

IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P No. 56/2009

Reserved on: October 18, 2011

Decision on: November 9, 2011

DELHI DEVELOPMENT AUTHORITY

..... Petitioner

Through: Mr. Sunil Malhotra with Mr. Abhishek
Puri, Mr. Rajat Malhotra and
Mr. Anupam Sharma, Advocates.

versus

M/S RAM CHAND PRUTHI & SONS

..... Respondents

Through: Mr. Ashok Sethi with
Mr. Rajeev Kapoor, Advocates.

CORAM: JUSTICE S. MURALIDHAR

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

JUDGMENT

9.11.2011

1. The Delhi Development Authority ('DDA') in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') challenges the Award dated 30th September 2008 passed by the learned Arbitrator rejecting the claims of the DDA and awarding some of the counter claims of the Respondent.

2. The Respondent, M/s Ram Chand Pruthi & Sons was awarded a contract by the DDA for construction of 144 dwelling units (DUs) on 29th

May 1970. The estimated cost was Rs. 19,43,840/-. The contract was to commence on 8th June 1970 and the stipulated date of completion was 7th June 1971. The Respondent was expected to construct the MIG Dwelling Units. Subsequently, a further contract for constructing 33 additional MIG DUs was also awarded at the estimated cost of Rs. 23,89,303/- with the stipulated date of completion as 7th September 1971. According to the DDA, since the work of the Respondent was slow and unsatisfactory, the DDA was compelled to rescind the contract on 24th January 1973. According to the DDA, the balance work was got completed by it at a huge cost.

3. Upon the contract being rescinded, the Respondent applied for appointment of an Arbitrator to adjudicate the disputes which arose between the parties. Mr. A. K. Lal was appointed as a Sole Arbitrator on 18th November 1973. The notices sent by the learned Arbitrator to the Respondent were returned undelivered with the remarks 'left without address'. Consequently, the learned Arbitrator closed the case and consigned the records on 19th September 1974. Thereafter, the DDA invoked the arbitration clause, i.e. Clause 25 by its letter dated 19th July 1976, and requested its Vice Chairman to appoint another Arbitrator. Consequently, the Vice Chairman, DDA appointed Mr. J. K. Bhattee as a Sole Arbitrator on 5th November 1976. Mr. Bhattee also could not proceed with the arbitration and was repatriated to his parent department. The subsequent Arbitrator, i.e, Mr. S. C. Gupta also vacated office. In his place, on 1st April 1978, Mr. H. D. Kochar is appointed as a Sole Arbitrator. In his Award dated 31st March 1983, Mr. Kochar ordered as under:

“After hearing both parties at length, perusal of the pleadings, examining carefully Statement of facts

counter statement of facts, claims, counter claims of both parties including affidavit by the Respondents. Considering the evidence adduced by them, I do hereby, make and publish my award as follows:

Claimants: Es. Engineer Housing Division No. VIII will pay (release) to the Respondent a sum of Rs. One lakh lying with them as security deposit in the form of fixed deposit (since encashed by the claimants) along with interest amount of Rs. 10064/- to the Respondents M/s Ram Chand Pruthi & Sons. The amount of Rs. 10064/- is the accrued interest on fixed deposit realized (received by the claimants at the time of encashment of fixed deposit.”

4. The above Award was challenged by the DDA in this Court in Suit No. 644A of 1983. On 12th April 1985, a learned Single Judge passed a detailed order which reads as under:-

“I.A. 3274/84

These are objections filed to the award dated 31st March, 1983 delivered by Mr. H. D. Kochar, who acted as sole arbitrator inter se parties with respect to the disputes and differences between them arising under contract No. EM.2(38)73/Arb/1438-43 dt. 1st April, 1978.

A perusal of the award shows that the learned arbitrator noted that five claims had been put up before him by the Delhi Development Authority. The contractor on his part also set up five claims. All these were elaborated and it was concluded that the arbitrator was competent to adjudicate upon them. However, while giving the award the arbitrator simply stated that the security deposit of Rs. 1 lac of the contractor lying with the Delhi Development Authority should be refunded and so also the interest of Rs. 10,064/- which has accrued on the same. No finding was given by him on the other claims nor it was specifically mentioned that

they were rejected. The grievance of the Delhi Development Authority therefore, is that the award is not complete and the arbitrator failed to decide all the disputes.

