

IN THE HIGH COURT OF DELHI AT NEW DELHI

CS (OS) 166/2005 & I.A. No. 5227/2008

Reserved on: November 17, 2011

Decision on: December 1, 2011

ASTRA CONSTRUCTION CO. PVT. LTD. Petitioner
Through: Mr. Manmeet Arora with Ms. Princy
Ponnan and Mr. Vipin Tyagi, Advocate.

versus

ARUNODAYA COOPERATIVE GROUP HOUSING SOCIETY LTD.
..... Respondent
Through: Mr. H.S. Phoolka, Senior Advocate with
Mr. Sharat Kapoor and Mr. Kanwar
Faisal, Advocates.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

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01.12.2011

1. These are proceedings for making the Award of the learned Umpire dated 29th December 2004 rule of the Court. The objections to the Award filed by the Respondent Arunodaya Cooperative Group Housing Society ('Society') under Sections 30 and 33 of the Arbitration Act, 1940 ('Act') will be disposed by this judgment.

Background Facts

2. The facts are that pursuant to a tender floated by the Society, an agreement was executed between the Petitioner Astra Construction Company Pvt. Ltd. and the Society on 27th March 1990 for rectifying the defective work done by the earlier contractor, completing the unfinished work and constructing a new block of 300 flats of the Society at Bundela, Phase-II, Vikas Puri, New Delhi. The contract amount was Rs. 4.68 crores and the contract period was initially for 15 months expiring on 27th May

1991 which was extended up to 31st December 1991. According to the Society the Petitioner could not complete the work within the specified time. Consequently, the Society by a letter dated 25th February 1995 invoked Clause 32 of the contract and decided to proceed with the works at site. The Petitioner approached this Court by filing Suit No. 647-A of 1995. By an order dated 14th August 1995, this Court appointed Mr. Justice S.S. Chadha (Retired) as nominee Arbitrator of the Petitioner and Dr. O.P. Jain as nominee Arbitrator of the Society. When Dr. O.P. Jain expressed his inability to act as Arbitrator, Mr. V.R. Vaish filled the resultant. On 9th May 1996 the two Arbitrators entered upon reference and appointed Mr. Justice G.C. Jain (Retired) as Umpire. Consequent upon the unfortunate demise of Mr. Justice G.C. Jain, Mr. Justice J.K. Mehra (Retired) was appointed as Umpire on 28th May 1998. The time for making and publishing the Award was extended from time to time.

The Awards of the Arbitrators and the Umpire

3. There was no unanimity between the two Arbitrators on the different claims. In his Award dated 4th January 2003. Of the Society's 22 claims, Justice Chadha rejected Claim Nos. 9, 11, 12, 14, 20 and 21. The Petitioner did not press Claim Nos. 16 and 17. Justice Chadha rejected counter claim Nos. 1, 4 and 7 to 16 and partly allowed Counter Claim Nos. 2, 3, 5 and 6 of the Society. In effect Justice Chadha awarded the Society Rs. 91,44,580/- together with interest @ 18% per annum.

4. Mr. Vaish in his Award dated nil rejected Claim Nos. 8, 9, 11, 12, 14, 15 and 22 of the Petitioner. He also rejected Counter Claim Nos. 7, 9, 10 and 12 to 16. In effect he held that the total amount payable by the Society to the Petitioner was Rs. 1,32,879/- together with interest @ 12% per annum.

5. Justice J.K. Mehra, the Umpire, in his Award agreed largely with Justice

Chadha and rejected Claim Nos. 9, 11, 12, 14, 16, 17, 20 and 21 and Counter Claims Nos. 1, 7, 9, 10 and 12 to 15. He awarded in all a sum of Rs. 2,25,74,196/- in favour of the Petitioner and Rs. 4,50,476/- in favour of the Society. Thus, the net total amount payable by the Society to the Petitioner was determined as Rs. 2,21,23,720/- together with 15% interest from 10th March 1995 till 4th January 2003 and 12% interest per annum from 5th January 2003 till 15th December 2004 and from 16th December 2004 till realization.

