

Sethi Engineering Corporation Vs. Delhi Development Authority and anr.

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Court : Delhi

Decided On : Feb-20-2009

Reported in : 158(2009)DLT19

Judge : Reva Khetrapal, J.

Acts : [Arbitration Act, 1940](#) - Sections 30 and 33

Appeal No. : CS (OS) 3248/1992

Appellant : Sethi Engineering Corporation

Respondent : Delhi Development Authority and anr.

Advocate for Def. : Anusuya Salwal, Adv.

Advocate for Pet/Ap. : Kirti Uppal and; Sanjit Singh, Adv

Judgement :

Reva Khetrapal, J.

1. This is a petition under Sections 30 and 33 of the [Arbitration Act, 1940](#) for setting aside the award dated 24th May, 2004 passed by the learned Arbitrator, Justice K. Ramamurthy (Retired).

2. The facts relevant for deciding the objection petition are as follows:

The Delhi Development Authority had awarded work to the Claimant/Non-Objector for construction of dwelling units '512 MIG Houses at Pocket-I, Dilshad Garden vide Agreement No. 14/EE/ND-18/82-83. The stipulated period of completion of the work was 12 months, which expired on 6th July, 1983. Disputes arose between the parties which were referred to the arbitration of the Engineer (Member), DDA, who made and published the award dated 20th July, 1992. The Claimant/Non- Objector approached the High Court for enforcing the award and the Respondent- DDA filed the present objections. By an order dated 19th October, 2001, the High Court holding that since the award was severable and not hybrid, remitted back the award insofar as the claim No. 6 was concerned.

3. The aforesaid claim No. 6 preferred by the Claimant/Non-Objector was in respect of damages on account of prolongation of work beyond the stipulated date of completion, on account of increase in the price of material, wages, labour, etc. The claim had been preferred for Rs. 14 lacs and the learned Arbitrator Shri N. Ramamoorthy vide his award dated 20th July, 1992 had awarded Rs. 11,18,720/-. After the matter was remitted back, the learned arbitrator appointed by this Court (Justice K. Ramamurthy) formulated the following two questions for consideration:

1) Whether the Respondent-DDA could rely upon Clause-1 in answer to the claim of the claimant under Claim No. 6?

2) Whether any duress was exercised by the Respondent-DDA on the Claimant in getting the undertaking which is mentioned in the application for extension of time and, therefore, the Claimant is entitled to the amount?

4. On consideration of the aforesaid, the learned arbitrator (Justice K. Ramamurthy) on 24.05.04 passed an award:

i) Directing the Respondent-DDA to pay to the Claimant/Non-objector a sum of Rs. 11,18,720/-.

ii) Directing the Respondent-DDA to pay interest @ 13% per annum on the sum of Rs. 11,18,720/- from 8.4.1988 till the date of payment.

iii) Directing the parties to bear their respective costs.

5. It is this award which is under challenge and on which I have heard Mr. Kirti Uppal, the learned Counsel for the Claimant/Non-Objector and Ms. Anusuya Salwan, the learned Counsel for the Respondent-DDA. Before dealing with their respective contentions, a look at Clause-1 of the General Conditions of Contract is called for. Clause-1 reads as follows:

The contractor must acquaint with the proposed site for the works and study the specifications and conditions carefully before tendering. The work shall be executed as per the programme approved by the Engineer In-charge. If part of the site is not available for any reason or there is some unavoidable delay in supply of materials, stipulated by the department, the programme of construction shall be modified accordingly and the contractor shall have no claim for any extras or compensation on this account.

6. The learned Counsel for the Respondent/Objector, Ms. Anusuya Salwan raised a two-fold contention. In the first instance, she urged that the learned arbitrator had made his award contrary to the General Conditions of the Agreement entered into between the parties and, in particular, Clause-1 of the said General Conditions of Contract. Secondly, the learned Counsel contended that the learned arbitrator had ignored certain important documents on record which clearly showed that the Claimant had delayed the project; and had himself requested for extension of time and was willing to accept the extension of time without payment of damages.

