
(2013) 05 DEL CK 0571
In the Delhi High Court
Case No : OMP. No. 421 of 2011

Union of India

APPELLANT

Vs

M/s. P.T. Munshi Ram and Associates Pvt. Ltd.

RESPONDENT

Date of Decision : 03-05-2013

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 30, 34, 34(2), 34(2)(a)(iv)
Interest Act, 1978 — Section 3

Citation : (2013) 200 DLT 591 : (2013) 2 ILR Delhi 1614

Hon'ble Judges : Manmohan Singh, J

Bench : Single Bench

Advocate : Saqib, for the Appellant; Sudhir Nandrajog Sr. Advocate with Mr. P.R. Chatterji, for the Respondent

Judgement

Manmohan Singh, J.—The abovementioned petition has been filed by the petitioner u/s 34 of The Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") challenging the award dated 31st January, 2011 passed in Arb. P. No. 139/2009. Brief facts of the petition are that on 11th February, 2002 the petitioner had called for tenders for construction of Compound Wall around Govt. Qtrs. at Nanakpura, Pocket B, New Delhi.

2. The respondent was awarded the work vide agreement dated 28th February, 2002 executed between the parties. The date of start of work was 1st March, 2002 while the stipulated date of completion as per contract was 30th April, 2002 but according to the petitioner the work was delayed. The same was completed on 15th February, 2006. Admittedly, there was a delay of about 45.5 months.

3. On 28th February, 2009 the respondents invoked clause No. 25 of their contract seeking appointment of an arbitrator within a period of 30 days to adjudicate the disputes that had arisen between the parties and Sh. Divakar Garg was appointed as Sole Arbitrator by Chief Engineer, NDZ-III CPWD vide letter dated 6th April, 2009 as per the terms of the said contract.

4. On 8th April, 2009 the respondent had approached this court by way of filling Arb. P. No. 139/2009 for appointment of arbitrator under Sector 11 of the said Act to adjudicate the disputes between the parties. The prayer made in the petition was allowed. Er. R.J. Bakhru was appointed as a Sole Arbitrator vide order dated 27th October, 2009. The petitioner submits that the above said order was obtained by the respondent by submitting totally wrong facts.

5. The respondent filed its statement of claim before the sole arbitrator on 27th November, 2009 to which the petitioner filed the Counter Statement of facts. After completing formalities, the award was published in favour of the respondent.

6. The petitioner has challenged the award in relation to Claim No. 1, 3, 4, 5, 7, 8, 9 and 10 of the Ld. Sole Arbitrator, inter alia, on the following grounds:

i) Arbitrator has no jurisdiction to make award against the specific terms of contract between the parties. Acceptance of claim of contractor by arbitrator without assigning reasons and ignoring agreement clause amounts to error apparent on face of record as well as contrary to terms of agreement.

ii) Arbitrator has travelled beyond the scope of Arbitration Agreement in granting compensation for delay in supply of material and payment of interest which is forbidden under agreement.

iii) The impugned award is perverse and illegal in so far as the same gives unjust advantage and benefit to the respondent which is in total disregard to the contractual terms between the parties.

iv) Arbitrator has deliberately ignored the preliminary submissions of the petitioner regarding disclosure of his impartiality and interest and also the factum of the appointment of Sh. Diwakar Garg as Sole Arbitrator by the Chief Engineer on 6th April, 2009. Arbitrator was duty bound to furnish his response/ decision on his jurisdiction, based on the preliminary objections raised by the petitioner before proceeding further with the adjudication. But the arbitrator deliberately chose not to respond to the same and this act of the arbitrator is totally unfair and amounts to legal misconduct.

v) Even in the impugned award, there is no mention of the appointment of Sh. Diwakar Garg as sole arbitrator by the Chief Engineer on 6th April, 2009. It is submitted that the said arbitrator Sh. R.J. Bakhru has totally misconducted himself in the most unfair and improper manner and deliberately chose not to deal with the said aspect.

vi) Arbitrator committed a grave error in ignoring clause 25 of the contract which stipulates that cost of arbitration is to be equally paid by both the parties. Interest @12% p.a. (simple) awarded by the Arbitrator is exorbitant, unsubstantiated and against the well settled judicial decisions of the Apex Court.

