

* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ FAO(OS) No.468/2007 & CM Nos.16027-28/2007
DELHI DEVELOPMENT AUTHORITY.....Appellant through
Mr. Bhupesh Narula, Adv.

versus

M/S. G.S. LUTHRA Respondent through
Mr. Raman Kapur, Adv.

% Date of Hearing : January 24, 2011

Date of Decision : March 30, 2011

CORAM:

* HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

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

VIKRAMAJIT SEN, J.

1. This Appeal has been filed under Section 39 of the Arbitration Act, 1940. It assails the Judgment of the learned Single Judge dismissing the Objections filed by the Appellant in respect of the Award passed by the Sole Arbitrator, Shri R.J. Bhakru, Chief Engineer, CPWD (Retired). Concurrent findings, thus, are against the Appellant.

2. In the formative years of arbitration, when it was still to be accepted as an alternative to Courts of law, it was understandable that the latter would prevail over the former. Arbitration, as dispute resolution mechanism, has now

developed into a robust institution, capable of effectively and expeditiously deciding disputes, especially owing to that some of the Arbitrators possessed specialized knowledge. Expectedly, the superintendence of the Courts has diminished over the years. Earlier, Awards were susceptible to being set aside if all questions raised were not discussed in the Award. However, with the passage of time the fiction that all points had been duly considered and rejected came to be adopted to make Awards impervious to jural interference. Similarly, whilst it was earlier accepted that Awards should contain reasons in clear terms, it was subsequently opined that if the trend/chain of thought was discernible, the Award was impregnable to attack. At the present time, the Apex Court has enunciated that judicial interference is not called for even in those instances where the arbitrator may have committed an error of fact. The following passage from *Union of India –vs- Rallia Ram*, AIR 1963 SC 1685, even though in the context of the repealed Arbitration Act, 1940 ('Arbitration Act' for short), is worthy of reproduction:-

An award being a decision of an arbitrator whether a lawyer or a layman chosen by the parties, and entrusted with power to decide a dispute submitted to him is ordinarily not liable to be challenge on the ground that it is erroneous. In order to make arbitration effective and the awards enforceable, machinery is devised for lending the assistance of the

ordinary Courts. The Court is also entrusted with power to modify or correct the award on the ground of imperfect form or clerical errors, or decision on questions not referred, which are severable from those referred. The Court has also power to remit the award when it has left some matters referred undetermined, or when the award is indefinite, or where the objection to the legality of the award is apparent on the face of the award. The Court may also set aside an award on the ground of corruption or misconduct of the arbitrator, or that a party has been guilty of fraudulent concealment or wilful deception. But the Court cannot interfere with the award if otherwise proper on the ground that the decision appears to it to be erroneous. The award of the arbitrator is ordinarily final and conclusive, unless a contrary intention is disclosed by the agreement. The award is the decision of a domestic tribunal chosen by the parties, and the Civil Courts which are entrusted with the power to facilitate arbitration and to effectuate the awards, cannot exercise appellate powers over the decision. Wrong or right the decision is binding if it be reached fairly after giving adequate opportunity to the parties to place their grievances in the manner provided by the arbitration agreement. But it is now firmly established that an award is bad on the ground of error of law on the face of it, when in the award itself or in a document actually incorporated in it, there is found some legal proposition which is the basis of the award and which is erroneous.

Acknowledging that the Arbitrator is the final judge of facts, the Apex Court in *State of Orissa -vs- Kalinga Construction Co. (P) Ltd.*, 1970 (2) SCC 861 held that the High Court erred in considering the matter as a Court of Appeal by re-evaluating the evidence.

3. In *Hindustan Iron Co. -vs- K. Shashikant & Co.*, AIR 1987 SC 81, the Court held that an Award ought not to be set aside even if the opinion of the Court was that the Arbitrator had reached wrong conclusions or failed to appreciate some facts. In *Coimbatore District Podu Thozillar Sangam -vs- Balasubramania Foundary*, AIR 1987 SC 2045, it was opined that an error of law and not a mistake of fact committed by the arbitrator could be corrected. The Award is not amenable to interference by the Court provided the Award is made fairly, after giving adequate opportunity to the parties to articulate their grievances in the manner provided by the arbitration agreement. Similar views were again expressed in *Indian Oil Corporation Ltd. -vs- Indian Carbon Ltd.*, (1988) 3 SCC 36; *Jawahar Lal Wadhwa -vs- Haripada Chakroberty*, (1989) 1 SCC 76; *Puri Construction Pvt. Ltd. -vs- Union of India*, (1989) 1 SCC 411; *M/s. Sudarsan Trading Co. -vs- Government of Kerala*, (1989) 2 SCC 30; *Food Corporation of India -vs- Joginderpal Mohinderpal*, AIR 1989 SC 1263 where even a plausible view