6. This Court has heard the submissions of Mr. H.S. Phoolka, learned Senior counsel with Mr. Sharat Kapoor, learned counsel for the Society and Ms. Manmeet Arora, learned counsel appearing for the Petitioner.

Interest and Costs

7. On behalf of the Society it is submitted that the learned Umpire's finding on the claim for interest and costs is unsustainable in law since the Agreement does not contain any clause relating to interest; the claim was in the nature of penalty; there were contradictions in the Award of the learned Umpire with regard to the period of interest; the Petitioner never submitted the final bill to the Society but filed it only before the learned Arbitrators on 15th June 1996 as Claim No. 1; the Petitioner had applied to the Court on 13th March 1995 under Section 20 of the Arbitration Act, 1940 ('Act') despite which interest had been awarded from 10th March 1995 onwards; even assuming interest were to be awarded it should have been a rate lower than 15% and 12%. As regards costs it is submitted that the Award of the learned Umpire was beyond the original claim; with the Petitioner having abandoned the site in December 1994 it is the Petitioner who should have been held liable to pay the costs incurred by the Society in defending itself in the arbitration proceedings. Further, the Petitioner unfairly exaggerated its claims which also entitled the Society to the costs incurred by it during

the arbitration proceedings.

8. Countering the above submissions Ms. Manmeet Arora, learned counsel for the Petitioner, submitted that the learned Umpire had awarded interest in accordance with law. Instead of awarding interest from 13th March 1995 the Umpire awarded interest from 10th March 1995. This could be at best a typographical error. As regards costs she supported the reasoning in the Award of Justice S.S. Chadha as well as that of the learned Umpire.

9. As regards the Petitioner's Claim No. 19 pertaining to interest, Justice Chadha referred to the settled law that in the matter of award of *pendente lite* interest the Arbitrator has the same power as the Courts have under Section 34 of the Civil Procedure Code, 1908. He awarded interest at 18% p.a. Mr. Vaish however rejected the claim for *pendente lite* interest since the Petitioner had not claimed it. Justice Mehra, the learned Umpire, agreed with Justice Chadha. However, the rate interest was reduced to 15% per annum for the pre-award period and to 12% for the post-award period.

10. On the question of interest this Court is unable to discern any illegality in the Award of the learned Umpire that calls for interference under Sections 30 and 33 of the Act. It is indeed settled law that the Arbitrator is entitled to award *pendente lite* interest as well as post-Award interest. The award of interest follows the determination of individual items of claims. The rate of interest awarded by the learned Umpire cannot be said to be arbitrary or excessive. Consequently, the Award of the Umpire on this aspect is affirmed. The claim as regards costs is also consequential to the determination of the individual items of claims and as to which party should be made to carry the costs of litigation. Considering that the learned Umpire, concurring with Justice Chadha found merit in many of the Petitioner's claims, the allowing of costs in its favour can hardly be said to

be illegal. The learned Umpire has explained the basis of the computation of costs with reference to the total fee paid to the Arbitrators and the fee payable to the learned Umpire on the basis of the number of hearings before him. The Award of the learned Umpire as regards costs is perfectly valid and is therefore affirmed.

Escalation

11. The next objection raised by the Society to the impugned Award of the learned Umpire is as regards Claim Nos. 2, 5 and 6 and Counter Claim No. 8 which deal with the issue of escalation on steel and cement. According to the Society the contract was silent on the payment of escalation. The Award of the learned Umpire failed to give details as to how a sum of Rs. 28,85,325/- was arrived at and under which head. Further it is submitted that while Justice Chadha has dealt with the claim of the Society towards equipment hire charges, he failed to deal with the separate heads of claims of escalation and also did not explain the basis for arriving at the figure of Rs. 28,85,325.

