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THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment reserved on: 17.02.2012

Judgment delivered on: 02.03.2012

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FAO(OS) No. 137/2005

M/s KRISHNA CONSTRUCTION CO.

..... Appellant

Vs

DDA & ANR.

..... Respondents

Advocates who appeared in this case:

For the Appellant: Mr Harish Malhotra, Sr. Advocate with Mr Rajinder Aggarwal and
Mr.R.K. Modi, Advocates.

For the Respondent: Mr Saurabh Khanna, Advocate for Mr.Gaurang Kanth, counsel for DDA.

CORAM :-

HON'BLE MR JUSTICE SANJAY KISHAN KAUL

HON'BLE MR JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J

1. By way of the present appeal, in effect, the appellant is seeking a reference of disputes to arbitration after nearly two and a half decades of the disputes having arisen. The appellant being aggrieved by the judgment of the Single Judge dated 14.3.2005, passed in Suit No.2010-A/1987, has preferred the present appeal. By virtue of the impugned judgment, the learned Single Judge has dismissed the appellant's petition under Section 20 of the Arbitration Act, 1940 (in short 'the Act').

2. In order to appreciate the rival contentions raised before us, it would be necessary to notice, the essential facts and circumstances, which led to the

institution of the petition under Section 20 of the Act, and then, the present appeal.

2.1 On 27.10.1980, the appellant was awarded the contract to construct 200 dwelling units, in phase-II, at the Village complex at Siri fort near Hauz Khas (in short the said works), in connection with the Asian Games, which were to be held in the city.

2.2 It appears that disputes arose between the parties with respect to rates to be awarded qua certain “substituted items” of work and the amounts to be paid vis-à-vis work carried out beyond the ‘deviation limits’. Consequently, the appellant on 21.4.1982, while the work was still in progress, invoked the arbitration mechanism, provided in clause 25 of its contract with the respondent, for adjudication of disputes inter se the parties.

2.3 The dispute in the first instance was referred to one Shri H. D. Kochar. Since, Shri H.D. Kochar vacated his office; Shri G. Subramanayam was appointed as the Arbitrator. The appellants, apparently challenged the appointment of Shri G. Subramanayam which, ended with, this court appointing Shri D.P. Goyal as the arbitrator, in place of Shri G. Subramanayam.

2.4 In the interregnum, the work assigned to the appellant was completed. There appears to be a dispute with regard to the date of completion of the work. The appellant claims that work got completed on 15.12.1982, while the respondent has asserted that the work was completed in May, 1982.

2.5 In the arbitration, when initially commenced before Shri H. D. Kochar five (5) claims were lodged by the appellant, which were followed by an application dated 5.11.1982, whereby the appellant sought to include two (2) additional claims. These were claims pertaining to, pendente lite and future,

interest and, a claim for cost. Thus, in all, the appellant lodged seven (7) claims.

2.6 While, the arbitration before Shri D.P. Goyal was in progress, the appellant notified the respondent qua certain other claims and sought their adjudication, by way of arbitration. This request was made on 7.12.1983. It is not in dispute that the said request was followed by the three letters and a legal notice. None of these communications elicited any response on the part of the respondent. The letters and the legal notice which were evidently sent by the appellant were dated: 1.5.1985; 14.1.1986; 24.4.1986 and 24.7.1987 respectively.

2.7 The respondent, however, based on the office memorandum dated 19.12.1985, followed by a communication dated 18.2.1986, issued by the Executive Engineer of the Department, referred its own counter claims to the Arbitrator, Shri D. P. Goyal, for adjudication along with the claims of the appellant, which were already receiving his consideration.

2.8 Shri D. P. Goyal, the learned Arbitrator, after duly adjudicating upon the claims and counter claims raised before him, made and published his award on 25.1.1987. A formal communication in respect of the same along with copies of the award was dispatched to the parties with copies to the Registrar of this Court and the Engineer-Member of the respondent.

2.9 The appellant, nearly eight months later in September, 1987 approached this court by way of a petition under Section 20 of the Act, with a prayer seeking a direction to the respondent to refer the disputes, raised for the first time, in its communication dated 7.12.1983, to arbitration. It must be pointed out that in the said petition the appellant made an averment that out of the fifteen (15) claims, it had sought adjudication of, vide its communication dated 7.12.1983, two (2) claims had already been adjudicated

upon by Shri D. P. Goyal, the learned Arbitrator while disposing of the counter claims of the respondents. Accordingly, the said claims need not be referred to arbitration. An averment was also made, with respect to, one additional claim which the appellant asserted arose on account of wrongful deduction. Averments in this regard find mention in para 10 of the petition, filed under Section 20 of the Act by the appellant.