vii) The award is also against the "public policy" of India and as such is also liable

to be set aside u/s 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996. The respondent's request for appointment of arbitrator under Clause 25 of the Contract was sent to the Chief Engineer, CPWD on 23rd March, 2009 (not on 28th February, 2009 as being contended by the respondent) and the same was received in the office of the Chief Engineer, CPWD on 3rd March, 2009. The respondent did not disclose the true and correct facts before this Court in Arb. P. No. 139/2009. By letter dated 6th April, 2009, the Chief Engineer had duly appointed Sh. Diwakar Garg as sole arbitrator to adjudicate the dispute between the parties. It is relevant to point out that the said arbitrator duly communicated his appointment to both the parties concerned vide notice dated 22nd April, 2009. The date of preliminary hearing was also fixed for 18th May, 2009. But this fact as well was also not brought to the notice of this Court in the proceedings in Arb. P. No. 139/2009.

7. On merit, it is alleged by the petitioner in its objections that the learned Arbitrator has incorrectly held that the measurements have been recorded unilaterally by petitioner without considering that it was specifically pointed out in Exhibit R-55 to 57 filed by the petitioner in the counter statement of claim, that bill was clearly accepted by the respondent. The substitution of item was correctly done as is evident from the item executed, but he chose to ignore the same and conveniently considered agreement item No. 10 to the benefit of the respondent when the welding is clearly included in agreement item No. 10. The Ld. Arbitrator failed to appreciate that notice was given by the petitioner to the respondent-claimant vide Exhibits R-51, R-58 of the Counter to Statement of Claim for joint measurement, but no response was received by the petitioner. All the executed work at site was measured by the field staff in M.B. and same was paid in final bill.

8. The learned Arbitrator has gone beyond the contractual terms and provisions by accepting the analysis of rates of the claimant-respondent in total disregard to Clause 12 of the contract as the analysis of rates submitted by the respondent is not as per Clause 12 of the agreement. As per Clause 12.12 (ii) the extra/substitute item is to be derived from the nearest similar item in the schedule of quantity of the agreement but the respondent has incorrectly held that recoveries made by the petitioner from the respondent is illegal as the respondent did not submit the fortnightly labour return as per Clause 19.D of the contract and no notice of default was required to be given by the petitioner to the respondent. He also failed to consider that compensation has been levied twice as under: (i) For the period 7th December, 2002 to 11th November, 2003 for Rs. 2,28,450/- (ii) For the period 12th March, 2003 to 15th February, 2006 for Rs. 1,82,760/- Respondent-claimant has not preferred any claim for Rs. 2,28,450/- and had accepted for the delay in completion of the work on his part. Similarly, delay during the period 12th March, 2003 to 15th February, 2006 was also on their account only. As per Clause 13 of contract, the respondent was free to opt for foreclosure of the contract if it felt that there is any element of force to stop the work at site. Hence the award of Rs. 4,65,000/- given for T & P, Rs.

7,44,000/- for salary of staff for supervision etc. and Rs. 5,19,724/- for overheads are totally unjustified. The respondent's claim for the loss due to under utilization of man/material is not justified for the period upto 11th November, 2003 though he has worked out an amount for this period also and the delay for remaining period is also on part of claimant for which compensation was rightly levied.

9. It is alleged by the petitioner that the learned Single Judge failed to consider that as per the terms of contract, the salary of project in-charge and others are not to be included in the award, since the service of the engineer is only required as per agreement and remaining personnel can be considered as part of overhead charges which were calculated incorrectly by him to be 5 % instead of 2.5%.

10. It is also stated by the petitioner that the rate of Interest @ 12 % p.a. (simple) awarded by the learned Arbitrator is exorbitant, against the well settled judicial decisions of the Apex Court and Section 3 of the Interest Act, 1978 which provides for current rate of interest @ 4% to 6% p.a. The arbitral award deals with disputes not contemplated by and not falling within the terms of the submissions to arbitration proceeding contains decisions on matters beyond the scope of the submissions to arbitration proceedings therefore, the same ought to be set aside u/s 34(2)(a)(iv) of the Act. The award is also against the "Public Policy" of India and is also liable to be set aside u/s 34(2)(b)(ii) of the Act.

