

R.B.Misra Vs. Dda

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Court : Delhi

Decided On : Jul-26-2013

Judge : G. S. Sistani

Appellant : R.B.Misra

Respondent : Dda

Judgement :

\$~08. * IN THE HIGH COURT OF DELHI AT NEW DELHI + CS(OS) 499A/2005 %
Judgment Delivered on:

26. 07.2013 R.B.MISRA Through: Petitioner Mr.R.Rajappan, Advocate versus
DDA Through: Respondent Mr.Ashwani Kumar, Advocate CORAM: HON'BLE
MR. JUSTICE G.S.SISTANI G.S.SISTANI, J.

(ORAL) IA NO.6718/2005 1. The present objection has been filed by DDA under
Sections 30 and 33 of the Indian Arbitration Act, 1940 assailing the award dated
03.07.1989.

2. The necessary facts to be noticed are that the claimant, Sh.R.B. Misra, was
awarded the work of construction of 528 Janta Houses in Block A, Group C,
Paschimpuri, New Delhi. Rs.46,42,004/-. The estimated cost was Besides the
estimated cost, the tender cost was Rs.53,38,304/-. Tender cost was 15% above
the estimated cost. The date of commencement of work was 14.12.1976 and the
stipulated date of completion of work was 13.10.1977. Admittedly, the work was

rescinded by the DDA on 08.06.1979. In all 10 bills were paid and the last bill was paid on 10.08.1978 when work was executed for Rs.11, 74,567/-.

3. Mr.Ashwani Kumar, learned counsel for the DDA submits that the Arbitrator has wrongly come to the conclusion that there was default on the part of the DDA in non-supply of bricks. Counsel further submits that the bricks were not to be supplied by the DDA and the learned Arbitrator has failed to consider the letter dated 17.1.1977 from the DDA and the letters dated 9.11.1976 and 27.11.1996 from the contractor to the DDA. Counsel contends that these letters would form part and parcel of the contract and as per which the liability for supply of goods were not that of the DDA. Counsel also contends that supply of bricks from the kilns of DDA was only a facility to be extended to the contractor and that too subject to availability of bricks and further subject to the condition that there was no other contracts to leave the bricks of the kiln of DDA at a higher rate. Similar argument has been raised by counsel for the DDA with respect to supply of cement. Counsel for the DDA submits that the learned Arbitrator has wrongly reached a conclusion that the supply of cement was inadequate. Counsel contends that the number of days when cement was not supplied was only 36 days, a fact which has not been considered by the Arbitrator and on the contrary the Arbitrator has held that during the period of May to August, 1988, there was extreme shortage of cement. Counsel also contends that while dealing with the question of non-supply of steel on time the Arbitrator has recorded a finding that there was shortage of steel, especially, of small dia but no detail finding has been given as to what was the particular dia of steel, which was in short supply.

4. Mr.Kumar also contended that while dealing with non-supply of GI/CI pipes the observation of the learned Arbitrator is that only minor quantity of relevant pipes could be issued due to shortage, but no detail has been discussed. Counsel further contends that the Arbitrator has wrongly reached a conclusion with regard to delay in making payments of bills, the Arbitrator has wrongly allowed recoveries in favour of the contractor and on the contrary the counter claim has been incorrectly disallowed.

5. Before the learned Arbitrator, in all, 8 claims and 2 counter claims were raised. The case of the claimant before the learned Arbitrator was primarily that the DDA had defaulted in supply of bricks, stipulated materials and timely monthly payments. On the other hand, the grievance of the DDA was that the claimant did not employ sufficient labour, due to which progress at site was slow, which resulted in the contract being rescinded by the Ex Engineer on 08.06.1979 with an intimation to the claimant/contractor that the balance work would be executed at his risk and costs.

6. Learned counsel for the applicant, DDA, submits that the learned Arbitrator has dealt with claim nos.1 and 2 jointly. It may be noticed that claim no.1, pertaining to the running bill, was in the sum of Rs.4,22,072/but the Arbitrator has only awarded Rs.1,21,383/- in favour of the claimant/contractor. As far as claim no.2 of the contractor is concerned, the same has been disallowed. Counsel further submits that claim no.1 has been wrongly decided by the Arbitrator by holding that various items were supplied by the DDA and due to default of the DDA the contractor could not execute and complete the work in time and also the delay in payment of 7th to 11th bills hampered the work of the contractor. Counsel also submits that this is factually an incorrect finding and the Arbitrator has come to a wrong conclusion that the bricks were to be supplied by the DDA. It is also contended that the learned Arbitrator has not appreciated the terms of the agreement and the documents placed on record.