2.10 It is not in dispute, even according to the appellant, that its “final bill” was finalized on 22.4.1988, post the institution of the petition under Section 20 of the Act.

2.11 The appellant, thus, took a cue, and sought to amend its petition under Section 20 of the Act. An amended petition was permitted to be filed, subject to the defences available to the respondent vide order dated 12.03.1991. The amended petition came to be filed on 30.8.1990.

2.12 The respondent opposed the petition essentially on two grounds. First, the petition was barred by limitation, in view of the fact, that even according to the appellant the cause of action for filing the petition under Section 20 arose on 7.12.1983 for the first time. There being no case for averring continuous cause of action. It was submitted, therefore, the original petition which was filed in September, 1987 and also the amended petition, were barred by limitation. The second ground of opposition was, that the petition was barred on the ground of constructive res judicata being based on the same cause of action which gave rise to disputes between the parties in the first instance and had culminated into an award dated 25.1.1987. The principles governing Section 11 and Order 2 Rule 2 of the Code of Civil Procedure, 1908 (in short ‘the Code) were sought to be invoked.

2.13 The learned Single Judge by the impugned judgment came to the conclusion: “though strictly speaking the bar of limitation may not hit the petitioner. The action was barred by constructive res judicata.”

2.14 It is the aforesaid finding of the learned Single Judge which has given rise the present appeal.

3. Mr. Malhotra, learned senior Advocate instructed by Mr Rajinder Aggarwal submitted that the learned Single Judge had erred in coming to the conclusion, which he did, in view of the fact that he lost sight of the fact that the fresh claims were based on the crystallization of claims as reflected in the final bill, which was, admittedly made on 22.4.1988. Therefore, the claims could not have been possibly raised while the arbitration was in progress before Shri D. P. Goyal nor could they have been adjudicated upon by the said arbitrator. Mr. Malhotra contended, all that the appellant was seeking by way of relief was a reference of his claims to an arbitrator for due adjudication.

4. Mr. Saurabh Khanna who appeared for the respondent contended to the contrary. He largely relied upon the judgment of the learned Single Judge to drive home his submission that the dispute now sought to be raised ought to have been raised in the first round before the arbitrator. Mr. Khanna further submitted that the learned arbitrator while, adjudicating upon the counter claim of the respondent had necessarily examined the disputes between parties, bearing in mind the fact, that the work had already stood completed. Therefore, the contention of the appellant that it could not have raised the claims, which are subject matter of its petition under Section 20 of the Act, is palpably erroneous. Mr. Khanna submitted that the claims of which reference is sought to arbitration is based on the same cause of action and the same evidence which has already received the attention of the learned

arbitrator vide award dated 25.1.1987. Mr. Khanna, thus, argued that the petition of the appellant under Section 20 of the Act was barred both under the provision of Section 11 and Order 2 Rule 2 of the Code. In support of his submission, reliance was placed by Mr. Khanna in *Kunjan Nair Sivaraman Nair Vs. Narayanan Nair and Others (2004) 3 SCC 277*.

5. Having heard the learned counsel for appellant and the respondent, in our view, the following undeniable facts have emerged:

5.1 The appellant took recourse to arbitration for the first time, on 21.4.1982, when the work assigned to him at the Games Village was in the process of being completed. As noticed by us above, there is a dispute as to the date when the work got completed. The respondent claims that the work got completed in May, 1982, while the appellant has claimed that the work was completed on 15.12.1982.

5.2 The respondent based on the above, has vehemently contended that the work assigned to appellant got completed even before the first arbitrator was appointed. The record shows that appellant has filed certain additional documents on 21.2.2009, to dispute this fact. These documents are photocopies and hence, we are unable to come to the conclusion based on those additional documents as to when Shri H. D. Kochar entered upon reference.