11. After hearing learned counsel appearing on behalf of respondent, I feel that it is necessary to refer some dates and events before dealing with the matter, the Same are as follows:

12. At the time of hearing of matter no one appeared on behalf of petitioner, however, later on Mr. Saqib, Advocate appeared and only made his submission while challenging the appointment of Arbitral Tribunal. His submission is that the order passed on 27th October, 2009 for appointment was contrary to the law as the petitioner before passing the said order on 12th April, 2009 already appointed Sh. Diwakar Garg, Chief Engineer as Arbitrator in terms of contract. According to him the respondent had misled the Court at the time of passing Order dated 27th October, 2009. Thus, the Award rendered by new Arbitrator is liable to be set aside on this ground itself.

13. The case of the respondent in nutshell is that as the petitioner failed to finalise the bill of the respondent even after repeated requests, the respondent therefore was constrained to approach the Chief Engineer for appointment of Arbitrator vide letter dated 28th February, 2009 posted on 2nd March, 2009. The Chief Engineer even after 30 days were over did not appoint any Arbitrator. The respondent then filed the petition u/s 11 on 8th April, 2009 in the High Court for appointment of independent and impartial Arbitrator. The letter of appointment by the petitioner was received on 12th April, 2009 and was posted on 9th April, 2009 after 30 days were over from the date of notice and after the respondent

had approached the High Court on 8th April, 2009 for appointment of an independent and impartial arbitrator u/s 11. Therefore the petitioner appointed the arbitrator after 30 days were over (from the date of notice) and after the respondent had approached the Court seeking appointment of impartial and independent Arbitrator.

14. It is submitted that the Court after due consideration of all the facts and circumstances of the case appointed Mr. R.J. Bakhru as sole arbitrator in the present matter vide its order dated 27th October, 2009 with the consent of both the parties. It was already in the knowledge of the Court that the petitioner had appointed the Arbitrator as is apparent from the order dated 27th October, 2009. However, as the appointment was made after 30 days were over from the date of notice and after the respondent had approached the High Court on 8th April, 2009 for appointment of an independent and impartial arbitrator u/s 11, therefore, the High Court held that the petitioner was no longer entitled for appointment of the Arbitrator and the High Court appointed the Arbitrator with the consent of both the parties. It is also pertinent to point out here that the Arbitrator appointed by the Chief Engineer, Shri Divaker Garg, resigned vide his letter dated 6th November, 2009 after the appointment of arbitrator by the High Court.

15. It is evident that the High Court after hearing both the parties and with the consent of both the parties appointed Shri R.J. Bakhru (Retd. Chief Engineer) as Sole Arbitrator. It is pertinent to point out that the said order dated 27th October, 2009 was a consented order and had not been challenged before any forum and infact has been acted upon by both the parties without any reservation/protests. The petitioner never raised the jurisdiction issue before the Arbitrator. The petitioner after the appointment of the sole Arbitrator has conceded to his arbitration and have filed their counter statement of facts and other relevant documents and have also attended all hearings in the matter, the petitioners have also filed their written submissions before the said Arbitrator for the purposes of adjudication upon the matter. Therefore, the objection raised by the petitioner is not tenable.

16. The learned Arbitrator has published his award after giving opportunity to both the parties and has reached the conclusions after taking into cognizance all documents, case laws and authorities referred by both the parties.

17. The learned Arbitrator has passed the speaking award dealing claims of the respondent, details of the same are:

a) Claim No. 1--Award of Rs. 17,58,576/- for balance due in final bill. The learned Arbitrator has given detailed reasons in four pages i.e., page 7 and 10 of the award. Learned Arbitrator is a technically expert person being retired Chief Engineer of CPWD. The Court cannot re-appreciate the evidence on merits. Referred to Himachal Pradesh State Electricity Board Vs. R.J. Shah and Company, .

The learned Arbitrator noted that the Ex. R-55 to R-57 relied by the petitioner clearly shows that even the R/A Bills were accepted under protest. No final bill was paid by the petitioner. The final bill was paid only during the Arbitration proceedings. The petitioner never issued exhibit R-51 & R-58 and these exhibits were denied by the respondent. Moreover, the petitioner could not establish/prove that R-51 or R-58 were ever dispatched or issued to the respondent. The learned Arbitrator has also held: "The payment of interim bills and final bill was delayed after making heavy reductions and illegal recoveries. The bills with details of measurements submitted by claimants were ignored and the bills prepared by the respondents were based on incomplete measurements recorded unilaterally by respondent inspite of protests by the claimants at each stage."

