

(2012) 02 DEL CK 0487
In the Delhi High Court
Case No : CS (OS) 192 of 2011

Vikas Vihar Co-Operative Group Housing Society Ltd. APPELLANT
Vs
Budhiraja Electricals and Another RESPONDENT

Date of Decision : 21-02-2012

Acts Referred:

Arbitration Act, 1940 — Section 14, 20, 30, 33

Citation : (2012) 1 ARBLR 476 : (2012) 188 DLT 565

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : Raman Kapur, with Mr. Dhiraj Sachdeva, for the Appellant; Anusuya Salwan with Ms. Raashi Beri, for the Respondent

Judgement

Justice S. Muralidhar

1. Vikas Vihar Cooperative Group Housing Society Ltd. ("Society") has filed CS (OS) No. 192 of 2011 u/s 14 of the Arbitration Act, 1940 ("Act") praying for a direction to the learned Arbitrator (Respondent No. 2) to file in this Court a copy of the Award dated 7th January 2011 by which the disputes between the Society and the Respondent No. 1, Budhiraja Electricals, arising out of a contract for providing electrical works for the 219 dwelling units of the Society, were adjudicated.

2. The disputes between the parties were referred initially to the sole arbitration of a retired Judge of this Court and an Award was passed on 19th October 2002. Both parties filed objections to the said Award in CS (OS) No. 192 of 2002. By an order dated 25th February 2010 this Court set aside the Award and Respondent No. 2 was appointed as the Sole Arbitrator to decide afresh the disputes between the parties i.e. both their claims and counter claims. By the fresh impugned Award dated 7th January 2011 the Society has been directed to pay Respondent No. 1 a total sum of Rs. 12,86,676 together with simple interest at 8% per annum from 1st October 1995 till the date of the Award. If the awarded amount was not paid by the Society within three months from the date of the receipt of

the Award, the Society was liable to pay Respondent No.1 post-Award interest at 10% per annum from 8th January 2011 till the date of payment.

3. The case of Respondent No. 1 before the Arbitrator was that by letter dated 12th October 1990 the Society informed Respondent No. 1 that the terms and conditions of the award of the electrical work would be governed by the tender form supplied on 28th July 1990. The work commenced on 21st October 1990. It was to be completed within a period of two and a half years i.e. by 20th April 1993. According to Respondent No.1 since the building work was not completed, the works of electrical installation could also not be completed within the stipulated period. Further, the Society failed to deliver the required materials. By a letter dated 10th February 1993, the Respondent asked for escalation due to increase in the market rates of the materials required and also requested the Society to pay the statutory variations as per the agreement. By letter dated 28th April 1993 Respondent No. 1 informed the Society that the agreement period had expired and that current market rates would be charged for the balance work executed after 20th April 1993.

4. According to Respondent No. 1, at a joint meeting held with the Society it was decided to prepare two lists for the work completed. One would contain the items of work which could not be carried out due to no avail ability of the site. The second list would contain items of work executed before the expiry of the date of completion. By a letter dated 19th February 1994, Respondent No. 1 submitted the rates of all such items. From 12th Running Account (RA) Bill, which was for Rs. 10,21,144/-the splitting of rates was resorted to. The bill was submitted in two parts, i.e., Part-A and Part-B. Part A of the bill was on the basis of current market rates. Part B was the left over work of the previous period executed according to agreement rates. The 13th and 14th RA Bills were also submitted in two parts. According to Respondent No. 1, against a total sum of Rs. 10,21,144, the Society released Rs. 5 lakhs on 18th April 1995 and Rs. 2 lakhs on 6th May 1994. Further, a sum of Rs. 2 lakh was released on 18th July 1994, Rs. 2.50 lakh on 26th August 1994, Rs. 3.50 lakh on 6th October 1994, Rs.1 lakh on 24th December 1994. The 14th RA Bill for Rs. 4,94,645 was submitted on 8th March 1995 and a reminder was sent by Respondent No.1 to the Society on 28th March 1995 for releasing payment. The Society did not release payments thereafter.

