K.C. Goyal Vs. Delhi Development Authority and ors.

K.C. Goyal Vs. Delhi Development Authority and ors.

SooperKanoon Citation : sooperkanoon.com/686643

Court : Delhi

Decided On : Jul-19-1993

Reported in : 1993IIIAD(Delhi)205; 1994(1)ARBLR179(Delhi); 53(1994)DLT141

Judge : Sat Pal, J.

Acts : Vocational Study v. S.S. Jaitely, AIR 1987 (Del) 387; Vishwanath Sood v. Union of Indian, AIR 1989 SC 952; Bharat Furnishing Co. v. Delhi Developent Authority 1991 4 Delhi Lawyer 355; Oriental Structural Engineers v. Delhi Developent Authority, 1993 49 DLT 514; G.D. Rathi Steels Pvt. Ltd. v. Delhi Developent Authority, 1992 3 DRJ 403

Appeal No. : Interim Application No. 7184 of 1988 and Suit No. 684A of 1988

Appellant : K.C. Goyal

Respondent : Delhi Development Authority and ors.

Advocate for Pet/Ap. : Sanjiv Malhotra and; A. Salwan, Advs

Judgement :

Sat Pal, J.

(1) The petitioner(hereinafter referred to as 'the contractor) was awarded the work of cartage of Bitumen by mechanical transport from Mathura Refinery to various D.D.A. stores within Union Territory of Delhi by the Delhi Development

Authority(hereinafter referred to as D.D.A.). Disputes and difference between the contractor and D.D.A. were referred to the arbitration by Shri Banarasi Dass (hereinafter referred to as the Arbitrator) vide letter of reference No. E.M.2(29)85/Arbn/3988-91 dated 25th April, 1985. The arbitrator gave his award on 24th February, 1988.

(2) On a petition filed by the contractor under Sections 14, 17 and 29 of the Indian Arbitration Act (hereinafter referred to as the Act), notice was issued to the Arbitrator for filing the award. Thereafter respondent No. 2 filed his award dated 24th February, 1988.

(3) Notice of filing of the award was given to the parties. The D.D.A.has filed objections against the award being is 7184/88 which have been opposed by the Contractor.

(4) The objections of the D.D.A. having been opposed, the following issues were framed:-

1. Whether the award dated 24.2.88 should be set aside for the reasons stated in the objection petition?

2.Relief.

(5) As directed by this Court, both the parties have filed affidavit in support of and opposition to the objections against the award. I have heard the learned Counsel for the parties. The D.D.A. has filed objections against claims No. 1, 2, 3, 6 and counter-claim Nos.l, 2, 3 and 4. Ms. Salwan, the learned Counsel appearing on behalf of the D.D.A., however, submitted that she does not press the objections against claim No. 6 and counter-claim No. 4. Accordingly, the objections with regard to claim No. 6 and counter-claim No. 4 are dismissed. Claims

(6) Against claim No. 1 a sum of Rs.14,820.00 was claimed by the Contractor as part rates. Against this claim, the arbitrator awarded a sum of Rs.l0,268/24p. In support of this finding, the reasons given by the Arbitrator are that the deduction made to the tune of Rs.l0,268/24p by the D.D.A. is unjustified in terms of the agreement as the D.D.A has failed to substantiate the deduction with cogent

evidence.

(7) Ms. Salwan, the learned Counsel for the Dda relying on Clause 2(g) of the Special Conditions of Agreement, submitted that in terms of the aforesaid clause the cartage is inclusive of charges on account of loading and unloading of the contractor's vehicles carting the materials. She further submitted that since the job of loading at Mathura Refinery was not done by the contractor, the deduction of Rs.10,268/24 by the D.D.A.was justified. I, however, do not find any merit in this contention. While disallowing this deduction, the learned Arbitrator has stated that the contention of the D.D.A. that they had paid loading charges to the Mathura Refinery is incorrect as they have failed to substantiate the deduction with cogent evidence. The learned Counsel for the D.D.A. did not bring to my notice any evidence that the said amount of Rs.l0,268/24p was paid to Mathura Refinery as loading charges. From this it is clear that the Arbitrator has given cogent reasons for disallowing this deduction. No error of law appears on the face of the award in respect of Claim No. 1. Accordingly the objection in respect of Claim No. 1 is dismissed.

(8) As regards claim No. 2 and 3, D.D.A. had admitted the amount awarded by the Arbitrator in respect of these two claims subject to admissibility of the counter claims. Since counter claims are dealt-with separately, there is no valid objection against these claims. Accordingly, the objections in respect of claims 2 & 3 are dismissed. Counter Claims

(9) As regards counter-claim No. 1, D.D.A. had claimed a sum of Rs. 46,431.00 towards forfeiture of security deposits under Clause 3 of the agreement. The Arbitrator has rejected this claim of D.D.A. While rejecting this claim, the learned Arbitrator has given the following reasons :-

(I)Respondents failed in making available the agreement quantity of 7000 Mt Bitumen to be carted by the claimants from Mathura Refinery to Dda stores in time so as to enable the claimants to complete the work within stipulated contract period.

(II)Respondents failed in releasing the payments to the claimants in time so as to enable the claimants to complete the work within stipulated contract period.

(III)After expiry of contract period stipulated in the agreement, no time was mutually agreed between the parties for completion of the balance work. Thus, the time was not kept as essence of the contract. Since, the rescission of contract by respondents is unjustified, there is no justification in forfeiting the security deposit because of risk and cost action which is only way of consequential relief arising out after rescission of contract under Clause3 of the agreement. Accordingly, I disallow the counter claim.