The respondent has notified the petitioner in regard to the rates being charged by it for the extra items at the time of commencement of work along with its analysis. The nomenclature of the structural steel item being item no. 10 clearly shows that the cost/element of welding is not included in item and is to be paid separately. That is why the agreement contains item of welding separately being item No. 25. Had the cost/element of welding being included in item No. 10, then there would not have been any occasion of agreement containing welding item separately being item No. 25.

The learned Arbitrator has held that the substituted item no. 1 is correctly payable as per the agreement item no. 10. There was no occasion of making a substituted item as the item was already there in the agreement. In regard to the compensation for delay the Supreme Court has in its recent decision in the case of J.G. Engineers Pvt. Ltd. Vs. Union of India (UOI) and Another, , has held:

In view of the finding of the arbitrator that the Appellant was not responsible for the delay and that the Respondents were responsible for the delay, the question of Respondents levying liquidated damages or claiming the excess cost in getting the work completed as damages, does not arise. Once it is held that the contractor was not responsible for the delay and the delay occurred only on account of the omissions and commissions on the part of the Respondents, it follows that provisions which make the decision of the Superintending Engineer or the Engineer-in-Charge final and conclusive, will be irrelevant.

In the instant case also after perusing the records, the learned Arbitrator has held:

The delay in completion of work and recording of completion certificate was exclusively and fully due to failure to perform reciprocal contractual obligations on part of respondents.

The learned Arbitrator has reached to the finding of the fact that it was petitioner who was responsible for delay and therefore the question of levy of compensation by the petitioner does not arise. Moreover the respondent never recognized the recovery of amount by the petitioner for delay in completion. The petitioner has made and shown only one recovery i.e. of Rs. 1,82,760/- in their

alleged final bill on the basis of notice/letter dated 23rd July, 2007 from S.E. (Ext. R/54), which was never issued to the claimants. The respondent denied the receipt of the letter (Ext R/54). The petitioner could not prove that it ever dispatched the Ext R/54 to the respondent. No show cause notice for levy of recovery was given by respondents.

b) Claim No. 2 - This claim has not been allowed by the learned Arbitrator as the learned Arbitrator has considered the compensation of damages for T & P, Staff, Overheads, Market rate/escalation of labour, material, watch and ward under claim No. 3, 4 and 5.

c) Claim no. 3 - Learned Arbitrator awarded Rs. 17,28,724/-. This award has been made u/s 73 of the Contract Act, 1870 in terms of which if a breach has been committed the other party has to be compensated. The learned Arbitrator held that various areas of work were given in stages during period 4th March, 2002 to 22nd September, 2003, no working drawings were issued by the petitioner, old grills were issued after 9th May, 2002 for part of work. The work in pocket A and issue of old grill was not contemplated in the agreement. Old grills had to be removed from other site, transported and repaired before fixing by respondents. The supply of cement/stipulate material was irregular and in small quantities, in spite of protests by the respondents, the payment of interim bills and final bill were delayed after making heavy reductions and illegal recoveries. The bills with details of measurements submitted by claimants were ignored and the bills prepared by the respondents were based on incomplete measurements recorded unilaterally by respondent inspite of protests by the claimants at each stage, there was delay due to electric cables and provision of gates.

d) The learned Arbitrator has come to the finding of the fact that the petitioner was responsible for delay and is thus liable for reimbursing the losses suffered by the respondent for the delayed period. The learned Arbitrator on page No. 4 to 7 of the award has discussed and concluded that the delay was on the part of the petitioner. The learned Arbitrator also held that it was petitioner who did not fulfill its part of the obligation and was responsible for delay as well as the consequence for such delay. He has calculated the losses for the main items of T & P required and has only allowed for part of the delayed period and not for the whole of the delayed period i.e. allowed only for 20 months against delay of 45.50 months. Similarly for the staff the learned Arbitrator has allowed for salary of staff for 24 months only. The overheads have been allowed @0.50% only against 2.50% admitted by the petitioner. Even the calculation with details have been given by the learned Arbitrator in the award.

