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Court : Delhi

Decided On : Jan-22-1993

Reported in : 1993(25)DRJ137

Judge : Dalveer Bhandari, J.

Acts : Arbitration Act, 1940 - Sections 14

Appeal No. : Suit No. 638-A of 1989

Appellant : Har Bhagwan

Respondent : Delhi Development Authority and anr.

Advocate for Pet/Ap. : S.K. Mittal and; A. Salwan, Advs

Judgement :

Dalveer Bhandari, J.

(1) Shri V.R.Vaish, Arbitrator has Filed the award dated 31.1.1989 and proceedings in the arbitration matter between Shri Harbhagwan vs. D.D.A. and others. The notice of filing of the award was issued to the parties and the objections were filed to the award on 8th May, 1989.

(2) On 25th September, 1990 after hearing the parties, the Court framed the issues. In the objection petition, it is mentioned that the arbitrator ignored the

material evidence on record and acted contrary to the terms of the agreement and consequently misconducted himself. It is also submitted in the application that under clause 25 of the agreement and also under the terms of reference, the Arbitrator was required to give a reasoned award, but the Arbitrator in the present case, has failed to give a reasoned award and the reasons so appended to the award are no reasons at all and in no way indicate the mental process of the Arbitrator. thereforee, the award is liable to be set aside on this ground alone.

(3) It is mentioned in the objection petition, that findings of the Arbitrator in respect of claim no. 1 are grossly erroneous and these errors arc apparent on the face of the record. It has also been submitted that the Arbitrator while allowing the refund of a security deposit, has acted contrary to the terms of the agreement. The learned counsel for the Objector Dda, has drawn the attention of the court to the letter dated 12.2.86 of the Office of the Executive Engineer, Cpd Vii, Dda, Vikas Sadan, New Delhi to Harbhagwan, the petitioner. In the said letter, it is mentioned that because the contractor has delayed/suspended the execution of the aforesaid work and according to the opinion of the Engineer-in-Charge, the contractor failed to complete the work by the stipulated date of completion. The show cause notice, thereforee, under the powers delegated under sub-clause (3)(a), (3)(b) and (3)(c) for the Executive Engineer, given as under:-

'Rescind the contract as aforesaid upon which rescission your security deposit stands absolutely forfeited to the Dda, and To take out the work out of your band as remained unexecuted or bad been executed for giving it to another contractor to complete the same in which case any expenses which would have been paid to you if the whole work had been executed by you in terms of the agreement. '

(4) It has been submitted that once the security deposit has been forfeited, then according to the terms of the contract, the Arbitrator, could not determine the issue of the security deposit to the petitioner claimant. This is clearly an error apparent on the face of the record. The Arbitrator cannot act beyond the terms of the reference and is bound by the contract and in case he acts beyond the terms of the contract, the award is liable to be set aside.

(5) It is further mentioned that items which are specifically excluded in the contract, the Arbitrator cannot enter into the reference and adjudicate upon those issues, and adjudication by the Arbitrator on those issues would be without jurisdiction.

(6) According to the contract, only Superintending Engineer was a competent authority to adjudicate upon this claim. The Arbitrator had no jurisdiction to arbitrate on issues which were not referred to him.

(7) The arbitrator while deciding the claim no.1 has not given any reasons, which he ought to have given according to the terms of agreement.

(8) The relevant clause 25 reads as .-

'EXCEPT where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions herein before mentioned and as to the quality of workmanship or materials used on the work or as to any other questions claim, right, matter or things whatsoever, in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitration of the person appointed by the Engineer Member, Delhi Development Authority at the time of dispute. It will be no objection to any such appointment that the arbitrator so appointed is a Delhi Development Authority employee that be had to deal with the matters to which the contract relates and that in the course of his duties as Delhi Development Authority employees he bad expressed view on all or any of the matters in dispute or difference. The arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason, such Engineer member Delhi Development Authority as aforesaid at the time of such transfer, vacation of office or inability to act shall appoint another person to act as arbitrator in accordance with the terms of the contract. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor. It is also a term of this contract that no person other than a person appointed by such Engineer Member, Delhi Development Authority as aforesaid

