

Naveen Construction Co. Vs. Delhi Development Authority and anr.

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Court : Delhi

Decided On : Feb-01-2002

Reported in : 2002VIAD(Delhi)707; 2002(62)DRJ252

Judge : Mukundakam Sharma, J.

Appeal No. : S. No. 2131-A/95 and I.A. No. 1222/97

Appellant : Naveen Construction Co.

Respondent : Delhi Development Authority and anr.

Advocate for Def. : Harjeet, Adv.

Advocate for Pet/Ap. : B.M. Sehgal, Adv

Disposition : Petition partly allowed

Judgement :

Mukundakam Sharma, J.:

1. The parties hereto entered into an agreement for development of an unauthorised colony in Trans-Yamuna area and laying down water line in School Block, Shakar Pur Complex, Delhi. Pursuant to the aforesaid agreement, the petitioner started the work and while executing the aforesaid work, certain disputes arose between the parties, which in terms of the arbitration clause in the agreement were referred for adjudication through the process of arbitration by

appointing an Arbitrator. In terms of the arbitration clause, namely, Clause-25 of the agreement, the Engineer Member, DDA appointed the sole Arbitrator, who entered into the reference and after allowing the parties to adduce evidence and hearing the parties made and published his award on 25.8.1995. Upon filing of the said award in this court, an objection is filed by the respondent/DDA seeking for setting aside the said award on various grounds as enumerated in the said objection. The petitioner, on the other hand, prays for an order for making the award a rule of the court and to pass a decree in terms of the award.

2. I have heard the learned counsel appearing for the respondent/objector as also the counsel appearing for the petitioner on the aforesaid objection filed by the respondent and this judgment and order shall also dispose of the said objection.

3. CLAIM NO. 1 before the Arbitrator pertains to petitioner claiming an amount of Rs. 1,20,000/- towards the amount of final bill. A counter-claim was also filed by the respondent before the Arbitrator, which was registered as Counter-Claim No. 4, in which respondent claimed an amount of Rs. 57,827.92 towards penal recovery for non-return of departmental materials as shown in the final bill. The Arbitrator took up the aforesaid two claims together and passed his award on the said claims holding that the petitioner is entitled for payment of an amount of Rs. 67,722.64. Accordingly, the counter-claim of the respondent stood rejected by the said award. I have considered the findings and the the conclusions recorded by the Arbitrator in respect of the aforesaid two claims, in the light of the documents placed on record. On perusal of the award, I find that although before the Arbitrator the respondent initially claimed Rs. 57,827.92 towards penal recovery for non-return of departmental materials, as shown in the final bill, the said amount of recovery at penal rate was reduced to Rs. 39,707.72, during the course of hearing before the Arbitrator. According to the respondent in terms of the final bill, an amount of Rs. 2,17,458.32 is recoverable from the petitioner, the details of which are given in the award. In the aforesaid calculations, an amount of Rs. 1,60,176/- is shown as claim of the respondent towards compensation for delay in execution of work. Item-A of the said recovery relates to income tax amounting to Rs. 3,087/-, which was accepted by the petitioner subject, however, to issuance of certificate. The aforesaid recovery to be made by the respondent; accordingly

stands accepted by the petitioner and, therefore, the award passed by the Arbitrator in respect thereof, justifying the said recovery is upheld. Item-B thereof pertains to recovery of materials issued by the department to the extent of Rs. 75,389.40. The aforesaid claim for recovery of Rs. 75,389.40 was sought to be raised by the respondent during the course of hearing, to Rs. 93,553.45. The aforesaid amount relates to balance quantity of C.I. Pipes and the same works out to Rs. 93,553.36, which was held by the Arbitrator to be recoverable from the petitioner. There is no objection filed by the petitioner as against the said award and, therefore, the said award is upheld. Item-C thereof pertains to recovery of materials at penal rates, which was claimed at Rs. 57,827.92 and which was reduced to Rs. 39,707/- during course of hearing. In respect of the said claim the Arbitrator held that the wastage of C.I. Pipes was within the permissible limit as per Clause-42 of the agreement and hence no recovery for C.I. Pipes at penal rate would be justified. The aforesaid conclusions have been arrived at by the Arbitrator upon interpretation of Clause-42 of the agreement and, therefore, no interference is called for in respect of the aforesaid conclusions, as this court cannot sit over as the Appellate Court over the interpretation and the conclusions of the Arbitrator in that regard.

