

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **F.A.O. (OS) NO.697 OF 2006 & C.M. NOS.15357 OF**
2006, 15358 OF 2006

% Reserved on : 2nd July, 2009
Pronounced on : 10th August, 2009

M/S. KUMAR CONSTRUCTION CO. Appellant
Through: Mr. B.K. Dewan, Advocate.

versus

DELHI DEVELOPMENT AUTHORITY Respondent
Through: Mr. Gaurav Sarin, Advocate.

CORAM:

HON'BLE MR. JUSTICE MUKUL MUDGAL

HON'BLE MR. JUSTICE NEERAJ KISHAN KAUL

1. Whether Reporters of the local newspapers may be allowed to see the judgment? No
2. Whether to be referred to the Reporter or not? No
3. Whether the judgment should be reported in the Digest? No

J U D G M E N T

NEERAJ KISHAN KAUL, J.

1. The present appeal arises out of the impugned judgment of the learned Single Judge dated 28th July, 2006. Briefly stated the facts of the case are as follows.

2. The dispute arose between the parties with regard to the contract for construction of convenient shopping centre at Gulabi Bagh, Delhi which was granted to the appellant vide agreement dated 25th October, 1988/25th November, 1988 entered into between the appellant and the respondent. An Arbitrator was appointed to adjudicate the disputes between the parties, who subsequently rendered the Award in the year 1992. The appellant raised objections

to the Award. The learned Single Judge was pleased to dismiss the said objections. Accordingly, the present appeal has been filed against the dismissal of the said objections.

3. As per the findings of the Arbitrator, the contractor/appellant did not complete the work and so the contract was rescinded and then the work was got done at the risk of the contractor. The Arbitrator further found that the Delhi Development Authority (DDA) had proved the breach of contract on the part of the contractor. Further, the Arbitrator held that the Contractor/appellant should have executed the work to the extent possible till the stipulated date of completion as per the agreement but he, in fact, abandoned the work. The claimant/DDA filed details that they suffered loss by getting the work completed elsewhere at extra cost. It was also held by the Arbitrator that the DDA was also responsible for the initial delay of five months in issuing of structural drawings. The Arbitrator, thus, came to the conclusion that the contractor, therefore, could not be held to be solely responsible for the delay. The Arbitrator applied the thumb rule of linear proportion and awarded a certain sum to the DDA. Essentially, the objections raised by the appellant before the learned Single Judge were as follows :-

- a) The Arbitrator violated the rules of natural justice.
- b) The DDA was responsible for the breach and hence the DDA was liable to pay damages and not the contractor/appellant.
- c) The Award was made beyond the period of four months provided by Section 28 read with the implied conditions of

arbitration agreement given in the First Schedule of the Arbitration Act, 1940.

4. As regards the point of violation of natural justice, the learned Single Judge set out the facts as follows :-

“10. The letters exchanged between the petitioner/contractor and the Arbitrator are on record. The first letter of the contractor on record is dated 3.11.2000 in which it is submitted that for unavoidable reasons it could not be possible to submit the CSF and, accordingly, time be granted at least upto 16.12.2000. The next letter is of 28.11.2000 seeking further time to file CSF by 31.12.2000 on the ground that the arbitration counsel Mr. R.D. Mittal was not maintaining good health. The Arbitrator addressed a letter to both the parties on 27.12.2000 stating therein that the respondent (petitioner/contractor) had requested for time to file CSF and his counsel was not well and, therefore, he was given chance till 31.12.2000 and the next date of hearing was fixed for 12.1.2001 at 2.30 p.m. The next document is an application from Mr. B.K. Dewan, advocate for petitioner, asking for an adjournment on 12.1.2001. The next letter of the Arbitrator dated 30.1.2001 addressed to both the parties says that the arbitration came up for hearing on 12.1.2001 at 2.30 p.m. when the contractor requested for an adjournment as he had to engage a new counsel and, therefore, the next date of hearing was fixed for 2.2.2001 at 3.00 p.m. On 2.2.2001 the petitioner/contractor filed written statement. The Arbitrator fixed the case for hearing on 9.3.2001 and informed the parties by letter dated 20.2.2001.

However, the date was subsequently changed by letter dated 27.2.2001 by which the fresh date fixed was 14.3.2001 at 3.00 p.m. The subsequent letter of the Arbitrator dated 10.4.2001 stated that the arguments would be heard regarding objections raised by the contractor on 20.4.2001 at 4.00 p.m. The next document is of 23.4.2001 wherein the Arbitrator records that on 20.4.2001 the contractor did not come and, therefore, hearing could not proceed. The adjourned date was then declared as

3.5.2001 at 4.30 p.m. On 3.5.2001 the Arbitrator received a request for adjournment from the contractor by post and, therefore, adjourned the hearing to 30.5.2001. This is recorded in the letter dated 28.5.2001. On 30.5.2001 the contractor again remained absent and the claimant requested for ex-parte proceedings. The Arbitrator recorded this in the letter dated 11.6.2001.