(10) Ms. Salwan submitted that the reasons given by the Arbitrator are not valid. She submitted that as against agreement quantity of 7000 M.T. Bitumen, D.D.A had paid price for 3200 M.T. to Mathura Refinery within the stipulated period of contract but the contractor could hardly cart 2524.694 Mt of Bitumen during the aforesaid stipulated period. She, thereforee, contended that since the contractor could not even cart 3200 Mt within stipulated period, he could not have carted the entire 7000 MT.

(11) I do not find any merit in the submissions made by the learned Counsel for the D.D.A. From the agreement it is evident that the same was valid from 4.9.83 to 3.9.84. It is also an admitted fact that during the stipulated period, D.D.A had deposited the amount with the Mathura Refinery for 3200 M.T. against the quantity of 7000 M.T. mentioned in the agreement. It is also an admitted fact that the D.D.A failed in releasing the payment of the claimant in time so as to enable the claimant to complete the work within the stipulated contract period. In view of these facts, the reasons given by the Arbitrator cannot be said to be arbitrary. In this connection, I may refer to a Division Bench judgment of this Court in the case of College of Vocational Study v. S.S. Jaitely, Air 1987, Del 134. In this case it was held that the 'arbitrator is entitled to decide rightly or wrongly but if an error of law appears on the face of the award then the Court can interfere and set aside the award.' Since no error of law appears on the face of the award, the objections in respect of counter claim No. 1 are dismissed.

(12) As regards counter claim No. 2, D.D.A. had claimed a sum of Rs. 77,861 .00 towards penalty under Clause 2 of the agreement and this claim has been rejected by the learned Arbitrator. The aforesaid penalty was levied by the D.D.A. on the ground that the contractor did not complete the work in time. The learned Arbitrator, however, held that the work could not be completed within the stipulated contract period because of fault on the part of the D.D.A. itself and he has relied on the same three reasons given by him in respect of counter-claim No. 1.

(13) Ms. Salwan, learned Counsel appearing on behalf of the D.D.A., however, submitted that in terms of Clause 2 of the contract, the time allowed for carrying out the work as entered in the tender is to be strictly observed by the contractor and shall be deemed to be the essence of the contract on the part of the contractor. She submitted that in the event of the contractor failing to comply with this condition, he is liable to pay as compensation an amount equal to one per cent or such smaller amount as the Chief Engineer of the D.D.A. may decide and the decision of the Chief Engineer is final. The learned Counsel, thereforee, contented that in terms of Clause 2 read with Clause 25 the learned Arbitrator had no jurisdiction to adjudicate the said counter claim. In support of her contention, the learned Counsel placed reliance in the case of Vishwanath Sood v. U.O.I., : [1989]1SCR288 and two judgments of this Court reported in the case of Bharat FurnishingCo. v. Delhi Development Authority 1991 (4) Del Law 355 and in the case of M/s. Oriental Structural Engineers v. D.D.A. (1993) 94 Dlt 514.

(14) On the other hand, Mr. Malhotra, the learned Counsel appearing on behalf of the contractor submitted that in the present case Clause 2 of the contract was not applicable inasmuch as the time was not the essence of the contract. He further submitted that in terms of the contract the total supply to be made by the D.D.A. was 7000 Mt Bitumen against which D.D.A. could arrange only 3200 Mt within the stipulated period. He further submitted that D.D.A. unilaterally even extended the time by six months. He, thereforee, contended that the reasons given by the learned Arbitrator for rejecting this counter claim were legal and justified. In support of his contention, he placed reliance on a decision of this Court in the case of Sudhir Brothers v. D.D.A. in Suit No. 1522-A/87 decided on 21.12.90.

(15) I have given my thoughtful consideration to the submissions made by the learned Counsel for the parties and I find that in the present case time was not the essence of the contract as D.D.A. could not make available the entire quantity of 7000 Mt Bitumen to the contractor for carting within the stipulated period and further D.D.A. unilaterally extended the period. In view of these facts Clause 2 of the contract became inoperative. Clause 2 would be applicable only when time was the essence of the contract. In the present case since total quantity of 7000 Mt of Bitumen was not made available for carting within the stipulated period, the question of completing the job by the contractor within that period did not arise. In view of these facts, I do not find any fault with the reasons given by the Arbitrator.

(16) The judgments cited by the learned Counsel for the D.D.A. are not relevant to the facts of the present case as in all those cases Clause 2 of the contract was applicable whereas in the present case, as stated hereinabove. Clause 2 of the contract was not applicable. The view I have taken is supported by an another judgment of this Court in the case of G.D.Rathi Steels Pvt. Ltd. v. D.D.A., 1992(3)DRJ 403. In that case also time was not maintained as of the essence of the contract and Clause 2 was, thereforee, held to be not applicable. The objections in respect of counter claim No. 2 are, thereforee, dismissed.

(17) As regards counter claim No. 3, D.D.A had claimed a sum of Rs. 1,00,000.00 under Clause 3 of the agreement. In the written submissions filed before the Arbitrator, D.D.A reduced this counter claim to Rs. 84922.77. This claim was rejected by the Arbitrator on the ground that the work awarded to the contractor could not be completed because of non-fulfilment of obligations in respect of making available full quantity of bitumen by the D.D.A.

(18) MS.SALWAN,LEARNEDCOUNSELFORTHE D.D.A. reiterated same submissions made by her in respect of counter claim No. 1 which was also made by the D.D.A. under Clause 3 of the agreement. Since I have found no merit in the submission made by the learned Counsel in respect of counter claim No. 1, the objections of D.D.A in respect of counter-claim No. 3 are also dismissed for the reasons given in respect of counter claim No. 1.

(19) In view of the above discussion, the objections filed by the D.D.A. against the award are dismissed and I direct that the award be made rule of the Court. Parties are left to bear their own costs.