taken by the Arbitrator was held not to be open to alteration by the Court. *Municipal Corporation of Delhi –vs- M/s. Jagan Nath Ashok Kumar*, AIR 1987 SC 2316 held that if the reasons appear *per se* to be not unreasonable and irrational, the Court ought not to reappreciate evidence. In *Hind Builders –vs- Union of India*, AIR 1990 SC 1340 it was cautioned that where two views were possible, there was no error apparent on the face of the Award. In *Bijendra Nath Srivastava –vs- Mayank Srivastava*, AIR 1994 SC 2562, the reasonableness of reasons given by the arbitrator was not open to challenge. Similarly, in *Hindustan Construction Co. Ltd. –vs- Governor of Orissa*, AIR 1995 SC 2189, it was repeated that the Court cannot reappreciate the material on the record. In *Trustees of the Port of Madras –vs- Engineering Constructions Corporation Ltd.*, (1995) 5 SCC 531, the decision of a Division Bench of the High Court of Madras, which reversed the Award on a question of fact and not a question of law, was set aside by the Supreme Court. After considering its previous decisions, the Apex Court in *B.V. Radha Krishna –vs- Sponge Iron India Ltd.*, (1997) 4 SCC 693 again held that the Court could not substitute its own view in place of that of the Arbitrator. In *Army Welfare Housing Organisation –vs- Gautam Construction & Fisheries Ltd.*, (1998) 7 SCC 290, the Court declined to vary an Award for the reason that without

reappreciating evidence it would not be possible to fault the quantum awarded towards anticipated expenses. The Arbitration & Conciliation Act, 1996 has now given statutory expression to the judicial view that Courts' interference in arbitration matters is to be eschewed.

4. The interpretation or construction of a contract or a contractual clause is also the province of the Arbitrator to whom a dispute is referred for final determination by the parties. The construction imparted by the Arbitral Tribunal to a contract or a contractual clause should remain impervious to another view which may be preferred by the Judge. Once there is no dispute as to the existence of a contract, the interpretation of clauses thereof is a matter for the Arbitral Tribunal to expound upon. Suffice it is to mention *Sudarsan Trading Co. -vs- Govt. of Kerala*, (1989) 2 SCC 38; *Tarapore & Co. -vs- Cochin Shipyard Ltd.* (1984) 2 SCC 680 and *Numaligarh Refinery Ltd. -vs- Daelim Industrial Co. Ltd.*, (2007) 8 SCC 466 with regard to this settled position of law.

5. The following passage from *Guru Nanak Foundation -vs- Rattan Singh and Sons*, AIR 1981 SC 2075 is contextual even today:-

Interminable, time consuming, complex and expensive court procedures impelled jurists to search for an alternative forum, less formal, more effective and

speedy for resolution of disputes, avoiding procedural claptrap and this led them to Arbitration Act, 1940 ("Act" for short). However, the way in which the proceedings under the Act are conducted and without exception challenged in courts, has made lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that the proceedings under the Act have become highly technical accompanied by unending prolixity, at every stage providing a legal trap to the unwary. Informal forum chosen by the parties for expeditious disposal of their disputes has by the decisions of the courts been clothed with 'legalese' of unforeseeable complexity.