7. As per the claimant the total requirement of bricks was about 40 lacs against which only 7 lacs bricks were supplied by the DDA. The bricks were to be supplied from Pira Garhi Bhatta of M/s.Gupta Construction Company, however, the contractor was forced to procure bricks from other brick kiln for which additional costs were incurred on transportation. Complaint was also made by the contractor with regard to non supply of stipulated materials including cement, steel, G.I. and C.I. pipes and delay in payments.

8. The stand of the DDA before the learned arbitrator was that there was acute shortage of cement and the quota system was introduced under which reduced supplies were made, in order to prevent any hindrance in the ongoing work. The

Ex Engineer and Superintending Engineer had stated as observed at page 3 of the award that supplies were less than 100 bags with the contractor for the following periods:

09. 02.77 to 11.02.77 06.05.77 to 20.05.77 06.06.77 to 08.06.77 and 20.6.77 to 21.6.77 29.06.77 to 01.07.77 01.08.77 to 10.08.77 which led to the finding that there was extreme shortage of cement during February, May, June, July and August, 1988 which delayed the progress of the work. With regard to the non-supply of steel on time, Executive Engineer and Superintending Engineer had accepted that there was shortage of steel, especially of small dia steel and the DDA was even forced to purchase some quantity of the steel from the open market. Similar was the stand taken by the Executive Engineer and the Superintending Engineer with regard to non supply of G.I. and C.I. pipes and it was stated that only minor quantity of S.C.I. pipes of 100 mm and 50 mm could be issued due to shortage and also other items of sanitary and water supply stores were also in short supply which further hampered the progress of the work. With regard to delay in payments the learned arbitrator has also observed at page 4 of the award that the Executive Engineer and Superintending Engineer had reported that there was general shortage of funds with the DDA and the contractor was not paid his dues regularly every month. The 7th bill was passed on 06.07.1977 for Rs.1,19,829/- and was paid in the following manner: Rs.40,000/- on 05.07.77 Rs.10,000/- on 10.08.77 Rs.30,000/- on 31.08.77 Rs.39,829/- on 25.09.77 On 09.11.1977 8th bill was passed and was paid in the following manner: Rs 5,000/- on 09.11.77 Rs 28,000/- on 17.11.77 Rs 25,000/- on 24.12.77 Rs 17,796/- on 17.01.78 Similarly the 9th and 10th bills were also paid in instalments. For the above findings the learned arbitrator has placed reliance upon R-20 dated 01.02.1980, R-21 dated 11.02.1980 and R-19 dated 08.01.1980.

9. The learned arbitrator has recorded a finding that it is on account of defaults on the part of the department that the contractor was seriously affected in the execution of the work due to which the same could not be completed on time. The learned arbitrator has also recorded a finding that on account of delay in the supply of cement, steel, C.I. pipes there was complete dislocation of the work and also on account of the abnormal delay in the payments of 7th, 8th, 9th and 10th

bills which was fundamental breach on the part of the DDA. The learned arbitrator further goes on to observe that the action of the DDA to have the balance work executed at the risk and costs of the claimant, is unjustified.

10. Claim no.1 of Rs.4,22,072/- on account of 11th running bill and Claim no.2 of Rs.15,48,119/- on account of the extra work carried out of the claimant/contractor have been dealt with by the learned Arbitrator jointly. So far as Claim no.2 is concerned, the same has been rightly disallowed by the learned Arbitrator on account of insufficient evidence and this Court finds no ground to interfere with the same. With regard to Claim no. 1 the learned Arbitrator has relied upon the measurement recorded by the DDA, as despite opportunities having been granted, the claimant/ contractor did not point out any mistakes in the measurements. The learned Arbitrator has also given details of recoveries due from the claimant / contractor which amounted to Rs.1,39,338/- and has given various details of the recoveries to be made to the claimant and after adjusting the advance, awarded a sum of Rs.1,21,383/- after giving the adjustments to all the recoveries. The learned arbitrator has also considered the objections raised by the DDA by which they have disallowed payment of certain sanitary items on the objection that these did not bear the ISI mark. Taking into consideration that the specifications did not provide for rejection in case the material was not ISI marked and the same were used without any objection raised by the DDA, the learned Arbitrator further goes on to observe that the use of non ISI marked sanitary items was only objected to by the Junior Engineer. The Engineer In-Charge did not reject these items nor were they replaced after the work was rescinded. Accordingly, the learned Arbitrator has concluded the non payment of sanitary items as unjustified and has thus rightly awarded a sum of Rs.26,096/- to the claimant towards the said claim on the basis of the measurements recorded in the 11th final bill.