7. Needless to say, the learned Counsel for the Claimant/Non-Objector Mr. Kirti Uppal vehemently controverted both the aforesaid contentions of the learned Counsel for the Respondent/Objector. He contended that the interpretation of Clause-1 of the General Terms and Conditions of the Contract had fallen for consideration before this Court in the case of *Shri Sunder Lal Khatri v. DDA* reported in 1994(2) ALR 479, wherein it was held that the damages under this Clause are for the fact that if the duration of work is prolonged because of non-fulfillment of the obligations on the part of the DDA, then the said award is justified in favour of the Claimant/Non- Objector. The learned Counsel further submitted that an appeal against the aforesaid decision, bearing FAO(OS) 252/1994, preferred by the DDA/Objector before the Division Bench of this Court was

dismissed.

8. On facts, it is not in dispute that the date of commencement of the work was 7.7.1982 and the stipulated date of the completion of work was 6.7.1983. On account of delay on the part of the DDA on various grounds, the work was completed on 21.7.1986, that is, three years after the stipulated date of completion. The final bill was received by DDA on 12.01.1988. It is also not in dispute that the claimant had applied for extension of time for completion of the work several times, giving the details of the nature of the hindrances and the number of days of delay. The total period of hindrances came to 1300 days. A perusal of the various hindrances listed in the applications for extension of time shows that the delay in the execution of work beyond the stipulated date of completion of work, i.e., 6.7.1983, was attributable to the DDA alone.

9. Then again, the DDA granted extension of time upto 27.1.1986, but without levy of any compensation. The stand of the DDA before the arbitrator was that an undertaking had been given by the Claimant /Non-Objector not to claim any damages on account of the delay in the completion of work. The DDA referred to the applications for extension of time (Exhibits R-3, R-4 and R-5), in which the claimant had stated at the bottom of the application:

We shall not claim any damages on account of delay in completion of the work.

10. The earlier arbitrator by his award dated 20th July, 1992, however, had come to the conclusion that the delay in completion of the work was entirely attributable to the DDA. He also observed that in view of this delay, it was not expected that the statement of the Claimant that the Claimant would not claim any damages on account of delay in the completion of the work, was voluntary in nature. However, the award was silent on the effect of Clause-1 of the General Terms and Conditions of the Contract and was accordingly remitted back for re- consideration of the same to a Retired Judge of this Court, who submitted the present award.

11. The contention of Ms. Salwan, the learned Counsel for the Respondent- DDA, as noticed hereinabove, is that Clause-1 stands attracted in the present case and by virtue of the fact that the Claimant had accepted Clause-1 while signing the

Agreement, the claim of the Claimant in Claim No. 6 is not sustainable. As regards the interpretation of Clause-1, it was submitted by her that when extension of time is granted, there is ipso facto 'modification' and, accordingly, the contractor cannot be allowed to raise any claim for any extras or compensation on this account. This was the proper construction and interpretation of Clause-1 of the General Conditions of the Contract. Further, according to her, when the DDA granted extension of time without any levy of compensation that would automatically mean that the Claimant had also accepted the same.

12. In order to buttress her contention that the learned arbitrator mis- conducted himself by ignoring the specific provisions of Clause-1 aforesaid and acted in manifest disregard of the contract, Ms. Salwan placed reliance upon the decision of the Hon'ble Supreme Court in Steel Authority of India Ltd. v. C. Budha Raja, Govt. and Mining Contractor 1999(3) ALR 335 (S.C). In paragraph-15 of the said decision, the Hon'ble Supreme Court observed as under:

15. ...It is settled law that arbitrator derives the authority from the contract and if he acts in manifest disregard of the contract, the award given by him would be arbitrary one. The deliberate departure from the contract amounts not only to manifest disregard of the authority or misconduct on his part, but it may tantamount to mala fide action....