5. Respondent No. 1 claimed that in order to mitigate the losses of the Society it decided to continue the work up to its final completion reserving its right to claim enhanced rates. The revised 14th RA Bill for Rs. 5,66,676/was handed over in person to Mr. Arjun Singh, President of the Society in the presence of the Secretary of the Society on 8th May 1995. Instead of releasing the above amount, the Society by letter dated 7th October, 1995 rescinded the contract and ultimately the work was stopped by Respondent No. 1 on 11th October 1995. The Society informed Respondent No. 1 that final measurement would be taken on 15th October, 1995. However, when the engineer of Respondent No. 1 visited the site, nobody turned up from the Society. Again on 17th October 1995 nobody

turned up from the Society for the site inspection and this was informed to the Society by Respondent No. 1 on 26th October 1995.

6. Respondent No. 1 then filed a petition u/s 20 of the Act this Court. In those proceedings, this Court directed the Society's architect to inspect the site after notice to both parties and prepare a report by 28th February 1996. Respondent No. 1 states that a copy of the report prepared by the architect was not sent to it. The 15th RA and final Bill for Rs. 13,37,119 was submitted by Respondent No.1 to this Court while the proceedings were pending. Subsequently, another Local Commissioner (LC), Mr. M.L. Ratra, a Retired Engineer, was directed to visit the site and take measurements of the work done. He submitted a report (Ex.AW1/A-1) which largely supported the stand of Respondent No.1.

7. The case of the Society was that in response to the letter dated 10th February 1993 of Respondent No. 1, the Society had by its letter dated 30th March 1993 categorically refuted the claim for escalation in rates. The Society pointed out that there was no clause in the agreement that enabled Respondent No. 1 to claim escalation. Respondent No.1 did not protest and opted to continue with the work. The 11th RA Bill submitted on 1st January 1994, much after the stipulated date of completion, was drawn up on the basis of the agreement rates. Payment against the 11th RA Bill was made after it was certified by the Architect. Since the 12th RA Bill and subsequent bills were not submitted in accordance with the agreed rates, the Society made ad hoc on account payments. In all the Society paid Respondent No.1 a sum of Rs. 42,48,091 after deducting tax at source. According to the Society, as against the 12th and 13th RA Bills although only Rs. 3,86,573 was payable, it paid Respondent No.1 Rs. 16 lakhs on account. In other words, the Society claimed that Rs. 12,13,427 had been paid in excess and was to be recovered from Respondent No.1. Two show cause notices dated 10th June 1995 and 6th July 1995 were issued by the Society to Respondent No. 1 and, thereafter the contract was terminated under Clause 42 by a letter dated 7th October 1995. The Society denies that any work was thereafter done by Respondent No.1. Consequently the claim of Respondent No.1 for a sum of Rs. 7,70,443 towards work purportedly done after submission of the 14th RA Bill is denied as not being arbitrable. The Society filed a counter claim for Rs. 11,20,890 against Respondent No.1 before the Arbitrator together with interest at 24% per annum, with effect from 10th June 1995 till the date of payment or the date of the decree whichever was earlier.

8. In the arbitral proceedings Respondent No. 1 examined Mr. Mohinder Lal Budhiraja, one of its partners, and Mr. Uma Shankar Sharma, Site Engineer, as witnesses. The Society examined Mr. Arjun Singh, President of the Society and Mr. Balbir Singh, Site Engineer, as witnesses. Mr. Uma Shankar Sharma was unable to be cross-examined as he expired during the pendency of the arbitral proceedings.

9. Claim No. 1 by Respondent No. 1 before the learned Arbitrator was for Rs. 5,66,676 being the balance payment against the 14th RA bill submitted on 8th