should act as an arbitrator and, if for any reason, that is not possible, the matter is not to be referred to arbitration at all. In all cases where the amount of the claim in dispute is Rs.50,000.00 . (Rupees fifty thousand), and above, the arbitrator will. give reasons for the award. .. Subject as aforesaid, the provisions of the Arbitration Act, 1940 or any statutory modification or re-enactment thereof and the rules made there under and for the time being in force shall apply to the arbitration proceedings under this Clause. It is a term of the contract that the party invoking arbitration shall specify the dispute or disputes to be referred to arbitration under this Clause together with the amount or amounts claimed in respect of each such dispute. It is also a term of the contract that if the contractors) does/do not make any demand for arbitration in respect of any clai:ii(s) in writing within 90 days of receiving the in taxation from the Engineer-in-charge that the Bill is ready for payment, the claim(s)of the contractors) will be deemed to have been waived and absolutely barred and the Delhi Development Authority shall be discharged and released of all liabilities under the contract in respect of those claims.'

(9) The Arbitrator with regard to claim no.1 has mentioned as under:-

'THIS amount had been withheld by the respondents on account of their dues.'As, after taking into account the counterclaims and final bill, payment is to be made to the claimant, no deduction is to be made from security deposit. Hence Rs.46, 179.00 be refunded to the claimant.'

(10) Apart from the fact that the Arbitrator was not competent to adjudicate upon this issue, no reasons whatsoever has been given while granting this claim to the claimant.The arbitrator has undoubtedly misconducted himself. The learned counsel for the Objector has drawn attention of the court to the leading judgment of the Supreme Court, Vishwanath Sood v. Union of India and another, : [1989]1SCR288 .In para 8 of the Judgment, the Court observed, 'In our opinion the question regarding the amount of compensation livable under clause 2 has to be decided only by the Superintending Engineer and no one else.' Clause 12 of the Contract clearly indicates that the Engineer-in-Charge can make sllerations. Learned counsel has placed reliance on the Associated Engineering Co. vs. Government of Andhra Pradesh, 1991 (2) Arb lr 181. Learned counsel has

particularly invited the attention of this court to paras 26 and 27 of the said Judgment.

(11) Learned counsel has also invited attention to the Full Bench decision of the Kerala High Court Government of Kerata and another v. V.P. Jolly, : AIR1992 Ker187 . In this case, the court has taken the view that even non-speaking awards aie liable to be set aside if the awards are contrary to all basic or rather obvious features, of the contract or travels beyond the terms of the contract so long as such decision can be arrived at, without interpreting or construing the terms of the contract. The violation must be evidenced from a mere look as the terms of the agreement.

(12) It is stated by the learned counsel that no reasons have been given for the reduction item. Learned counsel has pointed out page 4 of the award, in which it is mentioned that a recovery of Rs. 9555.96 has been proposed as per reduction items sanctioned. The items under reference were defective and the defects had been pointed out to the claimant. Hence reduction in rate of these items-is justified. The arbitrator ought to have given reasons for reduction items. The learned counsel has invited attention of the court to a Division Bench decision of this court, college of Vocational Studies v. S.S. Jaitley, Air 1987 Del 134. In this Judgment, the award was set aside because findings against some claims are without any reasons. The court came to the conclusion that the award is liable to be set aside because the findings have not been given, against some claims by the Arbitrator. Learned counsel submitted that mere reading of award shows that no reasons have been spelt out as for as claim no.4 is concerned. It has been mentioned regarding claim no.4 and the same is set out as under:- 'The claimant in his statement of fact claimed Rs.6200.00 under Clause 10(c) for increase in wages of labour. The respondent's case is that as the work was delayed by the claimant, he is not entitled to any payment under Clause 10(c) after the due date of completion which was 16.7.84. As the claimant is not responsible for delay in completion of work, be is entitled to payment under Clause 10(c) for increase wages from 1.6.84. The amount under 10(c) worked out by the respondent is Rs.6115.00. This was accepted by claimant also. Hence claimant be paid Rs.6115.00'