12. As regards escalation on steel, it is stated that the Petitioner had not led any evidence to prove the prices of steel at the relevant time. On the other hand the Society had called a witness from Rathi Steel to prove the prevailing prices of the steel during the period from 1991 to 1994. It was on the basis of this evidence that Mr. Vaish decided these claims and counter claims. He also cross-checked the evidence by comparing with the rates of CPWD and awarded Rs. 14,77,067/- plus Rs. 4,61,251/-, i.e., Rs. 19,38,318/- to the Society. However, Justice Chadha and the learned Umpire both held that as the Architect had certified the RA bills and his decision was final, the price could not be re-opened. It is pointed out by the Society that this also amounts to re-writing of the contract. The certificate of the Architect was final in terms of Clauses 34 and 35 of the General

Conditions of Contract ('GCC') except the payment regarding clause No. 8a, 8b, 12, 17, 23 and 32. None of these clauses dealt with the price of the materials. All the payments to the contractor were interim by way of advance and were subject to the payment at the time of the final bill. As regards escalation on cement it was submitted that there was no provision in the contract and the Award has been passed on the alleged minutes of the Society which were not on record. In any event, the minutes of the meeting dated 8th August 1991 did not have the effect of re-writing the contract.

13. The above objections have been considered. The contention of the Society that Justice Chadha did not explain how he arrived at the figure of Rs. 28,85,325 is not correct. A perusal of his Award, which has been concurred with by the learned Umpire, shows that he has dealt with this issue extensively. He merged Claims 2,5 and 6 and then proceeded to identify none parameters that had to be determined in order to determine the payment of escalation. These included, the date up to which escalation was payable, merging of Claims 2,5 and 6, amount of agreement items on which escalation was payable, amount of derived extra items, full value of material, amount of steel and cement used or brought to site which was deductible from material component of work, amount of owner's issue of material and whether equipment hire charges were a fixed rate service or not. Justice Chadha noted that Clause 22.4 (d) dealt with payment of price variation during the extended period of the contract. Since delays in the completion of the works beyond the contracted period was held by Justice Chadha as not attributable to the Petitioner the escalation was held to be payable at indices of quarter Dec'94 – Feb '95. Justice Chadha accepted as correct the view of the Architect that equipment hire charges was not a fixed rate service and the Society's contention to the contrary was rejected. Although the amount of escalation payable worked out to Rs. 30,73,345,

since the gross amount claimed by the Petitioner was Rs. 28,85,325/- its claim was limited to the said amount.

14. Justice Chadha rightly noted that escalation was admitted by the Society and paid up to the 39th RA bill. The Petitioner had claimed an escalation of Rs. 18,71,930 under in Claim No. 2, a certified escalation of Rs. 1,67,036 on the 40th RA bill in Claim No.5 and escalation of Rs. 7,84,036 on the 41st RA bill thus totaling Rs. 28,23,002/-. The Society had already conceded a total payment of escalation of Rs. 30,93,593.84 and sought refund of Rs. 23,78,275.35. The Society in their calculation froze the indices from 31st December 1991. As rightly held out by the learned Umpire, Justice Chadha's detailed discussion and conclusion on the issue of escalation deserves acceptance.

15. In the Award of Mr. Vaish it was observed that the Petitioner could not produce the minutes of the meeting of the Society. As rightly pointed out by Ms. Arora the burden of producing the minutes of the Society could not have been placed on the Petitioner. It could not possibly have access to the records of the Society. She referred to the documents forming part of the arbitral record which showed that from the 11th to the 39th RA bill the escalation for cement was allowed. Further in a letter dated 12th September 1991 from the Architect to the Society a reference was made to the meeting held of the Society on 8th August 1991 in which "it was decided by the Managing Committee of the Society that difference in price on cement between market price and base price of Rs. 70/- shall be reimbursed to the contractor effect from 1.6.91."