Mr. Aggarwal appearing on behalf of the contractor however, contends that the disputes not shown specifically adjudicated should be treated to have been impliedly decided and that when the arbitrator has given a consolidated award, its validity is not assailable. He has however, not pressed his plea that the objections of the Delhi Development Authority were barred by time.

Giving of a consolidated award is valid in law. The arbitrator need not specify what amounts were being allowed against different claims. However, that would not permit him to leave several of the claims undetermined. In case the arbitrator came to the conclusion that the only claim allowable was of the security amount, he should have specifically rejected the other claims. There being no such finding, it has to be assumed that he did not adjudicate upon them. In any case he should so say if he comes to this conclusion.

In the circumstances, I am constrained to remit back the award to the arbitrator for giving his decisions on the other claims which the parties had put up before him. The award be delivered within two months of the communication of this order to him and the appearance of the parties before him. He will proceed from the stage when he delivered the impugned award.”

5. Mr. Kochar, however, returned the records to this Court expressing his inability to continue the arbitration proceedings on account of his old age and illness. According to the DDA, the file got misplaced in-transit. The DDA accordingly filed an application being I.A. No. 5340 of 1999 for a direction to trace out the original records. Since the papers were unable to

be traced, the Chief Justice gave direction to reconstruct the file. Despite several adjournments, certified copies of the documents could not be filed.

6. On 24th September 2005, the following order was passed by the Joint Registrar:-

“The award dated 31st March 1983 given by Mr. H. D. Kochar, Arbitrator was filed and objections were made on behalf of the petitioner/Delhi Development Authority vide order dated 12th April 1985. The award was remitted back to the Arbitrator for giving his decisions on some of the claims put up by the parties before him regarding which no finding was given by the Arbitrator. Sometime thereafter, the records were lost. As per report made by the Registry, the original record of the arbitration proceedings and the award was sent back to Mr. H. D. Kochar the Arbitrator on 18th June 1985 at his given address but it was not received by Mr. H. D. Kochar. Sometime in the year 1999, Delhi Development Authority, the petitioner moved an application for appropriate directions to trace out the original arbitration record. The record could not be traced and, thereafter, orders were obtained from the Hon’ble Chief Justice for reconstruction of the record of the arbitration proceedings. Certified copies of the documents could not be filed, as original record was not available and not traceable. Now the petitioner/claimant has filed attested copies of the relevant documents filed by the parties before the Arbitrator which were available with the petitioner along with copy of the award dated 31st March 1983. The record of the arbitration proceedings to that extent has been reconstructed. None had appeared for the defendant/respondent despite Court notice. The matter be placed before the Hon’ble Court on 10.11.2005 for further directions.”

7. When the matter was placed before the Court on 10th November 2005,

the following order was passed:-

“I have perused the order dated 24.9.2005 passed by the Joint Registrar as well as heard the counsel for the claimant. As nobody is present on behalf of the respondent despite opportunity, there is no other alternative before the court except to pass appropriate directions disposing of this matter.

The arbitrator had made his award on 31.3.1983. The said award has remitted back to the arbitrator by the order of the court dated 12.4.1985. Thereafter, the record was misplaced.

Now as is clear from the order of the Joint Registrar, the record has been reconstructed. The Registry is directed to sent back the entire arbitration record to Sh. H. D. Kochar, Arbitrator for compliance with the orders of the court in accordance with law.

Consequently, this petition is finally disposed of with the direction to the arbitrator that he should dispose of the matter in accordance with the orders of the court dated 12th April, 1985 expeditiously and, in any case, not later than two months from the date he receives the copy of this order.”

8. When Mr. Kochar expressed his inability again to undertake the arbitration proceedings on account of his ill-health, the matter was again placed before the Court. The following order was then passed on 27th February:-

“Vide order dated 10th November 2005, the Court had passed orders in the present petition directing the arbitrator to decide the matter expeditiously and not later than two months from the date, the copy of the order was served upon him. However, the arbitrator vide letter dated 2nd February, 2006 had informed the Court that because of his ill health, he is not able to take burden of the arbitration proceedings and had also returned the

file/documents submitted to him to enable the new arbitrator to conduct the proceedings in the matter. In furtherance to this letter, vide order 17th February, 2006 the Registry was directed to inform counsel for the parties of the next date of hearing. Counsel for the parties had appeared on 21st February, 2006.

