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Court : Delhi

Decided On : Jul-16-1997

Reported in : 1997IVAD(Delhi)899; 67(1997)DLT900; 1998(44)DRJ417

Judge : C.M. Nayar, J.

Appeal No. : Suit No. S. 1709A of 1991

Appellant : Krishna Construction Co.

Respondent : Delhi Development Authority

Advocate for Def. : Ms. Anusuya Salwan, Adv.

Advocate for Pet/Ap. : Sh. Harish Malhotra, Adv

Judgement :

C.M. Nayar, J.

1. The present petition is moved by the petitioner under Section 14 of the Arbitration Act, 1940 to file the original Award dated 26th April, 1991 together with other proceedings pertaining to Agreement No. 31/EE/DDIV/79-80 in respect of work titled 'C/o 612 MIG houses at Bodella, Pocket CC-1 including internal development SH : C/o. 264 Houses, Group IV'.

2. The petitioner was awarded work on 23rd February, 1980 by respondent No. 1 and Agreement Bearing No. 31/EE/DDIV/79-80 was entered into between the parties. The completion of the work as alleged in the petition was carried on beyond the stipulated period due to delays, breaches and delayed supply of materials by respondent No. 1. The work was completed in May 1982. The agreement entered into between the parties contained an arbitration clause (Clause 25) for reference of all the disputes to an Arbitrator to be appointed by the Engineering Member of respondent Delhi Development Authority. The levy of compensation for delayed work was governed by the provisions of Clause 2. Clause 25 of the Agreement may be reproduced as follows :

'Clause 25.

Settlement of disputes by Arbitration

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 questions 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 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 he had to deal with the matters to which the contract relate and that in the course of his duties as Delhi Development Authority employees he had expressed view on all or any of the matters in dispute of 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 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 (Rupees Fifty Thousand) and above, the arbitrator will give reason 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 proceeding 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 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 all liabilities under the contract in respect of those claims.'

The Arbitrator in terms of the Clause referred above was appointed vide order dated 28th January, 1985 to decide the disputes in respect of the above mentioned contract. The following claims and counter claims were referred to the Arbitrator.

'CLAIM No. 1 : Claim for Rs. 2,87,717.16 towards work measured less than actually executed, rates paid less than justified as per agreement and reduction in payment for increase in labour wages under Clause 10(c) of agreement.

CLAIM No. 2 : Claim for Rs. 48,175.16 due to non-measurement/payment of work executed against agreement rates.

CLAIM No. 3 : Claim for Rs. 63,007.37 due to non-measurement of work executed against extra against extra items.

CLAIM No. 4 : Rs. 12,706.86 claimed for non-payment of increase in rates of bricks and brick tiles under Clause 10(c).

CLAIM No. 5 : Claim for Rs. 1,05,878.83 on account of excess/wrongful recovery.

CLAIM No. 6 : Claim for Rs. 12,123.64 claimed on account of non-payment due to increase in labour wages on certain items of work.

CLAIM No. 7 : Claim for Rs. 17,023.56 on account of non-payment of increase in labour wages w.e.f. 1-3-982.

CLAIM No. 8 : Claim for Rs. 69,934/- on account of refund of rebate recovered by the respondent wrongfully and illegally.

CLAIM No. 9 : Claim for Rs. 96,614.61 on account of maintenance of house after expiry of liability period.

CLAIM No. 10 : Claim for Rs. 7,738.97 on account of increase in rate of bitumen.

CLAIM No. 11 : 18% pendente lite interest.

CLAIM No. 12 : Claim for Rs. 3,13,412/- due to increase in rates of material and labour after stipulated date of completion.

CLAIM No. 13 : Claim for Rs. 14,76,098.13 towards compensation due to alleged hinderance on the part of the Department resulting in loss of progress due to capital turnover, loss due to loss of profit, excess expenses on machines, tools and plants.

CLAIM No. 14 : Claim for release of bank guarantees amounting to Rs. One lakh.'

The counter claim and additional counter claims which were referred by respondent-DDA read as follows :

'COUNTER CLAIM No. 1 : Respondent claim Rs. 1,92,710.68 as per the final bill.

ADDITIONAL COUNTER CLAIM No. 1 : Respondent claims Rs. 55,362.02 towards compensation levied by the competent authority under Clause 2 of the

agreement.