16. It appears to this Court that the claim for escalation could not have been rejected only because there was no specific averment in the agreement as contended by the Society. It appears from the minutes of the meeting of the

Society that they had in fact decide to admit the claims for escalation made by the Petitioner up to the 39th RA bill. This was what weighed with both Justice Chadha and the learned Umpire. Under Clause 24.1 the as certified by the Architect were admissible. In fact, as pointed out by the learned Umpire, it is the Society's own case that the Architect certified bill was the final one. This Court finds no perversity in the Award of the learned Umpire's Award which concurs with the Award of Justice Chadha that the Architect certified bill had to be accepted by the Society. The Award of Justice Chadha and the learned Umpire in accepting claim Nos. 2, 5 and 6 and rejecting claim No. 8 is not called for any interference.

Delay

17. The next issue is that of delay. It was contended by the Society that the Award of Mr. Vaish holding the delay up to 31st December 1993 as attributable both to the Petitioner as well as the Society and after 1st April 1994 attributable to the Petitioner should be accepted.

18. On the aspect of delay Justice Chadha has given elaborate reasons for holding that the delay was attributable to the Society. Since this issue involves appreciation of evidence and since this Court is not sitting in appeal, it is not persuaded to interfere with the concurrent opinions of the learned Umpire and Justice Chadha. The learned Umpire has analysed the reasoning of both Arbitrators and concluded that "Justice Chadha's analysis is closer to the ground reality, and I do not agree with Mr. Vaish as he has failed to appreciate the fact of non-payment of bills in time and has also not touched upon the importance of supply of instructions as pointed out by Justice Chadha within the stipulated period of 15 months." The learned Umpire Justice Mehra also concurred with the view of Justice Chadha that "there is documentary evidence to establish that the Petitioner continued to execute the work in spite of the fact that the respondent society failed to

fulfil its obligations under the contract to meet its payment commitments as such this slow progress of work was not adequate justification for termination of the contract.” This Court affirms the impugned Award of the learned Umpire on the question of delay.

The 40th and 41st RA Bill and the Final Bill

19. The last submission concerns Claim Nos. 2 and 3 which pertained to final bill, 41st RA and 40th RA bills. Relying on the decisions in *M/s Rashtriya Chemicals and Fertilizers Ltd. v. Chowgle Brothers 2010 (6) SCALE 393*, *Bharat Coking Coal Ltd. v. Annapurna Construction (2003) 8 SCC 154* and *Satender Kumar v. Municipal Corporation of Delhi 2010 (168) DLT 15*, it is submitted that only clerical errors in the RA bills could be corrected and the entire bills could not be re-assessed as has been done in the Umpire’s Award. Further, the payments made on the basis of the Architect’s certificate were only advances and not to be taken as a final determination.

20. Having accepted the Architect’s certification as the basis for passing the bills of the Petitioner up to the 39th RA Bill, the Society cannot be seen to reject that basis for the bills submitted thereafter. This Court finds that the reasoning of Justice Chadha as analysed by the learned Umpire merits acceptance. Whether it was the claims as regards RCC items or metro fittings or the use of hollock wood in place of teak wood Justice Chadha appears to have gone not only by the Architect’s certificate but has also analysed the evidence of the witnesses. Even as regards the other claims and counter claims Justice Chadha’s Award merits acceptance and this is what has been done essentially by the learned Umpire although in the actual computation there are differences, which again have been sufficiently explained by the learned Umpire. Viewed in light of the parameters of the law explained by the Supreme Court as regards the scope

of proceedings under the Act to challenge the validity of arbitral awards, this Court is unable to hold that the impugned Award of the learned Umpire suffers from any illegality that calls for interference.

21. The objections of the Society to the impugned Award dated 29th December 2004 of the learned Umpire are hereby rejected and the said Award is hereby made rule of Court. The suit is disposed of. The decree sheet be drawn up accordingly.

S. MURALIDHAR, J.

DECEMBER 1, 2011

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