(13) The Arbitrator has not given his finding on how the claim of Rs.6200.00 for increase in wages from 1.6.84 was justified. Whatever has been claimed without giving any details, the Arbitrator. The same has been decreed by the arbitrator without giving any reasons. The award is liable to be set aside on this count. The learned counsel has drawn the attention of the court to clause 10C of the terms of the contract. Learned counsel has also cited M/s Bharat Furnishing Co. vs. Delhi Development Authority and another, 1991(4) Del L 355. This case' was cited for the purpose that the Arbitrator could not sit over the findings of the Engineer concerned. He was neither justified in ignoring nor overriding the findings of the Engineer concerned while making the award, and by doing so, the Arbitrator has misconducted himself. It is clearly mentioned in the Agreement 'except where otherwise provided in the contract' , sitting over the finding; of the Engineer concerned has in fact led to exceeding the jurisdiction of the Arbitrator. Learned counsel has pointed out that findings of the Arbitrator regarding claim no.7 are totally erroneous, illegal and without jurisdiction. It has been submitted that the Arbitrator had no power to grant future interest, and the award is liable to be set aside on this count. The learned counsel for the claimant has tried to repudiate the contentions raised by the Objector and it is stated that the Arbitrator was appointed by the respondent and it is hardly proper, or fair, for them to assail the well-reasoned award given by the Arbitrator.

(14) It has been submitted by the learned counsel for the petitioner that the award given by the Arbitrator has to be respected and this court would not be justified in sitting in appeal over the award submitted by the Arbitrator. Learned counsel has drawn attention to Union of India v. Rampur Distillery & Chemical Co. Ltd : AIR 1973 SC1098 . In this case, the Court has laid down that party to a contract asking for security deposit from other party to ensure due performance of the contract is not entitled to forfeit the deposit on the ground of default when no loss is caused to him in consequence of such default. The learned counsel for the Objector distinguished this case on the ground that in this case loss has been caused to the Department because of not executing the contract by the claimant, in accordance with the terms of the contract. Learned counsel for the claimant has invited the attention of the court to the Judgment M/s Hindustan Tea Co. v. M/s K. Sashikant & Co. and another : AIR 1987 SC81 . In this judgment, the Supreme Court has laid

down that under the law, the Arbitrator has made the final arbiter of the dispute between the parties. The award is not open to challenge on the ground that the Arbitrator has reached a wrong conclusion or has failed to appreciate facts. The learned counsel for the petitioner pointed out that there is no quarrel with the proposition as laid down by the Supreme Court in the said case but in the instant case, the Arbitrator has given the award which is contrary to the settled law of the land and has totally misconducted himself on various counts.

(15) Learned counsel for the claimant has cited another judgment of the Supreme Court Hind Construction Contractors vs. State of Maharashtra, : [1979]2SCR1147 . In this case, the Court has observed, Whether time is of the essence of the contract, held, is a question of intention of the parties to be gathered from the terms of the contract. It has been further laid down in this judgment that the provisions for imposition of penalty in extention of time, would militate against such an inference time can be made of the essence of the contract by fixing a further period for completion. In similar facts, the Supreme Court in Vishwanath Sood's case (supra) has laid down:-