ADDITIONAL COUNTER CLAIM No. 2 : Respondent's claim for Rs. 2,36,032/- towards recovery on account of certain items of work, recovery on account of certain items of work left incomplete by the claimant and also certain items which were not executed as per specification.'

The amounts claimed by respondent DDA towards recoveries have been referred to in the following manner :

'The respondent has proposed the following recoveries : (1) Deduction item statement No. 1 2,38,725 (2) Deduction item statement No. 2 55,704 (3) Rate of GI Pipe 20 mm size wrongly paid in final bill 10,524 (4) Rate of brass ferrule wrongly paid in final bill 2,577 (5) Item of GI Pipe wrongly paid 2,809 ---------- 3,10,339Less : recovered in the final bill 1,00,000 -------------Balance to be recovered 2,10,339.00'

While dealing with Claim No. 1 the Arbitrator referred to the evidence and material on record and disposed of the same in the manner as indicated in the Award after perusal of documents and the Commissioner's report. In respect of Claim No. 2 the material and evidence on record was duly examined and claimant was held entitled to a sum of Rs. 14,298/-. Similarly cogent reasoning has been assigned while dealing with Claim Nos. 3, 4, 5 and 6 as indicated from the reading of the Award. Claim No. 7 was rejected as it was held that the delay in completion of work was partly on account of respondent and partly on account of the claimant. Claim No. 8 was upheld only to the extent of Rs. 44,290/- on account of refund of rebate recovered by the respondent. Claim No. 9 was rejected. Claim No. 10 was allowed to the extent of Rs. 6,390/- towards increase in rate of bitumen. Interest was awarded under Claim No. 11 at the rate of 10% from the date of Award to the date of payment or date of decree whichever is earlier. Claim Nos. 12 and 13 were rejected and there is no serious challenge to the same which has been agitated in this petition or at the time of hearing. Claim No. 14 was dealt with on the basis that since the bank guarantees had lapsed they had to be returned and no recover, was held due from the claimant.

4. Counter Claim No. 1 was allowed to the extent of Rs. 33,692/-. This was based on appreciation of evidence and due consideration of figures as referred to in the Award and no ground has been made out to disallow the amount already granted by the Arbitrator.

5. The Additional Counter Claim No. 2 for Rs. 2,36,032/- towards recovery on account of certain items of work left incomplete by the claimant was dealt with by the Arbitrator and an Award in the sum of Rs. 1,14,073.08 was held justified on the basis of evidence. This is based on cogent grounds and no reasons have been assigned by the petitioner to hold otherwise.

6. Now the only contest which has been made is with regard to the Additional Counter Claim No. 1 relating to compensation of a sum of Rs. 55,362.02 levied by respondent-DDA under Clause 2 of the Agreement. Clause 2 of the Agreement may be reproduced as follows :

'CLAUSE 2

Compensation Delay

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-forth of the whole time allowed under the contract has elapsed; three-eighth of the work, before one half of such time has elapsed, and three-forth of the

work before three-forth of such time has elapsed. However, for special jabs 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 liable to pay as compensation an amount equal to one per cent or such smaller 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 provisions of this Clause shall not exceed ten per cent, on the estimated cost of the work as shown in the tender.'

The learned counsel for the respondent has contended that the point arising herein is duly covered by the judgment of the Supreme Court as reported in Vishwanath Sood v. Union of India and another : [1989]1SCR288 . Similar clause in that case stipulating compensation to be paid by the Contractor for delay was examined and decision of Superintending Engineer on amount of compensation was held as final and the said plea could not, thereforee, be referred to arbitration. Paragraph 9 of the judgment reads as under :

'9. The Division Bench has construed the expression in Clause 2 in parenthesis that 'the Superintending Engineer's decision shall be final' as referring only to a finality qua the department, in other words, that it only constitutes a declaration that no officer in the department can determine the quantification and that the quantum of compensation levied by the Superintending Engineer shall not be changed without the approval of the Government. After referring to certain judicial decisions regarding the meaning of the word 'final' in various statutes, the Division Bench concluded that the finality cannot be construed as excluding the jurisdiction of the arbitrator under Clause 25. We are unable to accept this view. Clause 25 which is the arbitration clause starts with an opening phrase excluding certain matters and disputes from arbitration and these are matters or disputes in respect of which provision has been made elsewhere or otherwise in the contract. These words in our opinion can have reference only to provisions such as the one in parenthesis in Clause 2 by which certain types of determinations are left to the

administrative authorities concerned. If that be not so, the words 'except where otherwise provided in the contract' would become meaningless. We are thereforee, inclined to hold that the opening part of Clause 25 clearly excludes matters like those mentioned in Clause 2 in respect of which any dispute is left to be decided by a higher official of the Department. Our conclusion, thereforee, is that the question of awarding compensation under clause 2 is outside the purview of the arbitrator and that the compensation, determined under Clause 2 either by the Engineer-in-charge or on further reference by the Superintending Engineer will not be capable of being called in question before the arbitrator.

