
(2001) 09 DEL CK 0045

In the Delhi High Court

Case No : OMP 202 of 2000 and is 7818 of 2000

Union of India

APPELLANT

Vs

Mohanlal Harbanslal Bhyana and Co.

RESPONDENT

Date of Decision : 28-09-2001

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 16, 16(2), 16(3), 16(4), 16(5)
Contract Act, 1872 — Section 54, 73

Citation : (2001) 09 DEL CK 0045

Hon'ble Judges : Vinod Sagar Aggarwal, J

Bench : Single Bench

Advocate : Ashok Bhasin, for the Appellant; R. Rajappan, for the Respondent

Final Decision : Allowed

Judgement

V.S. Aggarwal, J.—Shri O.P.Goel had been appointed as the sole arbitrator. The arbitrator had submitted his award and awarded Rs. 4,15,026/- to the claimants as extra payment on account of increase in price of work done after the stipulated date.

2. An application has been filed u/s 34 of the Arbitration and Conciliation Act, 1996 (for short the Act). It has been asserted that the respondent (M/s Mohanlal Harbanslal Bhayana & Co.) were awarded a contract for construction of Doordarshan Bhawan, Phase II, Mandi House, New Delhi including the super structure, internal and external water supply and plumbing work. The date of the start of the work was 7.4.1995. The stipulated date for completion of the work was 18 months i.e. 6.10.1996. The respondent could not adhere to the schedule nor mobilise enough labour and resources and as such the contract could not be completed. The respondent had raised disputes and claimed extra escalation of 40% over the quoted rates. The said disputes pertaining to claims 1 and 2 read:-

"CLAIM No.1 - The Claimants claim Rs.27,00,213.00 up to 28.2.1998 as extra escalation of 40% over the quoted rates and further Declaratory Award @ 40%

over and above the quoted rates for further works being executed till completion of the work including payment under Clause 10 CC.

CLAIM No.2 - The claimants claim declaratory award of 40% over and above the quoted rates of the items of main contract for the work of "Tower-C portion to be carried out as per the directions of the respondents as this portion is beyond the scope of main project and also the decision was conveyed after the stipulated date of main project including payment under Clause 10CC."

3. The matter had been gone into by the arbitrator on a reference having been made to him. After hearing the parties the arbitrator had made the award and justified the claim of the respondent i.e. demand for extra claim over and above claim under clause 10(CC). The said award is being assailed alleging that the arbitrator was in error in holding that there is a breach of contract or that the petitioner were responsible for the said breach. he was also in error in coming to the conclusion that there was clear provision in the agreement that the site would be made available to the respondent in parts. The main thrust was that the arbitrator failed to appreciate that escalation was governed by clause 10(CC) of the General Conditions of the contract and any claim of escalation had to be given under the said clause. by giving the award, Therefore, the arbitrator went beyond the ambit of the contract agreement and the arbitrator in any case cannot go beyond the contract of the agreement. The arbitrator is a creation of the agreement itself and duty bound to enforce the terms of the agreement.

4. Reply had been filed on behalf of the respondent. It has been pleaded that the jurisdiction u/s 34 of the Act has been well defined. The petitioner has not brought out any reasons for challenging the award u/s 34 of the Act. The arbitrator has considered all the evidence produced before him and appreciated the arguments made by both the parties before publishing the award. The payment under clause 10(CC) provides the formula for payment of escalation under the contract. But the claim was for damages u/s 73 of the Contract Act for enhancing the quoted rate for the work executed after the stipulated date of completion. There was no change of formula under clause 10(CC) made by the arbitrator. The arbitrator held the legal proposition of law of contract u/s 73 read with Section 54 of the terms of a contract when the parties commit breach thereto. Therefore, the respondent controverted the assertions of the petitioner and further pleaded that he is entitled to damages for the extended period of contract.

5. The short question that comes up for consideration is as to whether the award because of the assertions made by the petitioner/applicant is liable to be set aside or not.

6. The main thrust of the argument of the learned counsel appearing for Union of India was that under the terms of the contract the arbitrator could only grant the escalation as per the provisions of the agreement particularly clause 10(CC) of the contract. The arbitrator had gone beyond the said terms and Therefore the

award is liable to be set aside. On behalf of the respondent it was highlighted that the scope of interference in terms of Section 34 of the Act is limited and in any case this fact was not brought to the notice of arbitrator and Therefore Section 16 of the Act would bar the petitioner from raising such a plea. It was further argued that in any case there is no deviation from the terms of the contract nor the arbitrator had gone beyond the reference.

7. Taking up the first plea as to if the petitioner/applicant had not taken the plea that the said fact cannot be gone into by the arbitrator and the effect thereto is concerned, strong reliance was placed on Section 16 of the Act. Sub-sections 2, 3, 4 and 5 of Section 16 which are relevant reads as under:-

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defense; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section 92) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

8. It is abundantly clear from aforesaid that the party may raise a plea that the arbitral tribunal does not have jurisdiction before the said arbitral tribunal not later than the submission of the statement of defense. The plea that arbitral tribunal is exceeding the scope of the authority shall also be raised as soon as the matter is allowed to be beyond the scope of the authority and in case such a plea is raised a party aggrieved by such an arbitral award may make an application for setting aside of such an award in accordance with Section 34 of the Act. There is no dispute that the provisions are mandatory in nature.