4. So far recovery for the cement is concerned, it was held by the Arbitrator that the cost of the chambers amounting to Rs. 37,291/-, which was confirmed by the respondent during the hearing held on 16.7.94 is payable and the recovery for 12.5 M.T. cement at stipulated rate of Rs. 86/- per M.T. amounting to Rs. 10,750/- is admissible. The said conclusions have been arrived at by the Arbitrator upon going through the relevant records. I have considered the said conclusions and I am of considered opinion that this court is not in a position and cannot re-appreciate the said evidence to come to a contrary finding and conclusion.

5. The next claim is towards recovery amounting to Rs. 1,60,176/- on account of levy of compensation for delay in execution of work. The respondent has preferred a Counter Claim No. 2 towards levy of compensation under Clause-2 of the agreement. The Arbitrator took up both the aforesaid two claims together and held that the levy of compensation by the Superintending Engineer is illegal and wrongful. In respect of the aforesaid conclusions objection is filed by the

respondent contending, inter alia, that the questions regarding the amount of compensation livable under Clause-2 has to be decided only by the Superintending Engineer and none else. In support of the aforesaid contention, counsel appearing for the respondent relied upon the ratio of the decision of the Supreme Court in Vishwanath Sood v. Union of India and Anr. reported in : [1989]1SCR288 and a Division Bench decision of this court in DDA v. Sudhir Brothers reported in 1995 (2) 306 as also a Single Bench decision of this court in Sudhir Brothers v. DDA reported in 1995 (2) 437.

Clause-25, which is the arbitration clause between the parties starts with the opening expression 'Except where otherwise provided in the contract.....'. Under Clause-2 of the agreement the Superintending Engineer, DDA has been given the power to levy compensation if there is any delay in completion of the work by the contractor, on fulfillment of the conditions laid down therein. The Aforesaid decision of the Superintending Engineer to levy compensation for the delay, has also been made final in the aforesaid Clause (2). A similar clause as that of Clause-(2) of the agreement, came to be considered by the Supreme Court in the decision of Vishwanth Sood (supra) wherein the Supreme Court held that the opening words of the arbitration clause, namely, 'Except where otherwise provided in the contract', placed the question of awarding compensation outside the purview of the Arbitrator and that the compensation determined by the Engineer-in-Charge or on further reference by the Superintending Engineer was not capable of being called in question before the Arbitrator. To the same effect is the Division Bench decision of this court in DDA vs. Sudhir Brothers (Supra).

6. Reference also may be made to the Division Bench decisions of this court in Bhagat Construction Company v. DDA in Suit No. 289-A/89 disposed of on 27.3.2000 and in Raghunath Gupta & Ors. v. D.D.A. in FAO (OS) NO. 52/2001 disposed of on 14.8.2001. When the ratio of the aforesaid decisions are applied to the facts of the present case, it is clear and apparent that the aforesaid dispute regarding levy of compensation by the Superintending Engineer, on account of delay, in completion of work by the contractor was an excepted matter and, therefore, could not have been referred to the Arbitrator for his decision being on excepted matter and no award could have been passed by the Arbitrator in

respect of the aforesaid claim. In the light of the aforesaid decision of the Supreme Court and the Division Bench decisions of this court, it is crystal clear that the compensation determined by the Superintending Engineer for the delay in completion of the work by the contractor was not capable of being called in question before the Arbitrator.

However, in spite of the aforesaid embargo and prohibition reference was made to the Arbitrator in respect of the aforesaid claim and the counter claim No. 2, which relates to levy of compensation for the delay caused on account of delay in execution of work by the contractor and the said dispute came to be determined by the Arbitrator in his award by rejecting the said counter claim and upholding the claim of the petitioner. The said determination was against the provisions of law as settled by the Supreme Court and by this Court. In the light of the aforesaid settled position of law, reference to the Arbitrator as also the decision of the Arbitrator on the aforesaid claim for recovery of an amount of Rs. 1,60,176/- was a nullity, non est and without jurisdiction. The aforesaid award in respect of claim for recovery of an amount on account of levy of compensation for delay in execution of the work and the counter-claim, are sought to be given effect to and made a rule of the court in the present proceedings. A decree is sought for in respect of the said award and, therefore, the validity or invalidity of the same could be set up and examined by this court whenever it is sought to be acted upon as a foundation for a right. Objection raised by the counsel appearing for the respondent is, therefore, found to have force and in my considered opinion the ratio of the decision of the Division Bench in the case of Bhagat Construction (Supra) is squarely applicable to the facts of the present case. The aforesaid award is also severable from rest of the award and accordingly the said award is segregated and the said award is set aside holding the same to be a nullity and without jurisdiction.

