

IN THE HIGH COURT OF DELHI AT NEW DELHI

(Reportable)

Reserved on: September 5, 2012

Decision on: October 4, 2012

O.M.P. 254 of 2006

MUNICIPAL CORPORATION OF DELHI

..... Petitioner

Through: Mr. H.S. Phoolka, Senior Advocate
with Ms. Mini Pushkarna, Advocate.

Versus

M/S HARCHARAN DASS GUPTA

..... Respondent

Through: Mr. Harish Malhotra, Senior Advocate
with Mr. V.K. Sharma and
Ms. Mansi Gupta, Advocates.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

04.10.2012

1. The Petitioner, Municipal Corporation of Delhi ('MCD'), has in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') challenged an Award dated 12th April 2006 passed by the learned sole Arbitrator in the disputes between the MCD and the Respondent M/s. Harcharan Dass Gupta, arising out of a contract entered into between the parties whereby the work of construction of staff quarters at Model Town, Sub-Head: Construction of four blocks of Type-A, Group C, was entrusted to the Respondent by the MCD.

2. The date of the start of the work was 13th April 1992 and the stipulated period of completion was 15 months. However, work did not actually begin

till 25th November 1992. As against the stipulated date of completion of 12th October 1993, the work was actually completed on 15th May 1995. Extension of time ('EOT') was granted by the MCD to the Contractor without levy of any compensation. The Contractor gave an undertaking to the effect that he would claim neither escalation nor compensation for delay in the completion of the work. 75% of the security was released on 13th February 1998 and the last payment was made on 31st March 1998.

3. According to the MCD, the Respondent invoked the arbitration clause only on 13th December 2002. Ten claims of the Contractor were referred to arbitration and by the impugned Award dated 12th April 2006 the learned Arbitrator awarded a total sum of Rs. 2,45,67,868.

4. A perusal of the impugned Award shows that there were five preliminary objections taken by the MCD. The first was that the Contractor had sought reference of disputes to arbitration beyond the time prescribed under Clause 25 of the agreement and further that the learned Arbitrator had no jurisdiction to entertain the claims under Section 28 (3) of the Act. While rejecting this objection, the learned Arbitrator noted that apart from merely reproducing Section 28 (3) of the Act, the MCD had not actually shown how the claims were outside the ambit of Clause 25 or how Section 28 (3) was attracted.

5. The second preliminary objection was that various bills including the final bill prepared by the MCD were accepted by the Contractor without any protest and therefore, nothing remained to be arbitrated upon as the payments were received towards full and final settlement. While rejecting

this preliminary objection the learned Arbitrator noted “admittedly, the final bill has not been prepared till date. Respondent sought opportunity to file a final statement of account during proceedings but despite last opportunity granted on 28th February 2006, failed to file it.” The third preliminary objection was that since the Contractor had failed to indicate any specific violation on the part of the MCD, or the amount incurred by the Contractor as a result of such violation, the Contractor was not entitled to claim anything under the Indian Contract Act, 1872. The learned Arbitrator rejected this objection by observing that this actually related to the merits of the claim.

6. The fourth preliminary objection was that claims which were based on delay in supply of steel and cement were not arbitrable as Form No. 37 and Condition No. 24 thereof formed part and parcel of the terms and conditions of the agreement. The Contractor could only have claimed EOT without levy of compensation and could not have claimed compensation for the delay in supply of steel and cement. The said objection was rejected by holding that there was nothing on record to show that Form No. 37 including Condition No. 24 thereof formed part and parcel of the contract between the parties. The fifth preliminary objection was that delay was on the part of the Contractor in not lifting the requisite material of cement and steel within time and therefore, the claim on that behalf was not tenable. This objection was rejected by the learned Arbitrator by pointing out that EOT was granted by the MCD to the Respondent up to the actual date of completion of the work, i.e., 15th May 1995 without levy of compensation. No EOT without compensation could have been granted by MCD if indeed any delay was attributable to the Contractor.

7. In the present petition under Section 34 of the Act no ground has been urged by the MCD to the effect that the rejection of its preliminary objections by the learned Arbitrator in the impugned Award was erroneous. On the other hand in para 3 (X) of the petition, it is urged that claims as referred to the learned Arbitrator were time barred, being much beyond the stipulated period of three years for initiating recoveries of the money due under the law of limitation. In ground 'A' it is sought to be urged that the claim of the Contractor was "miserably time barred and could not have been entertained beyond the stipulated period of limitation." All the grounds urged relate to the ten claims. In other words there is no challenge to the rejection by the learned Arbitrator of the five preliminary objections raised by the MCD.

8. It is seen that neither in the statement of defence filed before the learned Arbitrator nor at any time during the arbitral proceedings including the stage of final arguments was any plea raised by the MCD that the claims of the Contractor were time barred. Mr. Harish Malhotra, learned Senior counsel appearing for the Respondent, objected to the MCD raising the plea of limitation for the first time in the present petition under Section 34 of the Act. Mr. Malhotra relied upon the decisions in ***Naraindas R. Israni v. Union of India* 1993 (1) Arb.LR 233**, ***Narayan Prasad Lohia v. Nikunj Kumar Lohia* 2002 (1) Arb.LR 493 (SC)** and ***Uttam Singh Duggal & Sons v. Union of India* 2002 (2) Arb.LR 259 (Del) (DB)**.

9. In reply Mr. H.S. Phoolka, learned Senior counsel appearing for the MCD, did not dispute that the plea as to the claims being barred by limitation was not raised by the MCD before the learned Arbitrator.