May 1995. Claim No. 3 was for a sum of Rs. 7,70,443 being the value of the work executed after submission of the 14th RA bill (revised). The learned Arbitrator referred to the report of Mr. Ratra, the LC appointed by the Court, in which it stated that the overall work done was satisfactory. The learned Arbitrator noted that Mr. Ratra withstood the lengthy cross-examination by the Petitioner and that his testimony "in a way supports the claim of the Claimant." The learned Arbitrator opined that the evidence of the Respondent No. 1, coupled with the Report of Mr. Ratra, showed that the measurements recorded by the LC corresponded to the claim of Respondent No. 1, the default, if any, was only on the part of the Respondent (the Petitioner herein) in his not handing over the site in time for installation of electrical work and acts and omissions on the part of the Respondent ultimately resulted in financial losses to the Claimant. Claim No. 1 for Rs. 5,66,676 was, therefore, awarded to Respondent No. 1. As regards Claim No. 3 for Rs. 7,70,443, since Respondent No. 1 had only claimed Rs.3.50 lakhs in the petition filed u/s 20 of the Act in this Court, the claim was allowed only to that extent. Claim No.4 was not pressed by Respondent No.1. As regards Claim No. 5 for a sum of Rs. 5 lakhs on account of infructuous expenditure and damages, it was held that "interest of justice would be met if 50% of the amount claimed i.e. a sum of Rs.2,50,000 is allowed" in favour of Respondent No.1. Under Claim No. 6, the Society was directed to refund Respondent No.1 the security deposit of Rs.1.20 lakhs. Under Claim No.2 simple interest at 8% per annum from 1st October 1995 till the date of the Award was awarded. If the awarded amount was not paid by the Society within three months it was to pay post-Award interest at 10% per annum till the date of payment. The counter claim No.1 of the Society for refund of Rs. 11,20,890 was rejected on the ground that the Society was unable to substantiate it. Consequently counter claim No.2 for interest was rejected. The parties were directed to bear their own costs.

10. Mr. Raman Kapur, learned Senior counsel for the Society, submitted that the award was contrary to the express terms of the contract and was liable to be set aside u/s 30 read with Section 33 of the Act. He pointed out that the Society's stand throughout had been that there was no clause in the contract that permitted Respondent No. 1 to be paid the escalated rates. This was made clear to Respondent No. 1 by the Society by its letter dated 30th March 1993 to which there was no denial by Respondent No. 1. He referred to the letter dated 8th May 1995 of Respondent No.1 enclosing the 14th RA Bill for Rs.4,94,645. This was followed by a letter dated 4th May 1995 titled "revised bill for Rs.5,66,676 in which it was stated that the additional work for Rs.72,031 had been carried out after the submission of the 14th RA Bill. Mr. Kapur, therefore, pointed out that even according to Respondent No. 1 the additional work done up to 8th May 1995 was for Rs.72031/-. The Society's case is that it had already overpaid and by letter dated 7th August 1995 it denied that any amount was due. It was stated that the bills would be settled after verification by the Architect. Thereafter, two show cause notices were issued on 10th June 1995 and 6th July 1995 and the contract was terminated by the letter dated 7th October 1995 with

immediate effect. Respondent No. 1 confirmed by its letter dated 11th October 1995 that "we have stopped the work from today i.e. 10.11.1995 as per your instructions." It was, accordingly, submitted that the entire claim under 15th RA bill was wholly unjustified as there was no such extra work done and as such no bill was ever received by the Society, except when it was filed before this Court.

11. Mr. Kapur referred to the report of Mr. Pritpal Singh, the first Architect, who he states took measurements in the presence of Respondent No. 1. He pointed out that Mr. Ratra's report, in fact, could not speak of the status of the work on the date when the contract was terminated as such inspection took place much later. He referred to the evidence of Mr. Mohinder Lal Budhiraja which showed that no such work after the termination of the contract was performed by Respondent No. 1. This witness admitted to not having given any details for the claim of Rs.7,70,443. It is submitted that the learned Arbitrator overlooked the evidence on record and erred in awarding Rs.3.50 lakhs to Respondent No. 1.

12. Ms. Anusuya Salwan, learned counsel for the Respondent No. 1, submitted that an award does not become bad merely because escalation has been awarded. Reference is made to the judgment in P.M. Paul Vs. Union of India (UOI), . As regards the award of interest, reliance is placed on Union of India v. Saraswat Trading Agency (2009) 3 Arb. LR. 119 (SC). It is submitted that consequent upon the failure by the Society to hand over the site in time, Respondent No. 1 would be entitled to escalation notwithstanding absence of any clause in that regard. Reliance is placed on the judgment in K.N. Sathyapalan (Dead) by LRs. Vs. State of Kerala and Another, . Ms. Salwan handed over a chart explaining how sums claimed by Respondent No.1 under Claim Nos.1 and 3 had been computed.