'THE levy of compensation under the clause cannot be said to be in the nature of an automatic levy to be made by the Engineer-in-charge based on the number of days of delay and the estimated amount of work. Firstly, the reference in the clause to be requirement that the work shall throughout the stipulated period of the contract be proceeded with due diligence and the reference in the latter part of the clause that the compensation has to be paid 'in the event of the contractor failing to comply with' the prescribed time schedule make it clear that the levy of compensation is conditioned on some default or negligence on the part of the contractor. Secondly, while the clause fixes the rate of compensation at 1 per cent for every day of default it takes care to prescribe the maximum compensation of 10 per cent on this ground and it also provides for a discretion to the Superintending Engineer to reduce the rate of penalty from 1 per cent. Though the clause does not specifically say so, it is clear that any moderation that may be done by the Superintending Engineer would depend upon the circumstances, the nature and period of default and the degree of negligence or default that could be attributed to the contractor. In practice the amount of compensation will be initially

levied by the Engineer-in- Charge and the superintending Engineer comes into the picture only as some sort of revisional or appellate authority to whom the contractor appeals for redress. The compensation clause contains a complete machinery for determination of the compensation which can be claimed by the Government on the ground of delay on the part of the contractor in completing the contract, as per the time schedule agreed to between the parties. The decision of the Superintending Engineer, is in the nature of a considered decision which he has to arrive at after considering the various mitigating circumstances that may be pleaded by the contractor or his plea that he is not liable to pay compensation at all under this clause. The question regarding the amount of compensation livable has thereforee to be decided only by the Superintending Engineer and no one else.'

(16) Learned counsel for the claimant has argued that the Arbitrator has erred in rejecting the recovery on account of risk and cost of the petitioner as and when the work done was found defective. The Arbitrator has not given any reason as to why he rejected recovery of working done at the risk and cost of the contractor as such the award with respect to claim no.3 is bad in law and is liable to be set aside, so far as it rejects the recovery proposed by the respondent in the Final bill and order as it deals with the rejection of the counter-claim of the respondent. In reply to this, it has been submitted that since no such petition was received by the respondent before the Arbitrator, the respondent cannot be permitted to reagitate the issue before this Court because the Court cannot sit in appeal against the said award. In the reply it is mentioned that in the facts and circumstances no claim of the respondent with regard to the work executed, at the risk and cost could have been allowed. The contention of the respondent that action under Clause 2 of the agreement is not arbitrable is erroneous. The counsel has referred to Clause 10 (c) of the terms of the agreement.

(17) Learned counsel in the objection petition has averred that finding of the Arbitrator with respect to Claim No.4 is erroneous and error is apparent on the face of the record. By awarding claim amount of Rs.6115.00 the Arbitrator has acted contrary to Clause 10(c) of this agreement as this clause has no application where the delay, is on account of the contractor. Clause 10-C of the agreement

reads as under:- Clause 10C If during the progress of the works, the price of any material incorporated in the works, (not being material supplied from the Engineer-in-Charge's stores in accordance with Clause 10 hereof) and/or wages of labor increases as a direct result of the coming into force of any fresh law, or statutory role or order (but not due to any changes in sales tax) and such increase exceed ten percent of the price and/or wages prevailing at the time of receipt of the tender for the work, and contractor thereupon necessarily and properly pays in respect of the material (incorporated in the work) such increased price and/on in respect of labour engaged on the execution of the work such increased wages, then the amount of the contract shall accordingly be varied provided always that any increase so payable is not, in the opinion of the Superintending Engineer (whose decision shall be Final and binding) attributable to delay in the execution of the contract within the control of the contractor. Provided, however, no reimbursements shall be made if the increase is not more than 10% of the said prices/wages and if so the reimbursements shall be made only on the excess over 10% and provided further that any such increase shall not be payable if such increase has become operative after the contract of extended date of completion of the work in question.....'

(18) In reply to this allegation it is mentioned that Clause 10C of the agreement is applicable in the present case also. The objection raised in this para is frivolous. Moreover, the court ought not to sit as a court of appeal over the award so is to probe the mental process of the arbitrator.

(19) Learned counsel for the Objector has drawn my attention to the leading Mm of the Supreme Court in Associated Engineering Co. v. Government of Andhra Pradesh and another : [1991]2SCR924 . In this case the Supreme Court his dealt with a large number of Indian and English decided cases and arrived at the definite conclusion that:-

'THE Arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate in terms of the' contract. He has no power apart from what the parties have given him under the contract. If he has travelled outside the bounds of the contract, he has acted without jurisdiction. But

if be has remained inside the parameters of the contract and has construed the provisions of the contrct, his award cannot be interfered with unless he has given reasons for the award disclosing an error apparent on the face of it. A conscious disregard of the law or the provisions of the contract from which he has arrived his authority vitiates the award.'