However, Mr. Phoolka relied upon the decision of the Supreme Court in ***Kamlesh Babu v. Lajpat Rai Sharma (2008) 12 SCC 577*** and the decision of the Bombay High Court in ***Sealand Shipping & Export Pvt. Ltd. v. Kinship Services (India) Pvt. Ltd. 2012 (1) R.A.J. 589 (Bom)*** to urge that since such a plea went to the root of the matter, it could be raised even at this stage.

10. The above submissions on the issue of the Respondent's claims being barred by limitation have been considered by the Court. It appears that the consistent view of the Court has been that the plea of limitation is a mixed question of law and fact and has to be raised at the first available opportunity by the party resisting a claim. In ***Narayan Prasaid lohia v. Nikunj Kumar Lohia*** it was held that if there is no objection to the composition of the arbitral Tribunal in the first instance by a party under Section 16 of the Act then, it will result in a deemed waiver by such party of that objection under Section 4 of the Act. In ***Uttam Singh Duggal & Sons v. Union of India*** again, a Division Bench of this Court declined to set aside the Award on the basis of an objection which was not raised before the learned Arbitrator. It was held that the objection raised in that case appeared "not to have been raised before the Arbitrator and therefore, ought not to have been entertained by way of objection to the Award." In ***Naraindas R. Israni v. Union of India*** it was held that where the objection as to the limitation was not raised before the learned Arbitrator, it should not be permitted to be raised for the first time while challenging the Award.

11. In a recent judgment of this Court in ***M/s. Raj Kishan & Company v. National Thermal Power Corporation Ltd.*** [Decision dated 13th March

2012 in OMP No. 333 of 2004] it was held in para 5 as under:

“5. The plea of the Petitioner that NTPC’s claims were barred by limitation was not raised before the learned Arbitrator. A perusal of the present petition under Section 34 of the Act also reveals that no such ground has been raised by the Petitioner even in the petition. This ground has been raised only at the time of the arguments. It is a settled position of law that plea of limitation cannot be decided as an abstract plea of law divorced from the facts. As explained in **Ramesh B. Desai v. Vipin Vadilal Mehta 2006 (5) SCC 638** “a plea of limitation is a mixed question of law and fact.” Consequently, unless the plea of limitation is raised at the earliest point in time before the learned Arbitrator, it cannot be adjudicated upon as a mixed question of law and fact. In **Oil and Natural Gas Corporation Limited vs. Mc Chemical Engineers, 1999 (2) RAJ 149 (SC)** the Supreme Court negatived the plea of limitation raised for the first time in the course of challenge to the award before the Court. In **Tamil Nadu Water Supply v. M. Abdul Karim, 2010 (4) ALR 581 (Madras)** it was again held that without a proper foundation of facts laid before the learned Arbitrator to demonstrate that the claims were barred by limitation, a plea to that effect cannot be raised for the first time in Court. A Division Bench of Bombay High Court in **Vimal G. Jain v. Vertex Financial Services Pvt. Ltd., 2007 (4) Arb LR 18 (Bombay)** held that if the point regarding the bar of limitation is not raised before the Arbitrator, it should be deemed to have been waived. Consequently, “the question of entertaining such point in proceedings under Section 34 of the Act or in an appeal arising from the order passed therein cannot arise.” This Court has held to the same effect in **M/s. Uppal Engineering Corporation v. C.W.C., 2009 (3) Raj. 666 (Del.)** and **M. Sons Enterprises Pvt. Limited v. Shri Suresh Jagasia and Anr. 2011(123) DRJ 266.**”

12. Turning to the decisions relied upon by Mr. Phoolka, it is seen that **Kamlesh Babu v. Lajpat Rai Sharma** was not a case arising under the Act. Moreover, para 18 of the decision reveals that in the said case the defence as to limitation had been set up in the written statement though no issue was

framed in that regard. The Trial Court had in terms of mandate of Section 3 (1) of the Limitation Act, 1963 “come to a finding that the suit was barred by limitation.” It was in the said context that it was observed that “it was the duty of the first appellate court and also of the High Court to go into the said question and to decide the same before reversing the judgment of the trial court on the various issues framed in the suit.” In ***Sealand Shipping & Export Pvt. Ltd. v. Kinship Services (India) Pvt. Ltd.*** the Bombay High Court has in para 29 observed that though plea was raised “events reflect the claim as well as counter-claim so raised were not considered from the point of limitation.” Again it was emphasized that “even the issue was not framed though plea was raised.” Consequently, both the aforementioned decisions relied upon by Mr. Phoolka do not help the case of the MCD.

13. So far as the present case is concerned, MCD not having raised the plea of the Respondent’s claims being barred by limitation before the learned Arbitrator cannot be permitted to raise such plea for the first time in these proceedings. MCD’s objection to the impugned Award in respect of Claim Nos. 1, 2, 3, 5 to 10 on the ground of limitation is accordingly rejected.

14. Claim No. 2 was for a sum of Rs. 19,44,000 towards reimbursement of loss sustained due to delay in taking over the possession of the completed flats. The learned Arbitrator while discussing the said claim observed that even till November 2002 the possession of the flats was not taken over compelling the Contractor to deploy watch and ward. This is a pure factual finding and this Court is unable to find any error in such determination by the learned Arbitrator.

15. The objections to the impugned Award in relation to the other claims have been considered. The Court is not persuaded to hold that the impugned Award suffers from any patent illegality warranting interference.

16. The objections to the impugned Award dated 12th April 2006 are rejected and the petition is dismissed, but in the circumstances, with no order as to costs.

S. MURALIDHAR, J.

OCTOBER 4, 2012

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