6. Mr. Bhupesh Narula, learned counsel for the Appellant, has laid a challenge to Claims No.1, 5, 9, 12, 21, 22, 23, 29, 32 and 33. He relies on *Kochar Construction Co. -vs- Union of India*, 1994(1) ALR 269 wherein a Division Bench of this Court had opined that merely filing a cost analysis cannot be accepted as the evidence of expenditure on account of increased cost of construction even if the analysis was not traversed by the Respondent; since no independent evidence had been led in support of the claim, a sum could be awarded in respect of such a claim. He has also relied on a decision of another Division Bench in *Delhi Development Authority -vs- Sunder Lal Khatri*, 157(2009) DLT 555. This decision, in fact, follows another Division Bench Judgment reported as *Delhi Development*

Authority -vs- M/s Alkaram, AIR 1982 Delhi 365 where it had been observed that the “reasons are not deficient merely because every process of reasoning is not set out. Reasons are not insufficient merely because they fail to deal with every point raised before the Arbitrator at the hearing.” Eventually, the Bench held that failure to give reasons for computation of awarded amount constitutes legal misconduct on part of Arbitrator. We shall only mention a subsequent Judgment of the learned Single Judge reported as *M/s. Kalyan Chandra Goyal – vs- Executive Engineer, Southern Western Division-9, Delhi Development Authority*, MANU/DE/3675/2010 who had authored ***Sunder Lal Khatri*** which again has been relied upon. Our attention has also been drawn to the pronouncement in *Steel Authority of India Ltd. -vs- J.C. Budharaja*, AIR 1999 SC 3275 containing the following exposition of the law:-

15. Clause 32 of the agreement specifically stipulates that no claim whatsoever for not giving the entire site on award of work and for giving the site gradually will be tenable and the Contractor is required to arrange his working programme accordingly. Clause 39 further stipulates that no failure or omission to carry out the provisions of the contract shall give rise to any claim by the Corporation and the Contractor, one against the other, if such failure or omission arises from compliance with any statute or regulation of the Government or other reasons beyond the control of

either the Corporation or the Contractor. Obtaining permission from the Forest Department to carry out the work in the wildlife sanctuary depends on statutory regulations. Clause (vi) of the general conditions of the contract also provides that failure or delay by the Corporation to hand over to the Contractor possession of the lands necessary for the execution of the work or any other delay by the Corporation due to any other cause whatsoever would not entitle the Contractor to damage or compensation thereof; in such cases, the only duty of the Corporation was to extend the time for completion of the work by such period as it may think necessary and proper. These conditions specifically prohibit granting claim for damages for the breaches mentioned therein. It was not open to the arbitrator to ignore the said conditions which are binding on the contracting parties. By ignoring the same, he has acted beyond the jurisdiction conferred upon him. It is settled law that the arbitrator derives the authority from the contract and if he acts in manifest disregard of the contract, the award given by him would be an arbitrary one. This deliberate departure from the contract amounts not only to manifest disregard of the authority or misconduct on his part, but it may tantamount to mala fide action. In the present case, it is apparent that awarding of damages of Rs 11 lakhs and more for the alleged lapses or delay in handing over the work site is, on the face of it, against the terms of the contract.

16. Further, the Arbitration Act does not give any power to the arbitrator to act arbitrarily or capriciously. His existence depends upon the

agreement and his function is to act within the limits of the said agreement. In *Continental Construction Co. Ltd. v. State of M.P.* (1988) 3 SCC 82 this Court considered the clauses of the contract which stipulated that the contractor had to complete the work in spite of rise in the prices of materials and also rise in labour charges at the rates stipulated in the contract. Despite this, the arbitrator partly allowed the contractor's claim. That was set aside by the Court and the appeal filed against that was dismissed by this Court by holding that it was not open to the contractor to claim extra costs towards rise in prices of material and labour and that the arbitrator misconducted himself in not deciding the specific objection regarding the legality of the extra claim. In that case, the Court referred to the various decisions and succinctly observed: (SCC p.88, para 5)

“If no specific question of law is referred, the decision of the arbitrator on that question is not final however much it may be within his jurisdiction and indeed essential for him to decide the question incidentally. The arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks is just and reasonable. The arbitrator is a tribunal selected by the parties to decide their disputes according to law and so is bound to follow and apply the law, and if he does not he can be set right by the court provided his error appears on the face of the award.”