5.3 The clue to this fact is, however, quite clearly available in the recitals of the award dated 25.1.1987 passed by Shri D. P. Goyal. The recitals in the award of 25.1.1987 quite clearly detail out that Shri H. D. Kochar was appointed as the arbitrator vide office memorandum dated 20.7.1982 and that he entered upon reference on 03.1.1983. Shri H. D. Kochar dealt with the case till 20.5.1983, when evidence was recorded and documents were filed. Since, Shri H. D. Kochar vacated office, the respondent appointed Shri G.

Subramanayam, as the sole arbitrator vide office memorandum dated 21.6.1983. His appointment was objected to, by the appellant. Resultantly, this court vide order dated 13.11.1984, passed in OMP 94/1983, appointed Shri D. P. Goyal as the arbitrator. This fact was communicated to the arbitrator vide letter of the Registrar of this Court dated 29.1.1985.

5.4 The aforesaid would show that the stand of the respondent taken in the reply that the work assigned to the appellant was completed in May, 1982 is not refuted by the appellant by way of any rejoinder. Furthermore, as is obvious, the work was completed even before an arbitrator was appointed in the first instance, which was 20.7.1982.

5.5 The fact that the claims which are subject matter of the petition under Section 20 of the Act, were relatable to the completion of the work and, not the finalization of the final bill, is deducible from the fact that, even according to the appellant, arbitration was sought to be invoked for the second time, on 7.12.1983. It is pertinent to note that the final bill on the appellant's own showing, was finalized on 22.4.1988. Therefore, Mr. Malholtra's contention that claims, which were subject matter of the petition under Section 20 were, in a sense, pivoted on the factum of finalization of the bill is clearly erroneous.

6. Therefore, it was not as if the appellant was disabled from raising claims in the first round of arbitration, which are sought to be raised by way of a petition under Section 20 of the Act. If the respondents are right then, work got completed in May, 1982 and thus the appellant had an opportunity to lodge its claims straight away, as Shri H. D. Kochar entered upon reference only on 3.1.1983, pursuant to his appointment on 20.7.1982. Even if we were to assume for the sake of argument, even though our attention was not drawn to any material which would substantiate the claims that the work

was completed on 15.12.1982, it was quite possible for the appellant to seek reference of its claims which are subject matter of Section 20 petition.

6.1 This lapse on the part of the appellant is even more glaring when examined in the light of the fact that two additional claims were lodged on 5.11.1982 and the counter claim of the respondent was referred for adjudication as late as 6.3.1986. The fact that the respondent did not, according to the appellant, accede to its request made on 7.12.1983 should have propelled the appellant to approach the court at least after 6.3.1986 when the counter claims of the respondent were referred for adjudication to Shri D. P. Goyal, the learned Arbitrator.

6.2 In these circumstances, one can only come to the conclusion that the respondents are right in their contention that the appellant did not press the claims which were subject matter of its request dated 7.12.1983 as they were dependent on the result of the counter claim preferred by the respondent.

6.3 A perusal of the counter claim would show that respondent had claimed a sum of Rs. 4,40,000/- which was divided into ten (10) sub-heads. Except for the first sub-head, all others were in the nature of recoveries. The first sub-head pertain to reduction in the final bill on account of appellant having used material different from one he was required to use under the contract. The appellant had evidently used marble stone of Rajnagar medium quality instead of Makrana stone of first quality in derogation of clause 8.15(a) of the Schedule of quantity attached to the contract. A perusal of the other sub-heads would show that there were essentially recoveries made on account of consumables used in the execution of the work. The learned Arbitrator Shri D. P. Goyal while, adjudicating upon the said sub-heads of the counter claims rejected all claims except five (5), under sub-heads (e), (f), (g), (h) & (k). In addition, the Arbitrator also accorded pendente lite interest

@ 15% per annum from 3.1.1983 till the date of decree or date of payment, whichever was earlier. Similar relief qua interest was also accorded in favour of appellant.

7. Therefore, as rightly appreciated by the learned Single Judge the adjudication between the parties pertained to issues arising out of completed works and therefore, it was not as if the appellant was disabled from raising claims (which in fact it did vide request dated 7.12.1983) before Shri D. P. Goyal, learned Arbitrator. Having come to this conclusion, we have no difficulty in sustaining the impugned judgment.

8. The appeal is accordingly dismissed. The parties shall, however, bear their own costs.

RAJIV SHAKDHER, J

SANJAY KISHAN KAUL, J

MARCH 02, 2012

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