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Court : Delhi

Decided On : Mar-14-2005

Reported in : 122(2005)DLT54; 2005(81)DRJ762

Judge : Pradeep Nandrajog, J.

Acts : Arbitration Act, 1940 - Sections 20; Code of Civil Procedure (CPC) - Order 2, Rule 2

Appeal No. : CS (OS) No. 2010A/1987

Appellant : Krishna Construction Co.

Respondent : The Engineer Member, D.D.A.

Advocate for Def. : Anil Sapra, Adv.

Advocate for Pet/Ap. : Harish Malhotra, Adv

Disposition : Petition dismissed

Judgement :

Pradeep Nandrajog, J.

1. Petitioner prays for a second round of litigation. By the present petition filed under Section 20 of the Arbitration Act, petitioner prays that disputes be referred to arbitration of an Arbitrator appointed by this Court. Disputes, reference whereof is

sought to be got referred to arbitration are as under:-

a. For refund of Rs. 25,000/- wrongfully recovered asrebate deduction if the Final Bill was paid within six months of physical completion of the work.Rs. 25,000.00b. For further payment on items less measured and non-measured. Rs.6,00,000.00c. For refund of wrongful recoveries made from executedwork. Rs.6,00,000.00d. For refund of Rs. 5,000/- wrongfully recovered inrespect of the rebate quoted for regular fortnightlyand monthly payments.Rs. 5,000.00e. For payment of reimbursement as per clause 10(c) of the agreement.Rs.4,00,000.00f. Claim for compensation and damages suffered on overheads, establishment and machinery due toprolongation of the work by delays, defaults andbreaches on the part of the Department. Rs.38,00,000.00g. For payment of loss of affixed materials and damagesthereto caused by the intervention by the Department. Rs.1,00,000.00h. Claim for Rs. 1 lakh due to expenses incurred onshifting of labour camps, stores, workshops etc anddemolition of labour huts. Rs.1,00,000.00i. Regarding stipulated materials not issued at theagreement rate by the Department and had to beprocured in the open market at higher rates. Rs.2,00,000.00j. For further payment of Rs. 1 lakh for the constructionof sub station. Rs.1,00,000.00k. For further payment of Rs.3 lakhs for damages caused to the work by other agencies employed by the department for electrical work and works of furnishingand fixing of doors an cup boards as well as theemployment of departmental labour. Rs.3,00,000.00l. For further payment of Rs. 4 lakhs in respect of itemsexceeding deviation. Rs.4,00,000.00m. For refund of Rs.1,20,000/- wrongfully recovered ascost of stipulated material at penal rate. Rs.1,20,000.00n. For pendentelite and future interest @ 15% per annum.o. Cost of arbitration. Rs.15,000.00

2. Petitioner was awarded construction work in Asian Games Village Complex on 27.10.1980. It is not in dispute that the contract between the parties, being clause No.25, contains an arbitration clause. It is further not in dispute that on 7.12.1983, petitioner served the requisite notice as per arbitration clause on the Engineering Member, DDA requiring him to refer the disputes to arbitration. As per the petitioner, receiving no reply to the notice dated 7.12.1983, reminders were sent on 1.5.1985, 1.1.1986 and finally on 24.7.1987. Present petition was filed thereafter in September, 1987. Reply filed by DDA admits the contract between

the parties as also the arbitration clause. It is stated that on 21.4.1982, petitioner set up certain claims on which there was a dispute. Asper the arbitration clause, matter was referred for arbitration. An award was published by the Arbitrator on 31.1.1987 in sum of Rs.20,10,488 together with interest in favor of the petitioner. Awarded amount was paid. Innut shell, DDA challenges the very maintainability of the petitioner on the ground that disputes and differences which was agitated by the petitioner were referred to arbitration and no second reference could be sought. Principles of Order 2 Rule 2 were invoked by DDA.

3. In addition to the defense aforesaid, DDA pleads the defense of limitation. It is urged that the petitioner invoked the right by seeking reference of disputes to arbitration on 7.12.1983. Petition filed in September, 1987 was thus barred by limitation.

4. n rejoinder, petitioner states that the final bill was certified and amount paid to him on 22.4.1988 after the earlier award was made a Rule of the court and since the claims which are a subject matter of the present petition were not the subject matter of arbitration, neither is the present petition hit by limitation nor is it barred under Order 2 Rule 2 C.P.C. It is stated in the rejoinder that when arbitration was sought at the first instance, work was in progress and limited dispute pertaining trades for substituted items were sought to be referred to and were referred to arbitration at the first instance.

5. Sh. Harish Malhotra, learned counsel for the petitioner, in reference to the award dated 25.1.1987 published by Sh. D.P. Goel, Sole Arbitrator appointed when first reference was made submitted that as would be evident from the award, petitioners claims were:-

(i) Rate to be sanctioned for grit wash plaster, being a substituted item of work.

(ii) Claim for press steel door frames and mullions also as substituted items.

(iii) Claim for press steel window frames, again a substituted item.

(iv) Extra for steel windows, shutters, glazed louvered wire gauzed due to deviation limit being crossed.

(v) Claim for compound gates.

6. It was urged by Mr. Harish Malhotra that items afore-noted were substituted items or items where contract stipulated quantity, post deviation limit had been exceeded. Rate to be applied was in dispute and thereforee petitioner sought reference of dispute to arbitration. It was further urged that present claims relates to post contract period and thereforee are distinct from the claims which were subject matter of the first reference.

7. Sh. Anil Sapra, learned counsel for the DDA did not seriously dispute the proposition that successive references can be made, provided facts attracted successive references. However, what was urged was the fact that the petitioner was trying to over simplify the issue inasmuch as when first reference was sought, work was nearing completion and the only dispute were the claims of the petitioner which was ultimately referred to arbitration. At that stage, DDA had counter claims which were also referrer to arbitration. As per the counter claim of DDA, DDA was entitled to a refund of Rs.4,40,000/-. It was urged that sum quantified as payable was by finalising the amount due as if work was completed. Sh. Anil Sapra, learned counsel for the DDA submitted that the award would show that the learned Arbitrator while deciding on the counter claim of DDA adjudicated on the final bill payable to the petitioner for the reason, by the time award came to be pronounced, works were completed. Submission made was that parties were conscious of the fact that bill finalisation would be after considering the counter claims of DDA, to be adjudicated upon by the arbitrator and that was the reason, petitioner never pressed for disputes being referred to arbitration after serving the notice dated 7.12.1983. Additional submission made was that the petition was barred by limitation.

8. A Division Bench of this Court in the decision : AIR1985 Delhi358 , Shah Construction Company v. MCD, dealt with a situation where a reference was sought for arbitration after the matter was adjudicated upon by an Arbitrator at the first in stance.

9. On the issue of limitation, Division Bench held (para 16) that the period of limitation prescribed for filing of an application under Section 20 of the Arbitration

Act, 1940 is 3 years and time begins to run from the period 'when the right to apply accrues.'

10. Noting the decision of the Supreme Court, reported as : [1964]2SCR599 , UOI v. Birla Cotton, Spinning and Weaving Mills Ltd., Division Bench held, (refer para 17) that there cannot be any dispute with the proposition that right to apply would accrue when there existed a dispute which can be the subject matter of a reference.

11. Noting the decision of the Privy Council, reported as , Mt. Bolo v. Mt. Koklan, Division Bench held (refer para 22) that there can be no right to sue until there is an accrual of the right asserted in the suit and its infringement or at least clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted.

12. In the decision reported as : [1960]2SCR253 , Rukhmabai v. