

* **HIGH COURT OF DELHI : NEW DELHI**

OMP No.115/2007

% Judgment reserved on : 16th April, 2009

Judgment pronounced on : 8th May, 2009

Delhi Development Authority Petitioner
Through : Mr. D.S. Mahendru, Adv. with
Ms. Alpana Pandey, Adv.

versus

M/s. Amita Nand Aggarwal Associates Respondent
Through : Mr. Vivekanand, Adv.

Coram:

HON'BLE MR. JUSTICE MANMOHAN SINGH

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. To be referred to Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

MANMOHAN SINGH, J.

1. This petition has been filed by the petitioner under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') challenging the Award dated 16th October, 2006.

2. The undisputed facts between the parties are that the tenders for the subject work were submitted on 21.12.1989 and the work was awarded to the respondent by the petitioner vide letter dated 16.03.1990 with the awarded value of the work of Rs.85,79,315/-, which was 64.64% gross without deduction of rebates for timely payments and 64.34% net above after adjustment of rebates on the estimated cost of

Rs.52,20,467/-. The estimated cost was based on Delhi Schedule of Rates, 1985. The stipulated period of completion was six months to be reckoned after 10th day from the date of acceptance of the tender as per award letter. Thus, the stipulated date of start of the work was 26.03.1990. Undisputedly, the work was not completed within the stipulated period of six months upto 25.09.1990 and work prolonged beyond about six months upto 30.06.1993 for further period of about 33 months. The recorded date of completion is 30.06.1993.

3. The extension of time without levy of compensation under Clause 2 was granted by the respondent to the petitioner upto actual date of completion. In between, in 1994 part security deposit was released by the petitioner and labour escalation payment only as per statutory Govt. notifications on the work done upto 30.06.1993 was also paid to the claimant.

4. However, final bill on measurement books of the petitioner, as prepared and proposed by the petitioner was accepted and signed under protest by the respondent on 03.12.1996 and 09.12.1996 before receiving the cheque. After signing the measurements and bill under protest on 03.12.1996, the respondent vide letter dated 04.12.1996 informed the petitioner about the balance payments not included in the final bill of the petitioner. The respondent again vide letter dated 18.12.1996 requested the petitioner to make the balance payment within 30 days.

5. The respondent vide letter dated 05.02.1997 invoked arbitration clause 25. Ultimately, the petitioner having failed to appoint

Arbitrator within time despite requests, respondent no.2, was appointed by this Court vide order dated 09.08.2002 in OMP No. 228/1998.

6. The learned Arbitrator made and published the award after affording full opportunities to the parties to file pleadings, documents, to lead evidences, to file written submissions and make oral submissions and ultimately made and published the award on 16.10.2006.

7. The learned Arbitrator awarded a sum of Rs.29,31,068/- in favour of the respondent with interest @12% on all the claims except Claim no.2 on which a specified amount has been awarded from 09.12.1996 i.e. the date of payment of final bill to the date of award. It has been further directed that if the petitioner pays the awarded amount with interest as aforesaid within three months from the date of the award, there will be no interest from the date of the award till payment and if no payment is made within three months as aforesaid, the awarded amount of Rs.29,31,068/- will carry further interest @ 12% p.a. from the date of the award till the date of actual payment. The learned Arbitrator also directed the petitioner to pay Rs.1,00,000/- on account of cost of the arbitration proceedings.

8. On account of part payment, a sum of Rs.2,35,912/- vide cheque dated 16.01.2007 was received on 20.01.2007 with letter dated 16.01.2007, without any details or facts and figures by the Petitioner. As per respondents, after adjusting the amount of part payment, the balance amount as on 16.01.2007 is Rs.60,87,125/-which the petitioner is to pay with interest @12% from 16.01.2007 till the date of the payment and which was clarified to the petitioner by the respondents vide letter dated

20.01.2007. The said fact, according to respondent remained unrebutted from the act of the petitioner.

9. The petitioner challenged the award in respect of claim No.1 (e), (f), (l), 7, 8, 10 to 13. The payment in respect of the rest of the claim as mentioned above has been made by the petitioner within the stipulated time.

10. The petitioner contended that the award published by the Ld. Arbitrator is clearly based on surmises and conjectures and is against the public policy of India.

11. Regarding Claim No.1(e), it is urged that the Ld. Arbitrator grossly erred in allowing the sum of Rs.1,20,000/- in favour of the respondent towards shifting of existing cables. It is submitted that the removal of electricity cables etc. could only be done by the respective department of the Govt., the petitioner has no responsibility under the agreement to execute this work. The learned counsel for the petitioner relied upon Exhibit R-41 and R-34 to contend that the cables were never shifted by the respondents but were merely pushed away. Therefore, the findings of the Ld. Arbitrator is contrary to the evidence on record and is not sustainable in law.

12. Similarly regarding claim No.1(f), it is urged that the Ld. Arbitrator grossly erred in awarding the sum of Rs.20,000/- in favour of the respondent for shifting, relaying and rectification of damaged PVC pipes (125 mm outer diameter) water line belonging to MCD. The subject matter of the claim is the policy matter of the government as the same involves the network of essential services which cannot be

hampered unless or until some alternate arrangement is made.

13. It is further submitted that the learned arbitrator wrongly awarded a sum of Rs.11,940.22/- towards straightening and cutting of steel under Claim No. 1(e) without appreciating that item No. 13 of the agreement includes all operations including the work of straightening and cutting of steel bars which are received in bundles. The objection under claim No.1 raised by the petitioner is given up during the course of hearing.

14. As regards Claim No.7 and 8, it is submitted that the Ld. Arbitrator grossly erred in awarding a sum of Rs.20,00,000/- under claim No. 7 and Rs. 5 lacs in claim no. 8 while dealing with both the claims together. The list of delays recorded by the Arbitrator is only a hype created by the arbitrator as these are normal delays and having regard to the work involved in the case, whenever extension of time was sought by the petitioner, the same was allowed without levy of compensation by the respondent in view of the understanding between the parties. It is alleged that the Id. Arbitrator has grossly erred in holding that for assessing the damage, the provision under clause 10 CC will not apply and he will have to assess the damages under the provisions of section 73 of Indian Contract Act. In cases where the stipulated date of completion of work is more than six months, the 10 CC formula is applicable. The Arbitrator wrongly applied the Hudson formula to calculate the loss of overheads by holding that the same is widely recognized and applied in Construction Industry. Hudson formula is not prescribed in the agreement between the parties and thus

cannot be applied.

15. On account of watch and ward expenses in claim No.10, the Arbitrator has wrongly awarded a sum of Rs.30,000/- for 36 months and 18 days. It should have been 33 months and not 36 months as claimed by the respondents from 30.6.1993 to 18.3.1996.

16. As regards claim no. 11, it is submitted that the Ld. Arbitrator grossly erred in awarding the sum of Rs.7800/- on account of expenses incurred in transporting including loading and unloading of balance quantity of the steel. He relied upon clause 42 of the agreement in this regard.

17. As regards claim no. 12 and 13, it is submitted that the Ld. Arbitrator wrongly awarded interest @12% w.e.f. 9.12.96 i.e. from date of award till the date of payment except on claim no. 2 where the interest has been given for specified periods. The award of interest is on a very higher side. The Ld. Arbitrator also grossly erred in awarding a sum of Rs. 1 lac as cost to the respondent as the Arbitrator himself made the observation that both the parties were at fault at one or the other time and it could not be said that only the petitioner was responsible for the gross delay in the execution of the work, therefore, by awarding the cost in favour of the respondent, the arbitrator seems to have awarded the respondent for its inactions and mismanagement.

18. The learned counsel for the respondent vehemently argued that none of the objections filed by the petitioner are maintainable and sustainable within the provisions of the Section 34 (2) of the Act. All the objections are beyond the ambit and scope of the provisions of

Section 34 of the Act. The Award is not in any manner in violation of or against public policy of India nor there is any such objection taken by the petitioner.

19. The Arbitrator has made and published award after considering entire record and submissions before him and have given detailed reasons for his award in respect of the claims challenged by the petitioner. The Arbitrator is not supposed to give detailed reasons and write judgment like that of the Court. The reasons and finding of the Arbitrator in respect of the claims challenged by the petitioner is as per record available before the Arbitrator and in view of the contract, documents and evidence/ record available before him. The view taken by the Arbitrator is a plausible view if not the only possible view and the findings of the arbitrator based on record and interpretation of contract/ documents is a finding of fact and cannot be disturbed even if the Court by a process of reasoning come to a different view, because the Court is not sitting in appeal over the award of the arbitrator.

20. He relied upon various case laws to contend that where after taking into consideration the arbitration agreement, statements filed by the parties and documents produced, the arbitrator proceeds to give his award in writing as to all disputes referred to him, the Court will assume that the Arbitrator has considered and disposed of every claim made or defence raised.

21. It is further contended that reasonableness of reasons cannot be challenged and appraisal of evidence by the Arbitrator is never a matter which the court questions and considers.

22. Interpretation of contract is a matter for the Arbitrator to determine, even if it gives rise to determination of a question of law. Further as per provisions of Section 19 (4) of the Act, the appreciation of evidence and documents is within the sole jurisdiction and power of the Arbitrator.

23. The claimant herein respondent had made in all 13 claims before the arbitrator. Claim no. 1 for works done but not paid consisted of about 17 sub claims from (a) to (q). Out of 13 claims, the learned arbitrator has allowed partly only claims 1(e), (f), (g), (k), (l), claim no. 2 for interest on delayed payment of final bill and security, claim no. 4 release of withheld amount of final bill, claim no. 5 refund of penal rate recovery of stipulated materials, claim no. 7 damages by way of increased rates on the work done beyond stipulated period, claim no. 9 staff and overheads expenses for the prolonged period by way of losses, claim no. 10 watch and ward expenses of departmental materials from 30.6.1993 and 18.6.1990, claim no. 11 cartage of balance departmental materials at places other than departmental stores from where materials were issued, claim no. 12 interest @ 12% p.a. from 9.12.1996 on all awarded claims, except claim no. 2 till payment, claim no. 13 Rs. 1 lakh towards the fees of arbitrator.

24. Countering the argument of the learned counsel of the petitioner in clause 1 (e), it is submitted by the learned counsel for the respondent that the shifting of underground services was not contractual obligation of the respondent and was not within the scope of the work of the respondent. The petitioner instead of shifting the cable itself or

getting it done by DDA electrical department or through DESU asked the respondent to shift the cable by shifting. The execution of this extra item and additional expenses incurred were intimated by the respondent to the petitioner from time to time during the course of execution of the work. The letters R-34 and R-41 were clear instructions/authority to the respondent to shift cables. The appreciation of evidence and construction of the document was within the jurisdiction of the arbitrator and after considering the document/evidence taken by the arbitrator, his view is final and binding.

25. Similarly, the arbitrator on claim No.1 (f) considered the evidence on record and the statement made by Sh. S.C. Jain, SE DJB and noted his observations and is, therefore, final.

26. With regard to claim no. 1(l), the arbitrator made reference to the relevant DSR 1985 and DSR 1993 rates. The view/interpretation of the arbitrator is neither an impossible nor perverse but a plausible view and cannot be set aside even if erroneous. The learned counsel for the petitioner has given up his objection pertaining to the said claim during the course of his submission.

27. The arbitrator also considered and gave his categorical finding on claims No. 7 & 8 on account of increased rates i.e. Rs.20 lac in claim No.7 and Rs. 5 lakhs in claim no. 8. The finding of delay on behalf of the petitioner being a finding of fact based on record/evidence is final and binding. Further the plea of the petitioner with reference to clause 10C or clause 10CC have been dealt by the Id. Arbitrator. The

Ld. Arbitrator has also considered and appreciated the provision of clause 1 of general conditions and specifications as alleged and referred to by the petitioner during arguments though not pleaded in reply to these claims.

28. With regard to claim no. 10 the learned Arbitrator rightly awarded Rs.30,000/- towards watch and ward expenses of departmental materials from the date of completion on 30.06.1993 till it was taken over by the petitioner i.e. from 30.06.1993 to 18.06.1996 which works out to 36 months and not 33 months as alleged in objection petition. The claim no. 8 was for the period beyond stipulated period of completion till actual date of completion i.e. 26.09.1990 to 30.06.1993 whereas the claim under claim No. 10 was for the period after completion of the work beyond 30.06.1993 till the date of taking over departmental materials i.e. 18.06.1996.

29. In respect of claim no. 11 the learned Arbitrator while awarding Rs.7,800/- on account of expenses incurred in transporting materials on loading/unloading, stacking and hire charges of the truck, the arbitrator has considered and appreciated and interpreted clause 42 and not ignored it as alleged by the petitioner.

30. Regarding the rate of interest awarded in claim No.12, it is stated that the amounts were due since 1993-1994 when the bank rate of interest on loans was minimum 18% compounded quarterly, the Id. Arbitrator has allowed only 12% simple interest and that too after about two and half years from due date i.e. completion of work in 30.06.1993.

31. With regard to award of costs of proceedings under claim no.

13 at Rs. 1 lakh, it is urged that the claimant/respondent has paid arbitrator fee and incurred other expenses of about more than Rs. 2 lakhs. However, the arbitrator has allowed only Rs. 1 lakh which does not cover even the 50% of the fee paid by the claimant/respondent. The Id. Arbitrator is empowered and authorised to apportion and award the cost under Section 31 (8) of Act.