17. It is to be reiterated that to find out whether the arbitrator has travelled beyond his jurisdiction and acted beyond the terms of the agreement between the parties, the agreement is required to be looked into. It is true that interpretation of a particular condition in the agreement would be within the jurisdiction of the arbitrator. However, in cases where there is no question of interpretation of any term of the contract, but of solely reading the same as it is and still the arbitrator ignores it and awards the amount despite the prohibition in the agreement, the award would be arbitrary, capricious and without jurisdiction. Whether the arbitrator has acted beyond the terms of the contract or has travelled beyond his jurisdiction would depend upon facts, which however would be jurisdictional facts, and are required to be gone into by the court. The arbitrator may have jurisdiction to entertain claim and yet he may not have jurisdiction to pass award for particular items in view of the prohibition contained in the contract and, in such cases, it would be a jurisdictional error. For this limited purpose reference to the terms of the contract is a must. Dealing with a similar question this Court in *New India Civil Erectors (P) Ltd. v. Oil and Natural Gas Corpn.*(1997) 11 SCC 75 held thus: (SCC p. 79, para 9)

“It is axiomatic that the arbitrator being a creature of the agreement, must operate within the four corners of the agreement and cannot travel beyond it. More particularly, he cannot award any amount which is ruled out or prohibited by the terms

of the agreement. In this case, the agreement between the parties clearly says that in measuring the built-up area, the balcony areas should be excluded. The arbitrators could not have acted contrary to the said stipulation and awarded any amount to the appellant on that account.”

7. We shall now analyze Clause 13 of General Rules and Directions and Clause 1 of Specifications and Conditions which are relevant for our purposes and read thus:-

13. If at any time after the commencement of the work the Authority shall for any reason whatsoever not require the whole thereof as specified in the tender to be carried out, the Engineer-in-Charge shall give notice in writing of the fact to the contractor who shall have no claim to any payment of compensation whatsoever on account of any profit or advantage which he might have derived from the execution of the work in full, but which he did not derive in consequence of the full amount of the work not having been carried out, neither shall he have any claim for compensation by reason of any alterations having been made in the original specifications, drawings, designs and instructions which shall involve any curtailment of the work as originally contemplated.

1. The contractor must get acquainted with the proposed site for the works and study specification and conditions carefully before tendering. The work shall be executed as per programme approved by the Engineer-in-Charge. If part of site is not available for

any reason or there is some unavoidable delay in supply of materials stipulated by the Department the programme of construction shall be modified accordingly and the contractor shall have no claim for any extras or compensation on this account. (Underlining is ours)

8. On the strength of *J.C. Budharaja*, if the Award grants compensation/damages for delay in the project on a view that is irreconcilable with a plain reading of the said Clause, the Award would be liable to be set aside. It may now be convenient to set out the facts of the case. The Tender of the Respondent/Contractor was accepted by the Delhi Development Authority (DDA) vide letter dated 18.6.1981 and formal Agreements were subsequently signed. The construction work under this Contract was to be completed within eleven months, that is, well-in-advance of the commencement of the Asian Games, 1982. The Contract itself in terms states that the “work is a part of Indoor Stadium complex which is highly prestigious and time bound project of national importance which has to be completed within the stipulated time. It should be clearly understood that no delay whatsoever, will be tolerated”.

9. The learned Arbitrator has made a detailed analysis of the Clause and has concluded that since the Work had continued till 1987, time was not of the essence any longer. He opined that if the DDA was desirous of acting under Clause 13, they were contractually bound to "give notice of their decision within a reasonable time near about date of completion, i.e., 31.5.1982 or August 1984 when they paid last 21st R.A. Bill. The Respondent (DDA) all along gave the impression of their intention to complete the Work till May, 1987". This finding has not been interfered with by the learned Single Judge. In fact, the learned Single Judge has recorded that the letter terminating the Contract was issued on 12.5.1987. We think that the Clause relied upon by the Appellant has no applicability to a situation where the project continued well after the anticipated date of completion. The challenge to the concurrent findings on this score is bereft of substance. Avowedly, the notice stipulated under Clause 13 of General Rules and Directions, required to be given by the Engineer-in-Charge to the Contractor, was not given, though the construction work which was to be completed by 31.5.1982 carried on till 1984. It was as late as in 1987 that the DDA terminated the Contract without giving any reasons for its decision and in the teeth of their failure of complying with their obligation for serving prior

notice. Though the construction was not completed for reasons attributable to the DDA, the contract continued because the Contractor was not given any notice/intimation of the alleged intent of DDA to terminate the contract. The learned Arbitrator has dealt with this important aspect of the case in detail, and has come to the conclusion that "in case the respondent had intention to close the contract, they could give notice of their decision within a reasonable time near about date of completion, that is, 31.5.1982 or August, 1984 when they paid last 21st R.A. Bill. Respondent all along gave the impression of their intention to complete the work till May, 1987. Certainly, Clause 13 cannot be construed to mean that decision to close the contract could be deferred indefinitely for years together. There has to be reasonable time. Thus, Claimant was deprived of the profit which they could earn on completion of work". The learned Single Judge has concurred with the Arbitral Tribunal that the cessation of work between 1984 and 1987 was not covered by Clause 13. He has reiterated that the DDA is liable for damages that had occurred on this account. We find that the reasons for the grant of claim on this score by the learned Arbitrator are cogent and plausible. The Court cannot certainly replace these findings of the learned Arbitrator by its own.