Learned counsel for the DDA submits that they are willing to appoint a new arbitrator pursuant to Clause 25 of the general terms and conditions attached to the agreement between the parties. Learned counsel for the respondent submits that he has no instructions as his client has taken away the file from him.

Be that as it may, no prejudice would be caused if the arbitration proceedings are continued from where they have been left by the previous Arbitrator. Considerable time has elapsed. The DDA can safely supply the vacancy by appointment of a new/Sole Arbitrator, as such the approach would be in consonance with the terms of the agreement entered into between the parties. Resultantly, this petition is finally disposed of with a direction to the DDA to appoint a new arbitrator in place of Shri H. D. Kochar, the sole arbitrator, within 15 days from today and inform the respondent about the arbitrator so appointed who then shall enter upon the reference and proceed with the arbitration proceedings from the stage the earlier arbitrator left the arbitration proceedings.

The petition is accordingly disposed of.

File be consigned to Record Room.

Parties are left to bear their own costs.”

9. Consequently, one Mr. S. K. Jain was appointed as an Arbitrator to adjudicate the disputes. The DDA filed its claims and Respondent filed its counter claims. Both parties agreed that the 1996 Act would apply.

Both parties contended that the claims and counter claims respectively were barred by limitation. The learned Arbitrator held that the DDA had illegally terminated the contract and that since its claims were even otherwise legally untenable, the Respondent's objections to the claims on the ground of limitation were "not of much importance." The learned Arbitrator however negated DDA's objections to the counter-claims as being barred by limitation and on merits, upheld some of them.

10. Before this Court, Mr. Sunil Malhotra, learned counsel for the DDA was unable to persuade this Court that DDA's claims were not barred by limitation and that the decision of the Arbitrator rejecting DDA's claims called for interference. Accordingly, this Court is not inclined to interfere with that portion of the Award whereby DDA's claims have been rejected.

11. Mr. Malhotra submitted that the Respondent's counter claims were time barred. It was submitted that after invoking the arbitration clause and filing their counter claims before the first Arbitrator Mr. A. K. Lal, the Respondent never sought to agitate those counter claims after the first round of the arbitration proceedings came to an end when Mr. Lal consigned the case to the record room by the letter dated 19th September 1974.

12. Mr. Malhotra then focused on the counter claims filed by the Respondent, some of which were allowed by the learned Arbitrator. It was submitted that the scope of the proceedings before the Arbitrator was confined to those counter claims other than those decided by the Award dated 31st March 1983. However, in the present Award, the learned Arbitrator had once again allowed counter claim No. 1 which pertained to

refund of the security deposit of Rs.1,00,000/- and counter claim No. 4 (2) which pertained to interest on the said deposit both of which were already allowed by the earlier Award which was not sought to be executed by the Respondent despite being made rule of the court. Consequently, it was contended that these two counter claims were wrongly entertained once again by the Arbitrator.

13. As regards the other counter claims, i.e., counter claim Nos. 4(1), 4(3), 4(4), 4(5), 4(6) and 5, it is submitted that there were no original documents produced by the Respondent. The documents marked as Exhibits C1 to C-27 were purportedly typed copies and did not form part of the original arbitration record. The Respondent did not even produce the copies presumably in its possession from which the typed copies were prepared. The remaining counter claims were all based only on the aforementioned documents which were never proved before the learned Arbitrator. Consequently, the Award was based on no evidence at all and was therefore, required to be set aside.

14. Mr. Ashok Sethi, learned counsel for the Respondent countered the above submissions by submitting that the finding of the learned Arbitrator that the counter claims were not time barred called for no interference. He submitted that in terms of Section 4 of the Act DDA should be deemed to have waived any objection to the delay in the Respondent filing its counter claims or on placing reliance upon Exhibits C1 to C27 since no such objection was raised by the DDA in the first place before the learned Arbitrator. He also relied upon Section 28 of the Act which did not make the rules of evidence governing civil suits strictly applicable to arbitral proceedings. He submitted that the procedure followed by the learned

Arbitrator could therefore not be faulted, particularly when the entire arbitral record went missing and not on account of any fault of the Respondent. He submitted that even in the present petition initially no such grounds were raised by the DDA. They were later permitted to raise these grounds by way of amendment. With the DDA having lost the entire arbitral record, the burden of proving the documents forming part thereof ought not to be shifted to the Respondent. Given the limited scope of interference by the Court under Section 34 of the Act, the Award ought to be upheld.