32. It is well settled that the jurisdiction of the court when called upon to decide the objection raised by a party against an 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. (See **Puri Construction (P) Ltd. vs. Union of India (1989) 1 SCC 411**)

33. In the case of **Food Corp. of India Vs. Arosan Enterprises Ltd. ILR (1996) 1 Del. 185**, it is laid down that the approach of the court has to support the award if it is reasonably possible, rather than to declare it illegal. It is not permissible to reappraise the evidence or to go into the questions of quality and quantity of evidence. If two views are possible, the court even if inclined to take a view different from that taken by the arbitrators is not entitled to substitute its view over that of the arbitrators. But at the same time, it being an award which sets out reasons, though it is not permissible to go into the reasonableness of the reasons yet this court can set aside the award on finding errors apparent on the face of the award or if there is an error of law on the face of the

award.

34. The Apex Court in the case of **D. D. Sharma vs. Union of India, 2004 (5) SCC 325** held that the jurisdiction of the Court to set aside an award is well settled. An arbitrator being a judge chosen by the parties, his decision would ordinarily be final unless one or the other condition contained in Section 30 of the Arbitration Act, 1940 is satisfied for the purpose of setting aside his award. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. It is also trite that correspondences exchanges by the parties are required to be taken into consideration for the purpose of construction of a contract. Once it is held that the construction of an agreement fell for consideration of the arbitrator, the determination thereupon shall not ordinarily be interfered with. The court's jurisdiction in this behalf is merely to see whether the arbitrator has exceeded his jurisdiction or not.

35. In **BOC India Ltd. vs. Bhagwati Oxygen Ltd., 2007 (9) SCC 503**, the arbitrator refused to set aside the award of the arbitrator and held that when the arbitrator had considered all the aspects of the matter including the terms of the contract and all the materials on record and the statement of claim and has come to a conclusion of fact, it cannot but be held that the award was not based upon a proposition of law which is unsound or an error of law must have appeared from the award itself or from any document or note incorporated in the award or appended to it. When the arbitrator had taken a plausible view on interpretation of contract, it is not open to the court to set aside the

award on the ground that the arbitrator had misconducted himself in the proceedings.

36. Recently in the case of **Sethi Engineering Corp. vs. Delhi Development Authority, 158 (2009) DLT 19** similar question arose before this Court and the damages on account of prolongation of work beyond stipulated date of completion was awarded by the arbitrator and the observations were made in this regard by the Arbitrator. This court refused to interfere with the findings given by the arbitrator.

37. In the impugned award, the learned Arbitrator with regard to claim No.1(e) has referred to the letters dated 25.4.1990 and 2.2.1993, he has also referred other documents namely the letter R-34 dated 21.12.1991 and another letter R-41 dated 7.10.1992 and held that the claim, was justified and allowed the same to the extent of Rs 1,20,000/-. In claim No.1(f) also, the learned Arbitrator after considering the evidence of Mr. S.C. Jain and interpreting that the work was beyond the scope of the agreement awarded the amount of Rs.20,000/- in favour of the respondent. In claim No.1(l) after perusing Item No.13 in the agreement, the learned arbitrator allowed the claim of Rs.11,940.22.

38. On account of escalation/increased rate of material for the work done beyond stipulated period in claim No.7 and on account of overheads, establishment and staff expenses beyond stipulated period because of prolongation of the work in claim No.8, the learned Arbitrator gave detailed finding after interpreting clause 10 C and clause 10CC of the agreement, several letters, price indices and DSR

on 1985, 1991, 1993.

39. As regards claim No.10 and claim No.11 also, the learned arbitrator gave his detailed reasoning and awarded the amount of Rs.30,000/- and Rs.7,800/- respectively.

40. Claim No.12 and 13 pertains to the interest @ 12% p.a. and cost of Rs.1 lac towards arbitration proceeding which in my view, is in the discretion of the arbitrator and I find no reason to modify these claims.

41. I have perused the award carefully and have also gone through the pleadings of both the parties. the learned Arbitrator has considered all the documents relied upon by both the parties and evidence on record. The learned Arbitrator has also interpreted the terms of the contracts. In view of well settled law and my above discussion, I find no ground to interfere with the impugned award. The petition being devoid of merits, is hereby, dismissed. No costs.

MANMOHAN SINGH, J

MAY 08, 2009
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