The above said judgment was referred to by the Division Bench of this Court in the case reported as D.D.A. v. Sudhir Brothers 1995(2) Arb. LR 207, read as follows :

'4. Our attention has been drawn to the arbitration clause and also the relevant clause which relates to exclusion of certain matters from the purview of arbitration. The relevant clause 2 in the arbitration agreement deals with the question of compensation and directs that the concerned engineer should decide this question and his decision is final. The arbitration clause opens with the words 'Unless otherwise provided'. In view of this language, it is obvious from the decision of the Supreme Court in Vishwanath Sood v. Union of India and another (supra), that the Arbitrator could not have gone into the matter, the Delhi Development Authority ought not to have requested the Arbitrator to include the said amount in the arbitration award. We are told by the counsel for the appellant/Delhi Development Authority the Arbitrator was in fact informed that he could not go into the matter on merits. In any event, the Delhi Development Authority committed a blunder in requesting. Arbitrator to formally include the above said amount as part of the award. Taking advantage of the said request, the contractor argued the question of levy on merits and obtained a decision from the Arbitrator in his favour.

5. We, thereforee, find that entire procedure adopted by both the parties was totally unwarranted. If the D.D.A. considered that it was entitled to the recovery of Rs. 5,69,473/- outside the arbitration, it could have taken such steps as it thought necessary instead of asking the Arbitrator to include the said amount in the award. The contractor was also wrong in taking advantage of the same and asking the

Arbitrator to give a finding on the merits of the claim. The Arbitrator acted totally without jurisdiction in going into the said question and deleting the said item of counter claim for Rs. 5,69,473/- and holding that the contractor not liable for payment of compensation. That was not within the power of the Arbitrator. In view of the said unfortunate events, we have no option but to set aside that part of the award of the Arbitrator wherein he has gone into the merits of the decision of the Superintending Engineer and had come to the conclusion that the sum of Rs. 4,69,743/- was not payable by the contract. The validity of the levy of compensation in thereforee taken out from the award.

6. It will, thereforee, be for the D.D.A. to seek to recover the said amount of Rs. 5,69,743/- in whatever manner it is open to it and in case any such proceedings are taken, it will be open to the contractor to raise all defenses that may be open to him in law to contend that the levy is bad. In case, the D.D.A. seeks to recover the said amount of compensation from the contractor it will be open to the contractor to file a suit and raise all such contentions as he may deem fit. We make it clear that the question of limitation will not be raised by either of the parties, in view of the above unfortunate procedure adopted by both parties.'

In view of the settled position of law it is held that the validity of levy of compensation under Clause 2 was clearly outside the scope of arbitration and could not have been referred to the Arbitrator for decision. The finding of the Arbitrator that the levy of compensation by the Superintending Engineer under Clause 2 of the Agreement as not justified is set aside and rejected. The claim of compensation for a sum of Rs. 55,362.02 has to be taken outside the purview of arbitration. In view of the judgment as rendered in the case of D.D.A. v. Sudhir Bros (supra) it will be open for respondent Delhi Development Authority to recover the said amount of Rs. 55,362.02 or for the claimant to raise all defenses that may be open to in law to contend that the levy is bad. The question of limitation will not be raised by either of the parties in view of the fact that the counter claim which was not liable to be referred to arbitration was erroneously so referred.

It is well settled that the Courts will not examine the merits of the findings arrived at by the Arbitrator nor any reasons have been assigned by respondent Delhi

Development Authority to show that the Arbitrator has misconducted himself and has committed error apparent in the face of the record. There is also no serious challenge made to the findings of the arbitrator except to the extent as indicated in respect of the additional counter Claim No. 1. Award of the arbitrator in respect of Claim Nos. 1 to 14 is affirmed.

Save and except as aforesaid the Award dated 26th April, 1991 is made rule of the Court and the petitioner shall be entitled to interest at the rate of 10% from the date of decree till realisation. Let the decree be drawn accordingly. There will be no order as to costs.

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