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Bumbrah Electric Co. Vs. Delhi Development Authority and anr.

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Court : Delhi

Decided On : Feb-07-2002

Reported in : 2002IIAD(Delhi)753; 2003(1)ARBLR421(Delhi); 97(2002)DLT130; 2002(62)DRJ213

Judge : J.D. Kapoor, J.

Acts : Arbitration Act

Appeal No. : Suit No. 787A/95 and is 12003/95

Appellant : Bumbrah Electric Co.

Respondent : Delhi Development Authority and anr.

Advocate for Def. : Amita Singh, Adv.

Advocate for Pet/Ap. : Vivekanand, Adv

Disposition : Suit decreed

Judgement :

J.D. Kapoor, J.

1. There is no gainsaying the fact that theArbitrator is an instrument of the agreement and is notover it. If the Arbitrator traverses beyond the terms ofthe agreement such an award is liable to be set aside. Hehas to remain within the four

corners of the agreement.However, at the same time, it is cardinal principle thatthe sanctity of the award should always be preservedbecause the parties choose their own forum reposing theirfull faith not only in his competence but also in hisintegrity and impartiality. The parties, are, thereforeerestrained from picking holes with the findings of theArbitrator unless bias or perversity is manifest andpronounced.

2. At the same time, the court should also refrainfrom re-appreciating or re-assessing the evidence ormaterial on which the Arbitrator has based his findings.If this is allowed, it would amount to functioning ofcourt as appellate court which it is not. This is neitherthe object of Arbitrator Act nor the permissible area.The above principles have been culled out mainly in viewof the objections of the respondent to the award that theArbitrator has gone beyond his brief and has transgressedthe arena that did not belong to him.

3. As many as 12 claims were preferred by thepetitioner. Out of these only three found favor with theArbitrator and that too partially. Respondent-DDA haschallenged even those claims which on the face appear tobe based upon evidence and material produced by theparties.

4. The claimant was awarded electrical work of 408MIG dwelling units at 'A' Dakshini Pitampura. Somedisputes arose which were referred to the arbitrator ofSuperintending Engineer (Arbitrator)-II. The Arbitratorentered into reference and made the award on 20th March,1995 which through this petition is being sought to bemade rule of the court.

5. The respondent has filed objections to the awardthrough is 12003/95. The main thrust of the objection isthat under the arbitrator clause, obligation was castupon the Arbitrator to give cogent reasons while awardingthe claims. Apart from this, the learned counsel for therespondent has also contended that Arbitrator has ignoredthe relevant record placed before him and has thusmisconducted himself.

6. However, the aforesaid objections are withoutany substance as the Arbitrator has given reasons for theaward. Merely because the reasons in the opinion of oneparty are not cogent is not a ground for setting aside theaward. The cogency of the reasons of the Arbitratorcannot and does not come within the ambit of

misconduct.Even if reasoning is erroneous, it is the finding of theArbitrator which is to be upheld unless it is unsound andunworthy of acceptance.

7. With regard to claim No.1, the respondent hascontended that this claim was decided ex-parte and withoutaffording any opportunity to the respondent. It iscontended that final bill in respect of this claim waspaid on 15th March, 1998 and the same was accepted by thepetitioner without any protest on the same day. Theperusal of the award shows that the learned Arbitrator hasspecifically observed that the final bill was paid inApril, 1988 as earlier to this, the claimant had demandedthe copy of final bill and analysis for reducing the ratesthrough letters exhibits C-24 & C-25 but the respondentdid not furnish the details and the claimant acceptedreduction in rates for not providing electric cables/wireson the basis of rates available in Delhi Schedule of Rates(DSR) as applicable in terms of agreement. In view of theletters exhibits C-24 & C-25 of the petitioner, theArbitrator found the claim of the petitioner partlyjustified and not in whole. Merely because the final billwas accepted by the petitioners does not mean that he hadaccepted it without protest. By not responding to theletters Exhibits C-24 & C-25 the respondent made thepetitioner accept the final bill under reservation as thepetitioner accepted reduction in rates available in DelhiSchedule of Rates as applicable in terms of agreement.

8. It is a settled law that the findings of theArbitrator on factual matrix should not be disturbed evenif these are erroneous. The scope of challenge as to thefindings of facts based on material and evidence placedbefore the Arbitrator is almost non-existant. On theanvil of this principles, the objection of the respondentlacks merit.

9. As regards the objection with regard to claimNo. 2 which is on account of expenses incurred on drawingfishwire, it is contended by the counsel for therespondent that the said item is not covered under thescope of the agreement. According to the counsel, as perClause 1 of the additional condition of the agreement, thework was to as carried out strictly conforming with theC.P.W.D. specifications for electrical work, Part-I andin support of that copy of the said specification wassubmitted before the Arbitrator which clearly mentionsthat the fire wire of 10 SWG shall be drawn by theContractor but the said specification was

slightlymodified by the respondent and as per the additionalcondition No. 18 it was mentioned that the fish wire of 16SWG shall be drawn by the contractor. Since thisvariation is in accordance with the agreement and claimanthad not incurred extra expenditure, the objection appearsto be untenable in view of the observations and findingsof the Arbitrator that the fish wire is required to beprovided along with laying the recess conduits in terms ofspecifications produced by respondent but technically thesame was to be taken out after inserting wires in conduit.Hence, it was not part of installations. I do not findany fault in the findings of the Arbitrator and dismissthe objection.