e) Claim No. 4 - Award of Rs. 90,730/-. This Award has been made u/s 73 of the Contract Act, 1870 in terms of which if a breach has been committed then the other party has to be compensated. The Arbitrator has calculated net cost of work, after deduction of stipulated material, for the delayed period as Rs. 22,68,174/- and has only allowed 4% as average increase in cost of labour and material against 40% claimed by the respondent and has therefore allowed only

4% of Rs. 22,68,174/- which comes to Rs. 90,730/-.

f) Claim No. 5 - Award of Rs. 7,28,000/-. This award has been made u/s 73 of the Contract Act, 1870 in terms of which if a breach has been committed then the other party has to be compensated. The learned Arbitrator after study of documents on record held that the delay was on the part of the petitioner and claimant was forced to stay at site and thereafter the Arbitrator has awarded only for four chowkidars against 10 for each 12 hr shift i.e. 20 nos. claimed by the respondent. The respondent has exhibited the wages sheet as exhibit C-75 on page 126 to 141. The petitioner has not forwarded any objection against this claim. The petitioner has not forwarded any objection against this claim in their claim petition u/s 34.

g) Claim No. 6 - This claim was disallowed by the learned Arbitrator as the learned Arbitrator has compensated the respondent in claim no. 5.

h) Claim No. 7 - Learned Arbitrator has awarded cost of arbitration in favour of the respondent.

i) Claim No. 8, 9 & 10 - Learned Arbitrator has awarded pursuit, pendente lite & future interest @12% P.A. against 24% P.A. claimed by the respondent. The respondent has also enclosed exhibit C-172 being the certificate from the bankers of the respondent, certifying that the interest being charged by the bankers from the respondent was 16%. Further it is submitted that in clause 10 B (iv) the petitioner is charging interest @18% P.A. against the mobilization advance provided by it to the respondent against plant and machinery. Therefore if the petitioner wants to recover interest @18% on the mobilization advance given to the contractor, there could hardly be any justification in its grievance that rate of interest 12% as awarded by the learned Arbitrator is excessive, exorbitant and unsubstantiated.

18. In order to determine whether the Arbitrator has acted in excess of jurisdiction what has to be seen is whether the Claimant could raise a particular dispute or claim before an Arbitrator. If the answer is in the affirmative then it is clear that the Arbitrator would have the jurisdiction to deal with such a claim. On the other hand if the arbitration clause or a specific term in the contract or the law does not permit or give the Arbitrator the power to decide or to adjudicate on a dispute raised by the Claimant or there is a specific bar to the raising of a particular dispute or claim then any decision given by the Arbitrator in respect thereof would be clearly in excess of jurisdiction. Referred to Himachal Pradesh State Electricity Board Vs. R.J. Shah and Company, .

19. This Court will not sit in appeal over the matter/award and re-appraise the evidence adduced by the parties as there is no error apparent on the face of the record of the award and the objections are frivolous, vexatious and are liable to be rejected forthwith as it fails to show any error apparent on the fact of the award and/or any legal misconduct on the part of the learned Arbitrator. As per the settled law by the Supreme Court, the reasonability of the reasons of the

award made by the learned Arbitrator will not be looked into or appreciated by this Court in any manner whatsoever.

20. In another judgment the Supreme Court stated "Even if the decision of the Arbitrator does not accord with the view of the Court, the award cannot be set aside on the sole ground that there is an error of law apparent on the face of it. Referred to Tarapore and Company Vs. Cochin Shipyard Ltd., Cochin and Another, .

21. There are decisions on this issue, the same are-

i) The Supreme Court in M/s. Arosan Enterprises Ltd. Vs. Union of India and Another, , it has clearly stated:

In any event, the issues raised in the matter on merits relate to default, time being the essence, damages-these are all issues of fact, and the Arbitrators are within their jurisdiction to decide the issue as they deem fit-the Court has no right or authority to interdict an award on a factual issue and it is on this score the Appellate Court has gone totally wrong and thus exercised jurisdiction which it did not have.