(20) In this case the Supreme Court has further observed that the dispute as to the jurisdiction of the arbitrator is not a dispute within the award, but one which has to be decided outside the award. An umpire or arbitrator cannot widen his jurisdiction by deciding a question not referred to him by the parties or by deciding a question otherwise than in accordance with the contract. It is further observed that the Arbitrator in no circumstance can disregard the contract between the parties. He is, in fact, bound by it. He cannot travel outside its bounds. If he exceeded his jurisdiction by so doing, his award would be liable to be set aside.

(21) It is open to the court to see what dispute was submitted in order to determine whether the Arbitrator has exceeded his jurisdiction. If that is not clear from the award, it is open to the Court to have recourse to outside sources. The Court can look at the affidavits and pleadings of parties. The Court can also look at the agreement itself.

(22) The Supreme Court in this judgment has clarified the errors which are within and outside its jurisdiction. If the Arbitrator commits an error in the construction of the contract, that is an error within the jurisdiction. But if he travels outside the contract and deals with the matters not allotted 'to him, be commits a jurisdictional error. Such errors can be found out by looting into material outside the award. Extrinsic evidence is admissible in such cases because the dispute is not something which arises under or in relation to the contract or depend on the construction of the contract to be determined within the award. The dispute as to jurisdiction is a matter which is outside the award or outside whatever may be said about it in the award. The rationale of 'his rule is that, the nature of the dispute is something which has to be determined outside and independent of what appears in the award. Such jurisdictional errors need to be proved by evidence extrinsic to the award.

(23) The Objector has averred that Claim No.7 is erroneous and errors are apparent on the face of the record. The Arbitrator had no authority to grant interest from the date of the award as the Arbitrator is not a Court under Sec.34 Cpc and as such no authority to award interest from the date of the award and moreover no reasons have been given as to why he has awarded interest at the rate of 10 per cent from the date of the award till the date of payment.

(24) In reply to this learned counsel for the petitioner has mentioned that the Arbitrator had authority to grant any interest on the awarded amount from the date of the award. He was fully authorised and competent to award interest on the awarded amount from the date of award till its payment.

(25) The Delhi Development Authority has also filed evidence by way of affidavit of Shri C.Banerji, C.E.(S.E.Z.), Dda, Shahput Jat, A.G.V.C., New Delhi. In the affidavit the objections which are mentioned in the objection petition have been reiterated.

(26) The petitioner has also filed evidence by way of his own affidavit. The petitioner's affidavit is in the form of a counter-affidavit. All the averments mentioned in the reply to the objection petition have been reiterated in the counter-affidavit filed by the petitioner.

(27) Learned counsel has also drawn the attention of the Court to the full bench decision of Kerala High Court reported as Government of Kerala and another v. V.P.Jolly, : AIR1992 Ker187 (supra). In this Full Bench judgment the Court has relied upon earlier judgments of the Supreme Court, particularly, the judgment of the Supreme Court in Associated Engineering Co.'s case (supra). The Court observed:-

'IN the instant case the award challenged on ground of the arbitrator's alleged violation of the terms of the contract, or his alleged action in excess of his authority, such an attack cannot obviously be proved unless one is permitted to resort to the terms of the main contract, relating to the award of extra compensation or or extra rate. But in the case of a non-speaking award, one has to be confined to the award itself or to any document incorporated therein. If the

contract is not incorporated in the award, it is not permissible for the Court to look outside the award and refer to the terms of the contract. thereforee, the attack cannot succeed on the ground of error of law apparent on the face of the award, under Section 16(l)(c).'