11. As regards claim No.3 of Rs 1,60,261/- on account of clause 10 C, on account of increase in labour wages and increase in the prices of materials Claim no.4 pertaining to the unilateral action of the DDA under clause 3 of the agreement being illegal and claim no.5 pertaining to damages raised by the claimant/contractor are concerned, the learned Arbitrator has rejected the same. Claim no.6 pertains to refund of security deposit of Rs.1.0 lac. The learned

Arbitrator after giving adjustments has awarded Rs.72,472/- in favour of the claimant/contractor to be refunded by the DDA. Claim no 7 of Rs 2 lakhs towards materials lying at site and claim no. 8 pertaining to pendente lite interest, raised by the claimant, have been rejected by the learned Arbitrator.

12. The counter-claim no. 1 for a sum of Rs 41,86,916.14/- towards cost of work carried out at risk and cost of the claimant under clause 3 of the agreement raised by the DDA stands rejected primarily on the ground that the arbitrator has recorded a finding that the execution of the work was delayed due to various defaults of the DDA including non supply of stipulated materials like cement, steel and pipes, non issue of permits for bricks for full requirement from the Pira Garhi brick kiln and delay in payments. On account of delay the learned Arbitrator has held that the claimant/contractor was justified in stopping the work and the claim of the DDA with regard to having got work completed at the risks and costs of the claimant, has been rightly rejected.

13. The counter claim no.2 for a sum of Rs.3,09,517.83 towards the amount spent on rectification of left over work by the claimants raised by the DDA has been rejected by the learned Arbitrator, which was raised towards amount spent on rectification of the left over work by the DDA on the ground that no notice was served by the DDA before the rectification work was undertaken, nor expenditure incurred was intimated to the claimant/contractor when the work was being executed.

14. The arbitrator has also held that during progress of work no specific defects in the work were pointed out to the DDA. Although complaints were made about inadequate labour, insufficient shuttering materials and non-employment of graduate engineers. In the absence of any material on record and in the absence of any notice given for rectification before rectification of the work, the learned Arbitrator has rightly rejected the counter-claim no.2 of the DDA.

15. It is settled law that a possible view in the award cannot be set aside by the Court merely because it would have taken a different view. Appreciation of evidence has been held to be the domain of the Arbitrator and it is not open for the Court to reappraise the evidence. It has also been held that where the reasons

have been given by the Arbitrator in making the award, the Court cannot examine the reasonableness of the reasons. An Arbitrator is the sole Judge of the quality and the quantity of evidence and it is not for the Court to take upon itself the task of being a Judge on the evidence before the Arbitrator.

16. In the case of Municipal Corporation of Delhi Vs. M/s.Jagan Nath Ashok Kumar & Anr. AIR 198.SC 231.(1), it has been held by the Apex Court that the court should not sit as a court of appeal. Relevant portion of the judgment reads as under:

4. In this case, there was no violation of any principles of natural justice. It is not a case where the arbitrator has refused cogent and material factors to be taken into consideration. The award cannot be said to be vitiated by non-reception of material or nonconsideration of the relevant aspects of the matter. Appraisement of evidence by the arbitrator is ordinarily never a matter which the Court questions and considers. The parties have selected their own forum and the deciding forum must be conceded the power of appraisement of the evidence. In the instant case, there was no evidence of violation of any principle of natural justice. The Arbitrator in our opinion is the sole judge of the quality as well as quantity of evidence and it will not be for this Court to take upon itself the task of being a judge of the evidence before the arbitrator. It may be possible that on the same evidence the Court might have arrived at a different conclusion than the one arrived at by the arbitrator but that by itself is no ground in our view for setting aside the award of an arbitrator.

17. On careful reading of the award rendered by the Arbitrator, I find no grounds to interfere in the same. There is no illegality in the Award. Accordingly, objections are dismissed. CS(OS) 499A/2005 18. In view of the fact that objections have been dismissed, the award dated 03.07.1989 is made rule of the Court. Let decree sheet be drawn up accordingly. Claimant/contractor will be entitled to interest @6% from the date of award, till payment. G.S.SISTANI, J JULY ssn 26, 2013