It has been further held:

The common phraseology "error apparent on the face of the record" does not itself, however, mean and imply closer scrutiny of the merits of documents and materials on record. The Court as a matter of fact cannot substitute its evaluation and come to the conclusion that the Arbitrator had acted contrary to the bargain between the parties. If the view of the Arbitrator is a possible view the award or the reasoning contained therein cannot be examined.

It has also been held:

The Arbitrators have, in fact, come to a conclusion on a closer scrutiny of the evidence in the matter and reappraisal of evidence by the Court is unknown to proceedings u/s 30 of the Arbitration Act.

ii) The Constitution Bench of the Supreme Court in Goa, Daman and Diu Housing Board Vs. Ramakant V.P. Darvotkar, , had held:

There is nothing to show in this case that the Arbitrator misconducted himself of the proceedings in any other manner nor there is anything to show that the awards have been improperly procured. There is no allegation, far less any finding that the Arbitrator was biased or unfair or he has not heard both the parties or he has not fairly considered the submissions of the parties in making the awards on question. It is evident from the awards that the Arbitrator has considered all the specific issues raised by the parties in the arbitration proceedings and came to his finding after giving cogent reasons.

iii) This Court in Delhi Development Authority v. Amita Nand Aggarwal Associates, OMP No. 115/2007, decided on 8th May, 2009, has held:

It is well settled that the jurisdiction of the court when called upon to decide the objection raised by a party against the arbitral award is limited as expressly indicated in the Arbitration and Conciliation Act, 1996. The court has no jurisdiction to sit in appeal and examine the correctness of the award on merits with reference to the materials produced before the arbitrator. It cannot sit in appeal over views of the arbitrator by re-examining and re-assessing the materials.

iv) This court in *Sanyukt Nirmata Vs. Delhi Development Authority and Another*, , in para 12 has held:

Division bench of this Court in *Delhi Development Authority Vs. Bhagat Construction Co. (P) Ltd. and Another*, had observed that specially where a technical man like retired Chief Engineer of CPWD is called upon to act as an arbitrator, all that is required to be seen is that the arbitrator has applied his mind before awarding the claims and the arbitrator is not required to disclose the mathematical calculations in the award. Thus, until and unless the decision of the arbitrator is manifestly perverse or has been arrived at on the wrong application of law, the award would not call for any interference.

v) Division bench of this Court in *PL Munchi Ram & Associates (P) Ltd. v. Delhi Development Authority*, FAO (OS) 147/2002, decided on 12th August, 2011 has held:

We also agree with the submission of the learned counsel for the appellant that the very purpose of having an arbitrator (who is the chosen judge of the parties) and that too a specialist in the field, being a retired Director General of Works, CPWD, would be defeated if this Court was to scrutinize the mode and manner of calculations of all such claims. A Division Bench of this Court in *Delhi Development Authority Vs. Bhagat Construction Co. (P) Ltd. and Another*, had observed that where a technical man like a retired Chief Engineer of CPWD is called upon to act as an arbitrator, all that is required to be seen is that the arbitrator has applied his mind before awarding the claims and the arbitrator is not required to disclose the mathematical calculations in the award. Thus, until and unless the decision of the arbitrator is manifestly perverse or has been arrived at by the wrong application of law, the award would not call for any interference.

22. The submissions of the learned counsel appearing on behalf of petitioner has no force as the learned Arbitrator was appointed with the consent of the parties.

23. From the instant objections, it appears that the petitioner challenged the award merely on the ground that the learned Arbitral Tribunal had rejected the applicant's submissions on the interpretation of the Contract between the parties and the other tender documents after a perusal of the facts and circumstances presented by the applicant before the learned Tribunal.

24. A bare perusal of the objection shows that the petitioner has re-agitated its

claims before this Court in an attempt to treat this Court as an appellate body, which is clearly not permissible u/s 34 or any other provisions of the Arbitration and Conciliation Act, 1996.

25. The petitioner has merely challenged the Award without having made any specific pleading to establish either manifest error apparent on the face of the record and/or perversity.

26. The applicant has made out no case to bring the impugned Award within the fold of Section 34(2) of the Act whereupon this Court may exercise its jurisdiction u/s 34 of the Act. In view of aforesaid reasons, the objections filed by petitioner are not sustainable. This court hence upholds the award passed by the learned Arbitrator.