13. The first issue to be determined is whether the impugned Award is contrary to the contract inasmuch as the learned Arbitrator has allowed Claims 1 and 3 of Respondent No.1 which are premised on Respondent No.1 being entitled to enhanced rates. The correspondence between the parties in this regard is relevant and has also been referred to in the impugned Award. On 10th February 1993 Respondent No. 1 wrote to the Society in which in the first paragraph it stated that "the work was started immediately after the site for execution of work was made available to us". There is no mention here of any delay in handing over the site. The letter then refers to the increase in the price of petrol and petroleum products as well as increase in the rate of excise duty and labour rates. In response to the said letter, the Society replied on 30th March 1993 categorically stating as under:

the clause/clauses under which the escalation on account of rise in petroleum prices has been claimed may be cited. The alleged claim is misconceived and is denied. No assurance of making any payment on this or any other grounds except the due payments in accordance with the terms and conditions of the Agreement/Contract was given at any stage whatsoever.

14. In conclusion, the Society stated as under:

You are therefore, requested to take up the work with due diligence and speed up the progress of the work. The payments due would be made to you in accordance with the terms and conditions of the agreement. It may also be noted that in the event of failure to execute and complete the work in accordance with the terms and conditions of the contract/agreement, the society would be left with no other alternative but to take action against you as per the terms and conditions of the agreement between you and the society.

15. Far from protesting against the above stand of the Society, Respondent No.1 in its further letter dated 28th April 1993 explained that its earlier letter had been "misunderstood" and that "we have not any intention to blame the Society". It was stated that although the stipulated completion date had expired, Respondent No.1 was still executing the work. It was pointed out that in terms of the agreement, statutory increase in material and labour was to be paid and only that was being asked for. It was then stated that "token amount, whichever you feel feasible on account of labour increase and statutory increase". Finally, it was stated that the "price of all materials have gone up too much on higher side and our agreement period is over, so we will charge current rate for the balance work to be executed." And yet, the letter ended by asking the Society "to consider our case sympathetically in view of the points explained above." What is significant is that there is no mention in the above letter dated 28th April 1993 of any delay on the part of the Society in handing over the site to Respondent No. 1. Given the tone and tenor of the letter it is evident that Respondent No.1 was aware that it was not entitled to any enhancement in the rates in terms of the contract.

16. On 1st January 1994, Respondent No. 1 submitted its 11th RA bill which was after the expiry of the stipulated period on 20th April 1993 in accordance with the agreement rates. It stated that Respondent No.1 would be charging "current rates" for the additional blocks and other items. Payment was made by the Society against the 11th RA bill on agreement rates after it was certified by the Architect on the basis of the agreement rates. The letter dated 19th February 1994 from Respondent No.1 to the Society (ex C-7) shows that the Society had not agreed to paying the current rates. Even the 12th R.A. Bill submitted on 1st April 1994 was as per agreement rates and not enhanced rates. This is evident from the letter dated 1st August 1994 of Respondent No.1 where it stated for the first time that it had been decided to send details of "work not done within the agreement period and (ii) work (that) could not be done due to non-availability of site." In this letter Respondent No.1 was still requesting that "escalation amount be finalized as per agreement clauses." Clearly therefore, there was no agreement to pay escalated rates till this time. Meanwhile, admittedly, the Society kept making ad hoc on account payments which fact is not disputed by Respondent No.1.

17. On 8th March 1995 Respondent No.1 submitted the 14th R.A. Bill for Rs. 4,94,645 which was arrived at by totaling the 12th and 13th RA Bills and

adjusting the sum of Rs.16 lakhs received as ad hoc payments from the Society. A revised 14th RA Bill was submitted two months later on 8th May 1995 for a sum of Rs. 5,66,676. Respondent No.1 explained that since the submission of the 14th RA Bill on 8th March 1995, it had carried out "additional work for Rs. 72,031." The Society never agreed to this demand. On the other hand, its letter dated 6th July 1995 reiterated that Respondent No.1 was not entitled to enhanced rates.

