

Shanti Devi and Others Vs. Delhi Development Authority and Others

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Court : Delhi

Decided On : Nov-24-1998

Reported in : 77(1999)DLT182; 1999(48)DRJ344

Judge : Dr. M.K. Sharma, J.

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

Appeal No. : I.A. NO. 8413/1994 & Suit No. 3834/1991

Appellant : Shanti Devi and Others

Respondent : Delhi Development Authority and Others

Advocate for Def. : Mr. V.K. Sharma, Adv.

Advocate for Pet/Ap. : Mr. Ravi Gupta, Adv

Judgement :

ORDER

Dr. M.K. Sharma, J.

1. The predecessor-in-interest of the petitioners entered into a contract with the respondent No.1 for execution of the work of construction of 900 SFS houses at Sarita Vihar. During the execution of the aforesaid contract disputes arose between the parties and accordingly arbitration agreement contained in the said

contract was invoked. The respondent No.1 appointed respondent No. 2 as the sole arbitrator to adjudicate upon and decide the disputes arising between the parties. During the aforesaid proceedings before the arbitrator the predecessor-in-interest Shri O.P. Sharma expired on 6.2.1991 and the petitioners were brought on record. The arbitrator, after hearing the parties and after receiving evidence made and published his award on 15.11.1991. The said award was filed in this court, on receipt of which objections have been filed by the respondent No.1. By this common judgment and order I propose to dispose of the said objections filed by respondent No.1 as also the suit pending in this court arising out of application filed by the petitioners for filing the award in this court.

2. The award passed by the arbitrator is in respect of claims No.1, 2 & 3 of the petitioners.

CLAIM NO.1:

3. This claim relates to a claim of petitioners claiming an amount of Rs.3.51 lacs for deprivation of profit/loss because of unjustified action taken by the respondent No.1 in curtailing the scope of the work and awarding it to another agency. In order to appreciate the contents of the aforesaid claim it would be necessary to provide certain background facts giving rise to the aforesaid claim of the petitioners. The contract awarded to the predecessor-in-interest of the petitioners was for construction of 18 blocks. Subsequently however, by a letter dated 10.8.1988 the respondent No.1 curtailed the work and restricted the scope of work from 18 blocks to 14 blocks. According to respondent No.1 the aforesaid action of curtailing the construction work to 14 blocks had to be taken in view of the stay order issued by Court. It was also stated that the said action of curtailing the work to 14 blocks is justified in terms of clause 13 of the agreement which provides that the respondent could curtail the scope of the work for which the contractor shall not be entitled to any compensation. A notice dated 10.8.1998 (Ex.C-2) as required under clause 13 of the agreement was also served on the predecessor-in-interest of the petitioners. The petitioner challenged the aforesaid action of curtailing the work from 18 blocks to 14 blocks and also submitted that provisions of clause 13 of the agreement do not apply to the facts and circumstances of the

present case inasmuch as such provision would apply only when the work was not required, whereas in the present case the work of construction of 4 blocks was required and was got done by respondent No.1 through another agency at later stage.

4. As against above, the counsel appearing for respondent No.1 submitted that the predecessor-in-interest of the petitioners was also asked to submit his tender as against the aforesaid work got done later on. But he did not choose to submit any tender and he insisted that he should be allowed to do the work at the rate fixed in the original contract but was not agreeable to do the work at a lesser rate at which the contract was sought to be awarded to another agency.

5. The aforesaid contentions were also raised before the arbitrator. The arbitrator, after recording the submissions of the parties held that the restriction of the scope of the work in the present case was not justified especially in view of the fact that when respondent No.1 themselves assured even after expiry of the contract period that the site for the remaining 4 blocks would be handed over to the claimant as soon as it is handed over to the Engineer Division by the Land Department/DDA. The arbitrator held that since respondent No.1 invited tenders for the work unjustifiably withdrawn in spite of the fact that the claimant had been assuring that he was agreeable to execute further works at the same rate permissible under the said contract, respondent No.1 were not justified in entering into another contract for the work unjustifiably withdrawn. The arbitrator, accordingly, allowed a sum of Rs.1,89,600/- in favor of the claimant on account of damages. Clause 13 of the agreement which is relevant for the purpose of deciding the contentions raised in the present case is extracted below:-

CLAUSE 13.

If at any time after the commencement of the work the Authority shall for any reason whatsoever not require the whole thereof as specified in the tender to be carried out, the Engineer-in-Charge shall give notice in writing of the fact to the contractor who shall have no claim to any payment of compensation whatsoever on account of any profit or advantage which he might have derived from the execution of the work in full, but he did not derive in consequence of the full

amount of the work not having been carried out, neither shall he have any claim for compensation by reason of any alterations having been made in the original specifications, drawings, designs and instructions which shall involve any curtailment of the work as originally contemplated.