The Court has also observed that:-

'EVEN non-speaking awards are liable to be set aside if the awards are contrary to the basic or rather obvious features of the contract or traverse beyond the obvious terms of such contracts and so long as such decisions can be arrived at without interpreting or construing the terms of the contract. The violation must be evident from a mere look at the terms of the contract.'

(28) I have heard counsel for the parties at length and examined various decisions cited before me. When the award is scrutinised in view of the settled position of law, certain conclusions are irresistible.

(29) THE' Arbitrator ought to have given a reasoned award envisaged under clause (25) of the Agreements The reasons so 'appended to the award are no reasons at all and are merely the conclusions which do not indicate the mental process of the Arbitrator. Claim NO.1

(30) The Arbitrator has not given reasons while directing refund of security deposit to the claimant with regard to claim no.1. The Arbitrator did not appreciate that the decision was lawfully done by the D.D.A. under the terms of the Agreement. Under clause 12, the D.D.A. was competent to change the specification of flooring and the contractor could not refuse to do the work. On the contrary, the contractor was bound under terms of clause 12 to do the work on changed specification. The award with regard to claim No.1 is accordingly set aside. Claim N0.2 And Counter Claim No. 1

(31) The findings of the Arbitrator regarding claim no.2 are against the agreement. The Arbitrator erroneously rejected the recoveries on account of the final recovery of steel and compensation levied under clause 2 of the agreement. The work was carried out at the risk and cost of the contractor and the work done at the risk and

cost of the petitioner through N.C. Shanna and reducing the reduction item of Rs-9,555.96 to Rs.3424.00 are clearly contrary to the terms of the agreement. Under clause 2 of the agreement, Superintending Engineer was given final authority to levy the compensation and in case the Superintending Engineer imposed compensation in writing, it became final between the parties and it is not open to adjudication by the Arbitrator under clause 25 of the agreement as it falls under the excepted category of the arbitration clause. By adjudicating upon the levy of compensation and rejecting compensation of Rs.77,357.00 , the Arbitrator acted beyond the scope of the reference. He had no authority to reject or reduce the recovery on account of compensation levied by the Superintending Engineer. He ought not to have touched the reduction item as it was covered under the excepted category. The Arbitrator has acted in contravention to clause 42 by not allowing the penal recovery on steel. The award with respect to claim no.2 and counter claim No.1 is accordingly set aside. Claim N0.4.

(32) The findings of the Arbitrator with respect to claim no.4 is erroneous and this error is apparent on the face of the record. The Arbitrator by awarding Rs.6150.00 has acted contrary to clause 10-C as this clause has no application where delay is on account of the contractor.

(33) The findings of the Arbitrator with regard to claims no.3, 5, 6 and 7 and counter claim no.2 are in consonance with the terms of the agreement and settled position of law. Claim no.7 deals with the aspect, whether the Arbitrator is competent to award interest for the period from the date of award to date of payment. In the recent judgment of the Supreme Court in Hindustan Construction Co. Ltd. v. State of Jammu & Kashmir, : AIR 1992 SC2192 , it has been held:-

'THE arbitrator is competent to-award interest for the period commencing with the date of award to the date of decree or date of realisation, whichever is earlier. This is also quite logical for, while award of interest for the period prior to an arbitrator entering upon the reference is a matter of substantive law, the grant of interest fo,r the post-award period is a matter of procedure. Section 34 of Code of Civil Procedure provides both for awarding of interest pendente lite as well as for the post-decree period and the principle of Section 34 has been held applicable to

proceedings before the arbitrator, though the section as such may not apply.'

(34) In the facts and circumstances of this case, the award of the Arbitrator is set aside with respect to claim no.1, 2 and 4 and counter claim no.1. The award to that extent is remitted back to the Arbitrator for reconsideration in accordance with the law and the terms of the agreement. The award with regard to claim no.3, 5, 6 and 7 and counter claim no.2 is made rule of the court. The Registry is directed to prepare a decree accordingly. In the facts and circumstances of this case, the parties are directed to bear their own costs.