18. In the cross-examination of the witness for Respondent No. 1, Mr. Mohinder Lal Budhiraja on 15th May 1999 stated: "We did not write any letter to the respondent Society that a site was not available at a given time for execution or continuance of work." Although he volunteered to produce letters to that effect "on the next date" he never did. That the Society never agreed to enhanced rates is confirmed in his cross-examination on 14th September. In response to a specific question whether "any revised rates were agreed to by the Society in writing at any point of time over and above the agreed rates", Mr. Budhiraja answered in the negative. He was unable to say whether the claim for escalated rates "is confined only to statutory increases or whether that also includes fluctuation in market rates." This witness also could not explain if any losses had been suffered by Respondent No.1 as a result of the increased rates. On 15th May 1999, he admitted "it is correct that when we submitted 12th R.A. bill all previous payments had been received, but those payments had been received late and further volunteered that the payments covered by C/3 had also not been paid." He also stated that except for the letter dated 10th February 1993 (Ex. C/4) "we did not write any specific letter to the Respondent Society to the effect that we had suffered loss due to any act or omission by the respondent and that we would recover that loss from them." He also admitted that no written communication was sent to the Society "as to the proof of labour as well as staff at site employed by us to execute this work." He claimed that there was a register maintained and that he could produce the record, "if required."

19. In para 14.4 of the impugned Award the learned Arbitrator has referred to two pieces of evidence to conclude that the work done by Respondent No.1 was "highly satisfactory" and that the measurements recorded by the LC corresponded to the claim of Respondent No.1. Further, the said evidence was held to have "proved" that "default, if any, was only on the part of the respondent (Society) in his not handing over the site in time for electrical installations" and which "acts of omission" ultimately resulted in financial losses to Respondent No.1. The said two pieces of evidence were (a) the evidence of the Respondent No.1 and (b) the report of the LC Mr. Ratra. As noticed above, the evidence of Respondent No.1 did not support the above conclusion one bit. In fact it proved the case of the Society that there was no clause in the contract for escalation and that at no point in time did the Society agree to a demand for payment of enhanced rates.

20. A perusal of the report of the LC Mr. Ratra shows that although at one place

he stated that the work done by Respondent No.1 was "most satisfactory", in the later part he referred to the incomplete work. He stated "the work as whole is still not complete as in same position which was left undone by the contract. It is proposed that this may also be got complete Test Report of the wiring be kept in Record, through the connection from DVB is obtained." Mr. Ratra, in his cross-examination, admitted that he did not take notes during inspection. Clearly, his report did not advert to any delay in the Society handing over the site to Respondent No.1 or to the question of enhanced rates or of any consequent losses suffered by Respondent No.1.

21. The inescapable conclusion is that in fact there was no evidence to show that there was delay in the Society handing over the site to Respondent No. 1. There was no evidence to show that the Society had agreed to pay enhanced rates. There was no evidence to show whether Respondent No.1 had at all suffered losses and to what extent. It is not understood on what basis the learned Arbitrator came to a conclusion that the fault lay with the Society in not handing over the site in time and on that ground awarded Respondent No.1 its claim for enhanced rates. Further, the contract between the parties makes no provision for escalation. The reliance placed by learned counsel for the Respondent No.1 on the decisions in P.M. Paul v. Union of India and K.N. Sathyapalan v. State of Kerala is misplaced. In both those cases escalation was permitted since the arbitrator had in the first instance found on facts that there was delay and default on the part of the party against whom the claim was made. In the instant case, the very basis of the claim, viz., the alleged delay on the part of the Society in handing over the site to Respondent No.1 has not been established.

22. It was submitted by Ms. Salwan that extra work was done to the extent of Rs.5,66,476 by Respondent No.1 and that was reflected in the 14th RA Bill. The calculations submitted by her as a separate sheet acknowledge the fact that up to 11th RA bill, the Respondent had already been paid Rs.26,38,991. A further payment of Rs.16 lakh by the Society was also acknowledged. The balance of Rs.5,66,676 against 12th and 13th RA bills has been arrived at by revising the 14th bills in terms of the market rates. This was clearly not permissible. On the other hand, if the letter dated 8th May 1995 is perused, it clearly states that the amount due against the 14th RA Bill was only Rs.4,94,645 and that the additional work was for Rs.73,301 and, therefore, the revised bill was for Rs.5,66, 676. Clearly, therefore, the said amount was computed not on the basis of the agreed rates but the enhanced rates. In its letter dated 6th July 1995, the Society made it clear that Respondent No.1 had "arbitrarily adopted the rates in your bills hence the society made only on account payments." It was categorically denied that the Society had agreed to enhanced rates. Further, it was pointed out that Respondent No.1 had deployed only one person at site for doing the work for the last many months and the assertion that it had been attending the works primarily was "totally false". It was further pointed out that Respondent No. 1 was not entitled to any increase in cost of materials as the same could be purchased during or prior to the expiry of the stipulated period