13. The learned Counsel for the respondent Ms. Salwan also relied upon the decision in the case of Rajasthan State Mines and Minerals Ltd. v. Eastern Engineering Enterprises and Anr. 1999(3) ALR 350 (S.C.), in paragraph-22 whereof the Supreme Court held as follows:

22. It is settled law that the Arbitrator is the creature of the contract between the parties and hence if he ignores the specific terms of the contract, it would be a question of jurisdictional error which could be corrected by the Court for that limited purpose agreement is required to be considered. For deciding whether the Arbitrator has exceeded his jurisdiction reference to the terms of the contract is a must....

14. The learned Counsel for the defendant further placed reliance on the judgment rendered by the Hon'ble Supreme Court in the case of MD. Army Welfare Housing Organization v. Sumangal Services Pvt. Ltd. : AIR 2004 SC1344 ., wherein its earlier decision in Steel Authority of India Ltd. (supra) has been specifically approved and followed.

15. Per contra, the learned Counsel for the Claimant/Non-Objector Mr. Uppal submitted that the learned arbitrator had rendered the award after hearing the parties in detail and going into the relevant provisions of the Agreement. The learned arbitrator, after hearing both the parties, came to the conclusion that, in the instant case, there had been no 'modification' of the Agreement in terms of Clause-1 thereof and that was the understanding of the DDA itself, otherwise there was no need for taking an undertaking from the claimant in the application for extension of time. Far from ignoring Clause-1 of the Agreement, the learned arbitrator had squarely dealt with the same in his award dated 24.05.2004. Reliance was placed in this context by the learned Counsel for the Claimant/Non-Objector on sub-para (vi) of paragraph 38 of the judgment of the Supreme Court in Chairman and M.D., NTPC Ltd. v. Reshmi Constructions, Builders and Contractors 2004(1) ALR156 (S.C.), wherein it was held that:

Only in the event, a case of creation of a new agreement is made out the question of challenging the same by the respondent would have arisen.

16. Learned Counsel for the Claimant/Non-Objector further placed reliance upon the decision of this Court in the case of Anant Raj Agencies v. Delhi Development Authority and Anr. : 91(2001)DLT273 wherein it was held that:

19. The delay causing escalation is bound to act adversely and the contractor is bound to suffer losses and to extract such an undertaking is undertaking obtained under duress as the extension of time sought by the contractor would neither make up his losses due to escalation nor can such an undertaking operate favourably to the authority who has caused the delay and allowed the escalation. The arbitrator rightly allowed the claim on account of the escalation by ignoring the undertaking. The undertaking given by the claimant by no stretch of imagination was a voluntary act and was probably given under financial duress. The

respondent cannot be allowed to take advantage of its own wrong or lapse and thus the claim of the petitioner in this regard was justifiably allowed.

17. After hearing counsel for both the parties, I am inclined to agree with the submissions of the learned Counsel for the Claimant/Non-Objector for the following reasons: As noted by the learned arbitrator, it is not the case of the DDA that at any point of time after the agreement was executed between the parties, the DDA had approached the Claimant for any 'modification'. At the time of the execution of the agreement, when 12 months had been fixed for completion of the work, the DDA must have made a detailed assessment of the situation, particularly with regard to the availability of the materials at the site. It is only in cases where the delay is on the part of the DDA that the DDA has been given the right to seek 'modification' with the consent of the Contractor/Claimant. In a given situation, the Contractor may or may not agree for the 'modification'. Indubitably, in the instant case, no 'modification' was even sought for by the DDA. Then again, according to the understanding of the DDA itself, the application for extension of time filed by the Claimant did not tantamount to 'modification' of the programme of construction within the meaning of Clause-1 of the Agreement, and this is evident from the fact that the DDA took a specific undertaking from the claimant that he would not claim any damages on account of delay. Moreover, the delay was purely on account of the DDA and the unanimous finding of both the arbitrators in this regard is not disputed by the DDA. Therefore, to my mind, the DDA cannot rely upon the Clause- 1 of the agreement to contend that in spite of the delay of three years in completion of the work entirely due to the fault of the DDA, the Claimant is not entitled to the amount claimed in Claim No. 6.

