

D.D.A. Vs. Foundengers P. Ltd.

D.D.A. Vs. Foundengers P. Ltd.

SooperKanoon Citation : sooperkanoon.com/686584

Court : Delhi

Decided On : Mar-17-2003

Reported in : 2003(2)ARBLR499(Delhi); 104(2003)DLT418; 2003(68)DRJ383; 2003(2)RAJ392

Judge : B.A. Khan and; R.S. Sodhi, JJ.

Appeal No. : FAO (OS) 375/2001

Appellant : D.D.A.

Respondent : Foundengers P. Ltd.

Advocate for Def. : Sandeep Sharma, Adv.

Advocate for Pet/Ap. : K.K. Buchar, Adv

Disposition : Appeal dismissed

Judgement :

Khan, J.

1. An award for Rs. 2 lacs or so passed in favor of respondent is hanging fire for the last about 14 years or more.

2. Appellant allotted the contract to respondent for construction of houses which was to commence on 9.10.1984 and was to be completed up to 7.2.1985. The

work was, however, completed 11 months late on 7.1.1986. Appellant then issued a letter of levy of compensation on 7.6.1988, after 29 months and intimated final bill to respondent on 19.7.1988. He reacted to this setting up some claims by communications dated 25.8.1988 and 28.11.1988 and eventually invoked arbitration on 7.1.1989 raising as many as 7 claims. He firstly complained of deduction of Rs. 57,545/- on account of compensation levied by Appellant's Superintending Engineer in terms of clause 2 of the agreement which was not opposed by appellant during arbitration proceedings. He finally succeeded in some claims and obtained award dated 15.11.1993.

3. When the award was filed for being made rule of the court. Appellant filed objections to this and opposed it mainly on two grounds:- (i) that respondent's claim was time barred and (ii) that levy of compensation of Rs. 57,000/- and odd fell within 'excepted matters' and was not arbitrable under clause 25 of the agreement. The arbitrator disallowed both pleas and so did learned Single Judge who went a step further to record that these were not seriously pressed in service before him. Hence this appeal.

4. Claiming that respondent's claim was time barred, appellant's counsel contended that respondent had to prefer his claim within 90 days from the date of receipt of intimation from Engineer In charge which he had done 45 days after expiry of prescribed period. The claim was liable to be rejected on this ground alone. It was also not arbitrable under clause 25 of the agreement which excluded all such matters from arbitration on which the decision of Superintending Engineer was final. He cited a DB judgment of this court in DDA Vs . Sudhir Brothers : 57(1995)DLT474 to support this.

5. Respondent's counsel, on the contrary, justified the impugned order and submitted that respondent's claim on account of levy of compensation could not fall within 'excepted matters' under clause 25 as Superintending Engineer had failed to exhaust all the requirements and options provided in the clause. He referred to a judgment of this court in Bhartiya Construction Company Limited v. D.D.A, 1997 (2) Arb.L.R. 369 in this regard.

6. It becomes necessary to extract the relevant clauses of the agreement to appreciate the rival contentions:-

'Clause 25.

Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs drawings and instruction herein before mentioned and as to the quality of workmanship or materials used on the work or as to any other question claim, right matter or thing whatsoever, in any way arising out of or relating to the contract designs, drawings, specifications, estimates, instruction, orders or these conditions or otherwise concerning the works or the execution of 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 is also a term of the contract that if the contractor(s) does/do not make any demand for arbitration in respect of any claim(s) in writing within 90 days of receiving the intimation from the Engineer-in-charge that the Bill is ready for payment, the claim(s) of the contractor(s) will be deemed to have been waived and absolutely barred and the Delhi Development Authority shall be discharged and released of a liabilities under the contract in respect of those claims.

'Clause 2':-

The time allowed for carrying out the work as entered in the tender shall be strictly observed by the contractor and shall be deemed to be of the essence of the contract on the part of the contractor and shall be reckoned from the Tenth Day after the date on which the order to commence the work is issued to contractor. The work shall throughout the stipulated period of the contract be proceeded with all due diligence and the contractor shall pay as compensation an amount equal to one percent, or such smaller amount as the Superintending Engineer Delhi Development Authority (whose decision in writing shall be final) may decide on the amount of the estimated cost of the whole work as shown in the tender, for every day that the work remains uncommenced or unfinished, after the proper dates.

And further, to ensure good progress during the execution of the work, the contractor shall be bound in all cases in which the time allowed for any work exceeds, one month (save for special jobs) to complete one-eighth of the whole of the work before one-fourth of the whole time allowed under the contract has elapsed, and three-fourth of the work, before three-fourth of such time has elapsed. However, for special job, if a time schedule has been submitted by the contractor and the same has been accepted by the Engineer-in-Charge, the contractor shall comply with the said time-schedule. In the event of the contractor failing to comply with this condition, he shall be liable to pay as compensation an amount equal to one percent or such small amount as the Superintending Engineer Delhi Development Authority (whose decision in writing shall be final) may decide on the said estimated cost of the whole work for every day that the due quantity of work remains incomplete; provided always that the entire amount of compensation to be paid under the provision of this clause shall not exceed ten percent, on the estimated cost of the work as shown in the tender.'

7. Dealing with the limitation plea first, relevant clause undoubtedly stipulates invocation of arbitration by making a claim in writing within 90 days from receipt of intimation from Engineer-in-charge that the bill was ready for payment. Though this intimation is said to have been given to respondent on 19.7.1988, he had raised counter claims by communication dated 25.8.1988 and 28.11.1988 and had asked for arbitration on 7.1.1989. In the circumstances, it becomes sufficient to hold that he had failed to adhere to the prescribed deadline. In any case, Appellant's plea in this regard stands over-ruled by two forums below so much so that it was not also seriously pressed before the learned Single Judge. therefore, for whipping it up at this stage to ward off respondent's claim which he had been pursuing for the last 14 years or so deserves outright rejection.

8. We are also not impressed by the contention that levy of compensation of Rs. 57,000/- and odd on respondent in terms of clause 2 of the agreement fell within 'excepted matters' under clause 25, even if it was accepted that it excludes such matter from arbitration on which Superintending Engineer's decision was final. Because the compensation livable for late completion of work was dependent on number of factors which provided options to the Engineer concerned in the matter.

He had the discretion to explore and take recourse to any one of such requirements/options and then pass final orders for levy of compensation. It would be only then that his decision on this would become final and binding perhaps bringing it within the 'excepted matters' under clause 25. This is apart from the view taken by the Ld. Single Judge that the levy of compensation without a show cause notice to respondent was not sustainable.

9. Viewed thus, the Appellant's plea that Respondent's claim was not arbitrable was untenable and represented an attempt to defeat his claim which has remained pending determination for years.

10. For all this, we find no merit in this appeal which is dismissed.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com