The Arbitrator also informed the parties that next date of hearing was fixed for 2.7.2001 when both parties were directed to ensure their presence, failing which ex-parte proceedings would be taken. On 2.7.2001 the contractor again asked for adjournment which is evidenced by the letter dated 29.6.2001 saying that the petitioner -Mr. S.K. Gupta was not physically well and had been advised bed rest upto 12.7.2001. At the same time, a request was made not to fix any further date till certain documents were delivered to the contractor. This letter was accompanied by a medical certificate. The next document is dated 9.7.2001 wherein the Arbitrator records that the contractor had made a request for postponement of hearing but ex parte proceedings were taken up on 9.7.2001 and oral hearing was concluded. The claimant was directed to file non-judicial stamp papers worth Rs.75/- along with 10 additional sheets for making and publication of the Award. The contractor/petitioner then sent the letter dated 13.7.2001 asking for setting aside the ex parte proceedings. Arbitrator made his Award on 5.10.2001. The question is whether the Arbitrator has violated the rules of natural justice.”

5. The learned Single Judge rightly concluded that the narration of facts itself clearly showed that the contractor/appellant had no intention to appear and participate in the arbitration proceedings. The learned Single Judge rightly noted that after the first two hearings, the appellant did nothing other than seeking repeated adjournments on one pretext or the other. The learned Single Judge also noted that the contractor/appellant had even

engaged a counsel Mr. B.K. Dewan. However, Mr. B.K. Dewan did not put in appearance except on one occasion. The contractor never made any grievance about the failure on the part of Mr. B.K. Dewan to represent the appellant/contractor.

6. The learned Single Judge, in our view, correctly came to the conclusion that if the contractor/appellant was unwell, he could have deputed his advocate or his associate – Mr. Vijay Narang to appear before the Arbitrator but the appellant/contractor adopted none of the said two courses. The learned Single Judge, thus, rightly held that there was clear indication of the fact that the Arbitrator had given sufficient opportunities to the appellant/contractor till it became clear and evident that the contractor did not intend to take part in the arbitration proceedings. The learned Single Judge correctly held that, therefore, it was no more necessary for the Arbitrator to either adjourn the proceedings repeatedly or to set aside the ex-parte proceedings that had already taken place. In our view, the learned Single Judge was right in coming to the conclusion that there had been no violation of principles of natural justice.

7. So far as the second objection is concerned, the learned Single Judge has rightly held that whether DDA was responsible for the breach or not was a question of fact and it is not for this court to sit in appeal over the Award of the learned Arbitrator. The learned Single Judge was also correct in holding that in addition, the question as to who was in breach was also barred by the principles of constructive *res judicata*. The learned Single Judge took note of the

fact that the quantum of damages had been calculated by the Arbitrator according to his own wisdom by applying the principles of linear proportion. The learned Single Judge has rightly held that it could not be said that his calculation is perverse or in any way illegal to warrant any interference by the court.

8. As far as the third objection is concerned, that is, that the Award was passed beyond the period of four months, the learned Single Judge took note of the fact that in the objection petition filed by the contractor/appellant, there was no grievance expressed that the Award was made beyond the period of four months. It was only during the arguments that the said objection was taken. The learned Single Judge also noticed that even when the arbitration proceedings were in progress and the appellant/contractor repeatedly took adjournments, he never raised objection to the continuance of arbitration proceedings on the ground that four months' period had come to an end. The Arbitrator thus had correctly come to the conclusion that the appellant/contractor had himself delayed the proceedings. The learned Single Judge, in our view, was absolutely correct in coming to the conclusion that the Arbitrator had followed the rules of natural justice and had arrived at the finding on the basis of the material placed before him. The learned Single Judge was, thus, right in extending the time and to bring the matter to an end. The time was, therefore, rightly extended by the learned Single Judge.

9. The view taken by the Arbitrator was a plausible view and warrants no interference by the court. The court cannot re-appreciate evidence or examine the correctness of conclusions arrived at by the Arbitrator. The jurisdiction of the court is not appellate in nature. It is not open to the court to interfere with the Award merely because in the opinion of the court, the other view is equally possible. It is only when the Arbitrator has misconducted himself or the Award is improperly procured or otherwise invalid, the court may set aside the Award. When the Arbitrator has applied his mind to the pleadings, the evidence adduced before him and the terms of the contract, there is no scope for the court to re-appraise the matter as if this were an appeal and even if two views are possible, the view taken by the Arbitrator would prevail. So long as the Award made by the Arbitrator can be said to be one by a reasonable person, no interference is called for.

10. The scope of interference by the court is limited and the court would not be justified in re-appreciating the material on record and substituting its view in place of the Arbitrator's view. When there is an error apparent on the face of the record or where the Arbitrator has not followed the statutory legal position or where the Arbitrator exceeds the terms of the agreement or passes an Award in the absence of any evidence which is apparent on the face of the Award or unless there is total perversity in the Award or in cases of jurisdictional errors, the same can be set aside by the court. However, that is not the position in the present case.

11. We consequently see no infirmity in the judgment of the learned Single Judge to warrant any interference. Accordingly, the appeal is dismissed. All pending applications stand disposed of as well.

NEERAJ KISHAN KAUL
[JUDGE]

MUKUL MUDGAL
[JUDGE]

AUGUST 10, 2009
‘AA’