18. As regards the undertaking given by the Claimant/Non-Objector, the following Certificate issued by the DDA to the Claimant dated 4.5.1991 is apposite for the purpose of deciding the present controversy.

Delhi Development Authority Vikas Sadan

I.N.ANo. A3/F-264/EEHDXV III/82-83/1054 New Delhi, 4.5.91
From, To, TO WHOM
IT MAY CONCERN
Certified that M/s Sethi Engineering Corporation, 14/24, East
Patel Nagar, New Delhi-110 008. have executed the work of C/o 256 MIG Houses

Pocket 'I' Group-II, including internal development of Land at Dilshad Garden, Delhi-32 satisfactorily and the details are as follows:

Date of Start 28.6.82 Date of Completion 27.6.83 (As per stipulated) Actual date of completion 27.1.86 Gross Amount of Work done Rs. 1,31,28,498.58 (Rs. One Crore Thirty One Lacs Twenty Eight Thousand Four Hundred Ninety Eight and Paise Fifty Eight only)

The case of extension of time was granted without levy of compensation, as there was no delay on the part of the contractor. sd/- (S. GURBANI) Executive Engineer East Zone-3 Dilshad Garden, Delhi Development Authority 04/05/91'

19. The cross-examination of the Claimant dated 20th March, 2004 by the Respondent before the learned arbitrator is also apposite. The relevant portion is as follows:

Q-4. How do you say that you were forced to sign no claim certificate

The answer is:

I was told by the then Superintending Engineer that unless and until this undertaking is given and no claim certificate is signed he would not sanction the E.O.T. (Extension of time) without levy of compensation.

20. Further, vide Clause-2 of the Agreement between the parties, in the case of delay attributable to the contractor, the DDA was entitled to impose penalty on the contractor. If, as contended by the DDA, there had been delay on the part of the Claimant/Contractor in the instant case, penalty would have been levied as per Clause-2 and that would have come to about Rs. 10 lacs. No penalty was levied or sought to be levied. Therefore, clearly the delay was entirely attributable to the DDA.

21. In the aforesaid backdrop, it is not difficult to appreciate that the DDA, using its superior bargaining position and authority, obtained undertaking from the Claimant. As already stated, the Claimant in his cross-examination before the learned Arbitrator, had clearly stated that he was forced to sign the 'No Claim

Certificate' under duress. Had he not signed the same, the extension of time would not have been granted to him without levy of compensation and the whole matter may also have entailed dis-qualification to the contractor, which would have completely deprived him of his livelihood. Not a single witness was examined from the side of the DDA to state that the delay was attributable to the Claimant, or in any manner to controvert the statement made by the Claimant before the learned Arbitrator in his affidavit dated 6.2.1992 as follows:- 'I was forced to give the undertaking as asked for by the Superintending Engineer, Civil Circle-III, DDA, Delhi without my free will and consent' and further as follows:

That he informed me he would grant necessary extension of time for completion of work upto 27.1.86 only if I give the undertaking 'We shall not claim any damages on account of delay in the completion of the work

22. Viewed from any angle, in the instant case, when the final bill of the claimant had not been paid for a long time and the Respondent-DDA did not pass any formal order on the extension application, there appears to have been no other course open to the claimant except to give an undertaking on 31.3.1987 that he would not claim any damages on account of delay in the completion of the work.

23. In view of the aforesaid, I have no hesitation in holding that the Claimant had been forced and compelled to give the undertaking, which is not enforceable against the Claimant. The learned arbitrator has noted that, the fact that the impugned award in Claim No. 2 had been deducted from the total claim of Claim No. 6 is not disputed, and further, that the quantum of claim in Claim No. 6 is also not seriously disputed. The learned arbitrator has further observed that with reference to the claim of interest it was not disputed that in case the Claimant is held to be entitled to the claim, he would be entitled to pendente lite and future interest.

24. The challenge to the validity of the impugned award accordingly fails and the Objection Petition preferred by the Respondent/Objector is, therefore, dismissed. There will be no order as to costs.