10. The Claim granted by the learned Arbitrator towards compensation for damages and losses due to prolongation of contract period cannot also be assailed on the strength of Clause 1 of Specifications and Conditions. This Clause only stipulates that if for the reason of delay in supply of materials stipulated by the Department or if part of site is not available for any reason, the contractor is precluded from claiming for any extras or compensation on this account. Undisputedly, the construction, which was to be completed within eleven months, that is, by May, 1982, the same carried on till 1984 without any demur from the DDA and thereafter it remained in suspended animation till 1987 when the Contract was eventually terminated by the DDA. The learned Arbitrator has found the delay to be attributable only to the DDA for the reasons that there was delay in handing over complete and clear site due to delay in completion of work of pile foundation executed by another agency; delay in issue of drawings, designs, clarifications etc. and delay in clearing the pending R.A. Bills for the Work executed by the Contractor. The learned Arbitrator has held that the Contractor had intimated the Respondent of the overhead expenses on account of prolongation of work from time to time through its letters written to the DDA and since it was entirely due to lapses and defaults of the DDA, the

Contractor became entitled to claim the losses suffered by it. As on the other issues, the learned Single Judge has approved the conclusion arrived at by the Arbitral Tribunal. Clause 1 of Specifications and Conditions is, in our view, did not absolve the learned Arbitrator from determining the cause of delay and prolongation of Work and awarding the compensation resulting from the same.

11. Even in the absence of the abovementioned Clauses, it seems imperative to us that the Contractor must be specifically and categorically informed that the contract has come to an end. So far as building contracts are concerned, there are myriad consequences that invariably occur on their termination. To mention a few, an inspection of construction already carried out in order to determine their extent as well as quality would necessarily have to be simultaneously carried out. If not so done, it will lead to multiple claims being filed. Furthermore, it becomes well-nigh impossible for the Contractor to prove, or disprove for that matter, the extent of the work carried out by him. Secondly is the question of Watch and Ward. The Contractor would have to ensure the safety of the construction and material, if any lying at the Site, until such time as this responsibility is assumed by the Principal, in this case the DDA. Thirdly, an account and inventory will have to be made of plant

and machinery as well as material lying at the site. In the case in hand, therefore, the Respondent had no alternative or option but to continue at the site. The case of the DDA/Appellant primarily is that by virtue of Clauses mentioned above, they were insulated from a claim of damages. This contention has already been turned down. The more important aspect that arises is why there was a total inaction on the part of the DDA between the years 1984 and 1987. If the Contractor had abandoned the work, there was no need to issue the Termination Order after several years in 1987. If the work was not to be continued, then a timely decision ought to have been taken certainly before the expiry of year 1984. Dereliction of duty, or sheer negligence on the part of the DDA, has resulted in loss of monies over ₹ 33,00,000/- as far back as in September, 1993 expended towards construction upto 1984. Interest on this amount has been awarded at the rate of twelve per cent per annum which has been reduced to nine per cent by the learned Single Judge. Considering that two decades have elapsed from the date of the Award, this liability will now have mounted to around ₹ 1,00,00,000/- (Rupees one crore).

12. The Appellant has failed to show any plausible ground that call for any interference with the concurrent findings of the Arbitral Tribunal and the learned Single Judge. While dismissing

the Appeal, we direct the DDA to initiate departmental inquiries/proceedings to fasten responsibility and liability for this loss. For this reason, a copy of this Judgment be brought to the notice of the Hon'ble Lieutenant Governor, Delhi. Appeal is, therefore, dismissed. Pending applications also stand dismissed.

13. Parties to bear their respective costs.

(VIKRAMAJIT SEN)
JUDGE

(SIDDHARTH MRIDUL)
JUDGE

March 30, 2011