9. Learned counsel for Union of India in this regard asserted that such a plea had been raised before the arbitral tribunal and in this context reference can well be made to the award. The relevant portion of the award reads:-

"The respondent stated that in view of the acceptance of time extension and acceptance of escalation payment as per clause 10 CC by the claimants due under the contract, nothing extra could be paid and the claim of the claimants is not justified. They have further stated that they have sanctioned extension of time up to 21-6-98 based on the hindrances. The claimants may come up with further time extension, if so desired on justified and genuine hindrances. They reiterated that the claim is not tenable as the reimbursement for increase in market rates till completion of work will be governed by clause 10 CC only. The

respondents have further stated in their written submission that delay in executing the work was not entirely attributable to the respondents. The delays were mutual and after analysing the various aspect the respondents had taken liberal and lenient view and granted time extension to the claimants to the extent the same was found justified. The respondents had been reminding the claimants to improve the performance by deploying more labour and more materials and working in multiple shifts. The claimants were also requested during site meetings as well as through letter. They have stated that it would be seen that there were delays also on the part of the claimants.

Extra payment over the quoted agreement rates from the stipulated date of completion, till the date of invocation of arbitration i.e. 28-2-98 is not admissible as in the agreement there is a provision to compensate for increase in prices of materials & labour through clause 10 CC. The respondents have stated that the claimants ha been duly compensated under this clause and, Therefore, the claim deserves to be rejected. The basis of the claim given by the claimants is hypothetical. The cost indices arrived by the proforma devised by CPWD are meant for preliminary estimates which cannot be construed to be applicable to be rates entered in the agreement. The rates of materials etc. taken by claimants are only presumptive without any valid proof. Therefore, the average increased percentage worked out on such rates is not acceptable and cannot be considered in respect of the case."

10. It is abundantly clear from the above that the said plea had been raised before the arbitrator pointing out that the tribunal would be exceeding its authority and the said fact has in fact been considered. Consequently though the objection in legal terms was well taken on behalf of the respondent but on facts of the matter it does not succeed because the objection in this regard had already been taken before the arbitrator.

11. Not only that clause 4 of sub-section (2) to Section 34 even given an independent right to the aggrieved party while having recourse to Section 34 of the Act. The relevant provision reads:-

Application for setting aside arbitral award-(1) Recourse to a court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the court only if-

(a) the party making the application furnishes proof that-

(i) a party was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the

appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decision on matters beyond the scope of the submission to arbitration;

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitrating may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the courts finds that-

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

12. It is clear from aforesaid that if the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration. Even that fact could be raised independently of Section 16 as a ground to assail the award. But further probing in this regard become unnecessary because of the findings recorded in the preceding paragraphs. The contention of the respondent's learned counsel in this regard Therefore must fail.

13. On behalf of the respondent reliance was further placed on the decision of this court in the case of National Fertilizers Ltd. Vs. Chemicals and Allied Industries Corporation and Another, . The ration decidendi of the cited decision is firstly that the court is not sitting in appeal over the findings of the arbitrator and secondly that if a person participates in the proceedings in that event he is precluded from contesting on the point that the arbitrator had no jurisdiction to adjudicate on certain matters. On both counts indeed there is no controversy but in the present case the arbitrator had already been told about this fact and objection was forthcoming in this regard from the Union of India about the escalation that was claimed to be contrary to clause 10 (CC). In that view of the matter the decision will have little role to play in the facts of the case.

14. In this connection a Division Bench of this court in the case of Delhi Development Authority v. K.C.Goyal & Co. 2001 II AD (Delhi) 116 would indeed set at rest controversy that is being raised. In the said case K.C. Goyal & Co. had been awarded a contract by the Delhi Development Authority for development of land at Rohini. The disputes arose and the matter was referred to the arbitrator. The Delhi Development Authority contended that the arbitrator had

misconducted himself by not adhering to the provisions of the contract, namely clause 10 (CC) and was going beyond the terms of the contract. The Division Bench upheld the contention and relied upon the earlier decision of this court in the case of Delhi Development Authority Vs. U. Kashyap, . In paragraph 13, the conclusion was drawn in this regard and reads:-

"13. Since the present case is squarely covered by the ratio of Associated Engineering Company case (supra) which was applied to by the Division Bench of this Court in DDA Vs. U. Kashyap (supra) interpreting Clause 10(CC) itself, following this judgment, irresistible conclusion is that the Award rendered by the Arbitrator in respect of Claim No.9 was erroneous and the Arbitrator committed legal misconduct by going beyond the provisions of Clause 10(CC). The Award of the Arbitrator and the impugned judgment and decree to this extent, Therefore, has to be set aside."

15. The decision of the larger bench in this regard indeed has binding effect and otherwise also one finds no reason to take a different view. It clearly show that the arbitrator had gone beyond the scope of the reference and the award positively would be hit by clause 10(CC) of the contract. Therefore, the arbitrator was not justified in awarding the said amount.

16. For these reasons the conclusions are obvious. The application u/s 34 of the Act filed by the Union of India is allowed and the impugned award dated 23rd November, 1999 as well as the modified award of 10/13th February, 2000 is set aside.