7. The next claim was in respect of recovery amounting to Rs. 2800/- on account of penalty for non-submission of labour reports in terms of Clause-19-D of the agreement. While allowing the said claim and holding that the said recovery is not justified, it was held by the Arbitrator that there was neither any notice nor any order of the competent authority levying any penalty under said Clause-19 D of the

agreement for non-submission of labour reports. Since the said conclusions is based on appreciation of the evidence on record, no interference is called for as against the said award. Similarly, the recovery of an amount of Rs. 56,000/-, for non-engagement of qualified Engineer was found to be not valid as there was no notice from the respondent to the petitioner regarding non-employment of Engineer. It was also held that no penalty was levied by the competent authority and no action for recovery was taken during the progress of work. The aforesaid conclusions are based on appreciation of the evidence on record and, therefore, I am not inclined to interfere with the aforesaid award passed by the Arbitrator.

8. In CLAIM NO. 2 the petitioner claims payment of an amount of Rs. 88,000/- towards release of security deposit. The said security deposit was forfeited by the respondent upon rescission of the contract. The Arbitrator held that the aforesaid rescission was illegal and wrongful as the time was never enlarged and made as the essence of the contract. While coming to the aforesaid conclusions, the Arbitrator has considered the evidence on record as also the decision of the Supreme Court. On appreciation of the evidence it was held by him that rescission of contract was illegal and wrongful and the petitioner was not liable for any penal action under Clause -3 of the contract and that the forfeiture of security deposit was wrongful. In view of the fact that the said conclusions are also based on appreciation of the records and interpretation of Clause-3 of the contract, I see no reason to interfere with the aforesaid award passed by the Arbitrator.

9. CLAIM NO. 3 pertains to a claim of Rs. One lakh under Clause 10-C of the agreement. I was found by the Arbitrator that the rates of wages were enhanced during the progress of work and the petitioner had paid the enhanced wages for execution of the work and, therefore, an amount of Rs. 16.303.83 was ordered to be paid to the petitioner in respect of the aforesaid claim. It was argued that the said claim could not have been adjudicated upon by the Arbitrator as according to the respondent the said claim is not admissible under Clause 10-C in view of the fact that Superintending Engineer, DDA had levied compensation under Clause-2 of the agreement. It was also stated that payment under Clause 10-C can be made if in the opinion of Superintending Engineer, there is no delay in execution of the work, attributable to the petitioner and accordingly it was argued that the said

claim is not admissible. The Arbitrator has awarded an amount of Rs. 16,303.83 in respect of the aforesaid claim on the ground that the rates of wages were enhanced during the progress of work and the petitioner had paid the enhanced charges for execution of the work. As the Arbitrator, on appreciation of the evidence, found that there was, in fact, increase in the rates of the wages during the progress of the work and that the contractor has paid wages at such enhanced rate, the petitioner is entitled to receive such amount as determined by the Arbitrator, in terms of Clause 10-C of the agreement. The Clause-2, which is sought to be invoked, is not applicable to this claim in hand. Objection in that regard, therefore, stands rejected.

10. No objection is filed as against Claim No. 4 as no amount was awarded by the Arbitrator in respect of the aforesaid claim.

11. So far the claim of the petitioner for pendente lite interest is concerned, it was ordered by the Arbitrator that the petitioner should be paid simple interest that the petitioner should be paid simple interest @10% p.a. on the amount awarded against the above claims. I find no reason to interfere with the aforesaid award of the Arbitrator.

12. Counter-Claim No. 1 of the respondent pertains to a claim of Rs. 75,000/- towards extra expenditure to be incurred to get the balance work done at risk and cost of the petitioner. The aforesaid counter-claim was later on withdrawn by the respondent as stated in the counter statement of facts and, therefore, the counter-claim No. 1 requires no consideration by this court.

13. I have already given my decision so far Counter-Claim No. 2 is concerned. Accordingly, what remains to be considered is Counter Claim No. 3, which was held to be not justified. The said counter-claim relates to a claim of the respondent for payment of an amount of Rs. 12,347/- towards amount to be spent to get the defective work rectified. No detail was submitted by the respondent in that regard and, therefore, there is no evidence to substantiate the said counter-claim. There is no reason to interfere with the said award passed by the Arbitrator.

14. thereforee, in terms of the aforesaid conclusions and findings, the petition as also the objection filed by the respondent stand disposed of. The award passed by the Arbitrator in respect of Claim Nos. 1(a) to (c), (e), (f), Claim No. 2, Claim No. 3, Claim Nos. 4 & 5 and Counter-Claim No. 3, is made a rule of the court. The award made in respect to Claim No. 1 (d) and Counter Claim No. 2 is set aside.

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