10. Last objection is with regard to claim No. 9which was not account of loss of profit on balance work.It is contended that Arbitrator did not take intoconsideration exhibit C-4 vide which the claimant hadwithdrawn the said claim, as such the claim was outsidethe scope and ambit of arbitrator agreement. In thisregard, referring to Clause 4 which provides that if thesite for work is not available either in part or in fullor for any reason, the time of execution of the electricwork shall be correspondingly extended and no claim foridle labour or any other request for compensation (exceptas provided) under Clause 10 shall be entertained, it iscontended by counsel for the respondent that sinceagreement was closed at the request of the claimant, noquestion of un-earned profit arises and thereforee award inthis regard is liable to be set aside.

11. Admittedly, stipulated period of contract was 12months but the respondent was not in a position to makethe site in question available for about 42 months. Thepetitioner made a request for closure of the contract on16.4.1984 which was accepted in September, 1986.According to the petitioner, the claimant closed thecontract out of frustration as the claimant was to workwith clear coordination but the work was stopped due tosome unknown reasons. The contract was thereforee closedby the claimant to mitigate his losses.

12. Perusal of exhibit C-24 shows that the claim bythe petitioner in this regard was withdrawn on the promiseof the respondent that it will refer the matter to thearbitrator but the respondent did not keep its promise andas such the petitioner was at liberty to prefer thisclaim. However, the aforesaid position of not keeping

thepromise and to refer the matter to arbitrator was madeclear when application containing the disputes and theclaims of the petitioner including claim No. 9 was referredby the court to the Arbitrator for adjudication. Thecontention of the counsel for the respondent has been welltaken care of by the Arbitrator with the observation thatrespondent closed the contract after about 2 & 1/2 yearsafter request of claimant to close the contract. It wason this ground that claim on account of loss of profit onbalance work at the rate of 10% was reduced to 5%.

13. As is apparent, the aforesaid claim is neitherbeyond the terms of the agreement nor is against letterand spirit of the exhibit C-24 whereby contract was closedby the respondent. The very fact that the disputesreferred by the petitioner in the main petition filedbefore the court was considered as disputes referable forarbitrator fortifies the stand of the petitioner. Thecircumstances of not providing the site for such a longtime and then taking two & half years for closing thecontract after request of the petitioner to do so couldnot have been lost sight by the Arbitrator nor can thiscourt excuse the cavalier, casual and indifferent attitudeof the respondent firstly in not providing site within thestipulated period and secondly in taking inordinately longtime to close the contract after receipt of such requestby the petitioner which was made out of frustration anddue to non-cooperation of the respondent.

14. In view of the foregoing reasons, I do not findany merit in the objections and the same are herebydismissed.

15. Award is made rule of the court. Suit isdecreed for the amount awarded against these claims withpendentelite and future interest @ 12% till realisation.Decree sheet be prepared accordingly.

1. There is no gainsaying the fact that the Arbitrator is an instrument of the agreement and is not over it. If the Arbitrator traverses beyond the terms of the agreement such an award is liable to be set aside. He has to remain within the four corners of the agreement. However, at the same time, it is cardinal principle that the sanctity of the award should always be preserved because the parties choose their own forum reposing their full faith not only in his competence but also in his integrity and impartiality. The parties, are, thereforee restrained from picking

holes with the findings of the Arbitrator unless bias or perversity is manifest and pronounced.

2. At the same time, the court should also refrain from re-appreciating or re-assessing the evidence or material on which the Arbitrator has based his findings. If this is allowed, it would amount to functioning of court as appellate court which it is not. This is neither the object of Arbitrator Act nor the permissible area. The above principles have been culled out mainly in view of the objections of the respondent to the award that the Arbitrator has gone beyond his brief and has transgressed the arena that did not belong to him.

3. As many as 12 claims were preferred by the petitioner. Out of these only three found favor with the Arbitrator and that too partially. Respondent-DDA has challenged even those claims which on the face appear to be based upon evidence and material produced by the parties.

4. The claimant was awarded electrical work of 408 MIG dwelling units at 'A' Dakshini Pitampura. Some disputes arose which were referred to the arbitrator of Superintending Engineer (Arbitrator)-II. The Arbitrator entered into reference and made the award on 20th March, 1995 which through this petition is being sought to be made rule of the court.

5. The respondent has filed objections to the award through is 12003/95. The main thrust of the objection is that under the arbitrator clause, obligation was cast upon the Arbitrator to give cogent reasons while awarding the claims. Apart from this, the learned counsel for the respondent has also contended that Arbitrator has ignored the relevant record placed before him and has thus misconducted himself.