and that the Society is not ready to bear any additional costs due to defaults. This was followed by the letter dated 7th August 1995 in which it was pointed out that the 12th and 13th RA bills have not been certified "because the bills are not based on agreement rates. Since Respondent No. 1 had already been overpaid, no payment against 14th bill has been made by the Society."

23. The learned Arbitrator appears to have completely ignored all of the above evidence in allowing Claim No. 1 for Rs. 5,66,676. The entire case of the Respondent No. 1 in respect of Claim No.1 (and consequently interest on the said amount in Claim No.2) should, therefore, fail for absence of credible evidence. The impugned Award in this regard is contrary to law, contrary to the contract and overlooks the evidence on record. It cannot be sustained in law.

24. Turning to Claim No. 3, the impugned Award itself notes that there was no basis for Respondent No.1 claiming a sum of Rs. 7,70,443. The calculation now handed over by Ms. Salwan shows that the computation is based on the premise that the Respondent No. 1 is entitled to market rates as opposed to the agreed rates. Notwithstanding that Respondent No.1 was not entitled to enhanced rates in terms of the contract, it also does not appear to have substantiated the claim with reference to any document. In his cross- examination Mr. Mohinder Lal Budhiraja stated:

We have not given, so far as I remember, any details as to how this amount of Rs.7,70,443/-, (revised amount of claim No. 3) has been arrived at. We have however given the reason and background for this revised bill vide claim No. 3 of the statement of claim.

25. There was also no credible evidence to show that Respondent No.1 had performed any extra work to the extent of Rs. 7,70,443 in a short span of five months after the 14th RA Bill and particularly when the contract was terminated on 7th October 1995. The fact remains that Respondent No.1 never submitted the 15th RA Bill prior to the proceedings in this Court. Mr. Budhiraja in his evidence stated "it is after the 14th running bill that we submitted our measurements with the 15th and final bill. That bill is C-21. It is correct that the measurements were filed with this bill, but the measurements were filed with the affidavit by way of evidence of Shri Uma Shanker Sharma, our Engineer, and these are on record." The said measurements were filed much later with the affidavit of the Architect of the Respondent No.1. Clearly, no credence could have been given to such an affidavit. In fact, the learned Arbitrator too did not accept this claim. There was no basis for even the claim of Rs. 3.50 lakhs which the learned Arbitrator appears to have accepted without giving reasons. The said figure obviously was not supported by any contemporaneous evidence. The burden was on Respondent No.1 to prove by documentary evidence the extent of work done by it after the 14th RA bill. The learned Arbitrator's award of Rs.3.50 lakh under Claim No. 3 is also based on no evidence and deserves to be set aside.

26. As regards Claim No. 5, the impugned Award proceeds on the erroneous

premise that work could not be completed before the expiry of the stipulated date "owing mainly to the non-availability of the site." As already shown, there was no basis for such a conclusion. Consequently, there was no question of Respondent No.1 being entitled to overhead or establishment charges on account of "extended stay". There was no evidence to support such a claim. The award in this regard also requires to be set aside.

27. As regards the counter claims of the Society, it does not appear to have actually made such a claim against Respondent No.1 except in response to the latter claim against the Society. It has also not shown the basis for arriving at the sum which constituted the excess payment. The impugned Award to the extent of rejection of the Society's counter claims does not call for interference.

28. Consequently, the impugned Award to the extent that it has allowed the claims of Respondent No.1 is hereby set aside. However, the rejection of the counter claims of the Society is upheld. Consequently, the Award is made rule of the Court only to the extent of rejection of the counter claims of the Society. The suit is disposed of in above terms.