15. The above submissions concerning the counter claims bring up two issues. The first concerns limitation. This Court finds that there was no Award as such passed by the first Arbitrator Mr. A. K. Lal who merely consigned the case to the record. His appointment as such was as a result of the Respondent invoking the arbitration clause. With there being nothing to show that the Respondent was served it could not have lodged its claims at that point in time. Thereafter the DDA invoked the arbitration clause and another arbitrator came to be appointed. Although the Respondent lodged its counter claims for the first time in 1978, a perusal of the order dated 12th April 1985 of this Court shows that no plea was raised by the DDA that the counter claims of the Respondent were time barred and therefore ought not to have been entertained by the learned Arbitrator. When the case was remanded by this Court to the learned Arbitrator, the mandate to the Arbitrator was to give his decision on the other claims that is other than what had already decided in the Award dated 31st March 1983. Consequently, this Court does not find any merit in the contention of learned counsel for the DDA that the Respondent's claims were time barred.

16. On merits, learned counsel for the DDA is justified in his contention that two of the counter claims i.e. counter claim Nos. 1 and 4(2), i.e., claim for refund of the fixed deposit of Rs. 1,00,000/- and interest thereon in the sum of Rs. 10,064, were already covered by the earlier Award dated 31st March 1983 and were not referred to the present Arbitrator when this Court remitted the matter for a decision on the other claims by its order dated 12th April 1985. In other words, the learned Arbitrator on remand could not have again adjudicated on Counter Claim Nos. 1 and 4(2).

17. The other counter claims allowed by the learned Arbitrator were based on the documents exhibited as Exhibit C1 to C27 by the Respondent. These did not form part of the original arbitral record which was reconstructed under the orders of this Court. It appears that the original record of arbitration proceedings of the Award was originally sent back to Mr. Kochar on 18th June 1985 but was not received by him. The record could not thereafter be traced. The attested copies of the relevant documents were filed by the DDA and to that extent, the record was reconstructed. The reconstructed record did not contain Exhibits C1 to C27.

18. A query was posed to learned counsel for the Respondent whether it possessed the documents from which Exhibits C1 to C27 were typed. Learned counsel for the Respondent informed the court that they were not available with the Respondent as well. It was sought to be explained that these documents were moth-eaten, old and illegible and, therefore, were not produced. No such plea was taken by the Respondent at any time before the learned Arbitrator perhaps because no such query was raised. If indeed those documents were moth-eaten, it seems improbable that

perfect typed copies of the entire documents could have been prepared. It is surprising that the learned Arbitrator did not examine this aspect of the matter. Even though the learned Arbitrator was not expected to strictly follow the rules of evidence, he had nevertheless to be satisfied that the documents relied upon in support of the counter claims were reliable copies of the originals. If the originals could not be produced for some reason the Arbitrator had to ascertain the reasons therefor. No such procedure appears to have been followed by the learned Arbitrator in the instant case.

19. In the considered view of this Court, the learned Arbitrator misdirected himself in allowing the counter claims on the basis of the unproven Exhibits C1 to C27. The burden was on the Respondent to prove their genuineness and the Respondent failed to discharge that burden. This Court accordingly holds that the allowing of some of the counter claims of the Respondent by the learned Arbitrator as referred to hereinabove was erroneous in law.

20. For the aforementioned reasons, the impugned Award dated 30th September 2008 of the learned Arbitrator to the extent it rejects the claims of the DDA is upheld and is set aside to the extent it has allowed the counter claim Nos. 1, 4(1), 4(2), 4(3), 4(4), 4(6) and 5 of the Respondent. Consequently, OMP No. 56 of 2009 is partly allowed to the above extent, but in the circumstances, with no order as to costs.

S. MURALIDHAR, J

NOVEMBER 9, 2011
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