6. However, the aforesaid objections are without any substance as the Arbitrator has given reasons for the award. Merely because the reasons in the opinion of one party are not cogent is not a ground for setting aside the award. The cogency of the reasons of the Arbitrator cannot and does not come within the ambit of misconduct. Even if reasoning is erroneous, it is the finding of the Arbitrator which is to be upheld unless it is unsound and unworthy of acceptance.

7. With regard to claim No.1, the respondent has contended that this claim was decided ex-parte and without affording any opportunity to the respondent. It is contended that final bill in respect of this claim was paid on 15th March, 1998 and the same was accepted by the petitioner without any protest on the same day. The perusal of the award shows that the learned Arbitrator has specifically observed that the final bill was paid in April, 1988 as earlier to this, the claimant had demanded the copy of final bill and analysis for reducing the rates through letters exhibits C-24 & C-25 but the respondent did not furnish the details and the claimant accepted reduction in rates for not providing electric cables/wires on the basis of rates available in Delhi Schedule of Rates (DSR) as applicable in terms of agreement. In view of the letters exhibits C-24 & C-25 of the petitioner, the Arbitrator found the claim of the petitioner partly justified and not in whole. Merely because the final bill was accepted by the petitioners does not mean that he had accepted it without protest. By not responding to the letters Exhibits C-24 & C-25 the respondent made the petitioner accept the final bill under reservation as the petitioner accepted reduction in rates available in Delhi Schedule of Rates as applicable in terms of agreement.

8. It is a settled law that the findings of the Arbitrator on factual matrix should not be disturbed even if these are erroneous. The scope of challenge as to the findings of facts based on material and evidence placed before the Arbitrator is almost non-existant. On the anvil of this principles, the objection of the respondent lacks merit.

9. As regards the objection with regard to claim No. 2 which is on account of expenses incurred on drawing fishwire, it is contended by the counsel for the respondent that the said item is not covered under the scope of the agreement. According to the counsel, as per Clause 1 of the additional condition of the agreement, the work was to as carried out strictly conforming with the C.P.W.D. specifications for electrical work, Part-I and in support of that copy of the said specification was submitted before the Arbitrator which clearly mentions that the fire wire of 10 SWG shall be drawn by the Contractor but the said specification was slightly modified by the respondent and as per the additional condition No. 18 it was mentioned that the fish wire of 16 SWG shall be drawn by the contractor.

Since this variation is in accordance with the agreement and claimant had not incurred extra expenditure, the objection appears to be untenable in view of the observations and findings of the Arbitrator that the fish wire is required to be provided along with laying the recess conduits in terms of specifications produced by respondent but technically the same was to be taken out after inserting wires in conduit. Hence, it was not part of installations. I do not find any fault in the findings of the Arbitrator and dismiss the objection.

10. Last objection is with regard to claim No. 9 which was not account of loss of profit on balance work. It is contended that Arbitrator did not take into consideration exhibit C-4 vide which the claimant had withdrawn the said claim, as such the claim was outside the scope and ambit of arbitrator agreement. In this regard, referring to Clause 4 which provides that if the site for work is not available either in part or in full or for any reason, the time of execution of the electric work shall be correspondingly extended and no claim for idle labour or any other request for compensation (except as provided) under Clause 10 shall be entertained, it is contended by counsel for the respondent that since agreement was closed at the request of the claimant, no question of un-earned profit arises and thereforee award in this regard is liable to be set aside.

11. Admittedly, stipulated period of contract was 12 months but the respondent was not in a position to make the site in question available for about 42 months. The petitioner made a request for closure of the contract on 16.4.1984 which was accepted in September, 1986. According to the petitioner, the claimant closed the contract out of frustration as the claimant was to work with clear coordination but the work was stopped due to some unknown reasons. The contract was thereforee closed by the claimant to mitigate his losses.

12. Perusal of exhibit C-24 shows that the claim by the petitioner in this regard was withdrawn on the promise of the respondent that it will refer the matter to the arbitrator but the respondent did not keep its promise and as such the petitioner was at liberty to prefer this claim. However, the aforesaid position of not keeping the promise and to refer the matter to arbitrator was made clear when application containing the disputes and the claims of the petitioner including claim No. 9 was

referred by the court to the Arbitrator for adjudication. The contention of the counsel for the respondent has been well taken care of by the Arbitrator with the observation that respondent closed the contract after about 2 & 1/2 years after request of claimant to close the contract. It was on this ground that claim on account of loss of profit on balance work at the rate of 10% was reduced to 5%.

13. As is apparent, the aforesaid claim is neither beyond the terms of the agreement nor is against letter and spirit of the exhibit C-24 whereby contract was closed by the respondent. The very fact that the disputes referred by the petitioner in the main petition filed before the court was considered as disputes referable for arbitrator fortifies the stand of the petitioner. The circumstances of not providing the site for such a long time and then taking two & half years for closing the contract after request of the petitioner to do so could not have been lost sight by the Arbitrator nor can this court excuse the cavalier, casual and indifferent attitude of the respondent firstly in not providing site within the stipulated period and secondly in taking inordinately long time to close the contract after receipt of such request by the petitioner which was made out of frustration and due to non-cooperation of the respondent.

14. In view of the foregoing reasons, I do not find any merit in the objections and the same are hereby dismissed.

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