Provided that the contractor shall be paid the charges on the cartage only of materials actually and bona fide brought to the site of the work by the contractors and rendered surplus as a result of the abandonment or curtailment of the work or any portion thereof and then taken back by the contractor provided however, that the Engineer-in-Charge shall have in all such cases the option of taking over all or any such materials, at their purchase price or at local current rates whichever may be less. In the case of such stores having been issued from D.D.A. Stores and returned by Contractor to D.D.A. Stores, credit shall be given to him by the Engineer-in-Charge at rates not exceeding those at which they were originally issued to him, after taking into consideration and deduction for claims on account of any deterioration or damage while in the custody of the contractor and in this respect the decision of the Engineer-in-Charge shall be final.

6. A notice was also issued by the respondent to the predecessor-in-interest of the petitioner on 10.8.1988 informing him that the scope of the work under the agreement although was for 18 blocks, the scope of the work for 4 blocks due to stay order of the land had been curtailed and restricted to 14 blocks and completed, and thus notice under clause 13 of the agreement was given to the claimant informing him that the scope of the work stands curtailed to 14 blocks completed and that the claimant would not be entitled to any claim or compensation on account of any profit or advantage which he might derive from the execution of the work in full.

The contention of the learned counsel for the petitioners is that the provisions of clause 13 would apply only when the whole work stipulated in the contract is not required to be carried out. In the present case, according to him the entire work was required to be done. But so far 4 blocks were concerned the same could not be carried out immediately because of the stay order and thus the respondent No.1 could not have applied the provisions of clause 13 to the facts and

circumstances of the present case. The arbitrator also held that the said provisions are not applicable to the facts of the present case and that the respondent No.1 misapplied the said provisions.

7. A careful perusal of the language of clause 13 would show that the said provision is intended to give absolute power to respondent No.1 to curtail the work as specified in the tender for any reason whatsoever and at any point of time after the commencement of the work. Admittedly, the notice as required under clause 13 was issued by respondent No.1 to the claimant after the commencement of the work. The respondent No.1 is thus empowered for any reason whatsoever to decide that it does not require the whole of the work as specified in the tender to be carried out and withdraw and/or curtail such part of the work. The only restriction imposed in exercise of that power is to issue a notice by respondent No.1 to the contractor which in this case stands fulfilled and complied with. In the face of the aforesaid express stipulation between the parties as provided for under clause 13 the claimant contractor could not have claimed any amount on account of any loss of profit and/or compensation whatsoever on account of any profit or advantage which he might have derived on execution of the full work. The aforesaid stipulation clearly empowers the respondent No.1 to withdraw any part of the work contracted to be done on any reason and further provides that the contractor cannot have any claim to any payment of compensation whatsoever on account of any profit or advantage which he might have otherwise derived from the execution of the work in full which he did not derive on account of the consequence of the work not having been carried out. In this connection reference may be made to a decision of the Supreme Court in the New India Civil Erectors (P) Ltd. v. Oil & Natural Gas Corporation; reported in JT 1997 (2) SC 633. In the said case it was held that if the arbitrators act contrary to the specific stipulation/condition contained in the agreement between the parties the award is required to be set aside. In the said decision the Supreme Court also referred to another decision of the Supreme Court in Sudershan Trading Company Vs . Government of Kerala; reported in : [1989]1SCR665 , wherein it was held that if the parties set limits to action by the arbitrator, then the arbitrator had to follow the limits set for him and the court can find that he exceeded his jurisdiction on proof of such excess. In the present case by agreeing to the provisions of clause 13 the

parties set limits that even in case of withdrawal and/or curtailment of a part of the work from the whole, no compensation could be payable to the contractor, and thus the arbitrator was required to follow the aforesaid limits and if the arbitrator acts in excess of his jurisdiction in holding that the contractor is entitled to compensation he acts in excess of his jurisdiction and then the award is required to be set aside.

8. In my considered opinion the ratio of both the aforesaid Supreme Court decisions are squarely applicable to the facts and circumstances of the present case. The parties agreed that even if there be curtailment of any work from what was agreed upon in the contract no compensation could be claimed and/or be paid to the contractor on the ground that he has been deprived of such profit. In view of such express stipulation in the contract an arbitrator could not have held that the respondent misapplied the aforesaid provision and awarded damages to the petitioner for such curtailment for deprivation of profit. In doing so the arbitrator expressly exceeded his jurisdiction and thus the aforesaid award given by the arbitrator against claim No.1 is required to be set aside, which I hereby do.

CLAIM NO. 2:

9. This claim relates to payment of interest as the arbitrator awarded the claim for an amount of Rs.1,89,600/-. He also awarded interest at 12% on the amount in claim No.2. The award passed by the arbitrator as against Claim No.1 having been set aside the award of the Arbitrator as against claim No. 2 has to be set aside and the same is accordingly, set aside.

CLAIM NO. 3:

10. This claim related to payment of cost of arbitration proceedings which was awarded by the arbitrator for an amount of Rs.4,000/-. As the award of the arbitrator has been set aside by me this award is also required to be set aside, which I hereby do.

11. The objections of the respondent thus, stand allowed. The award of the arbitrator is set aside. The suit as also the objections stand disposed of in terms of

the aforesaid order. There shall be no order as to costs.

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