of breach and the liability to pay damages by the contractor to the government. In my opinion, this decision would be of no assistance to the petitioner. 9. The petitioner has referred to the decision reported in 1994 (1) A.L.R. 179 (case of K.C. Goyal versus Delhi Development Authority and others). The question involved was of forfeiture of the security deposit and levy of penalty as Dda failed to make available the commodity for transport and it was held that "no penalty can be levied". It may be appreciated that this court is called upon to consider the question of maintainability of petition u/s 20 for the reason that determination of compensation under clause 2 of the agreement being not arbitrable. This decision, in my opinion, is not applicable to the facts of the present case. 10. The above discussion would reveal that in view of the above-

referred Supreme Court judgment, the present petition would not be maintainable as the dispute would not be arbitrable and in substance the petitioner challenges the determination of compensation under clause 2 of the agreement on the ground of delay instead of using the word "determination of compensation under clause 2". The plaintiff cleverly seeks reference of dispute of delay in execution of the work and thereby challenges the determination of compensation under clause 2 of the agreement, which is not permissible according to the Supreme Court judgment. 11. In the result, the petition fails as not maintainable. The petition is dismissed accordingly.

(6) No order as to costs.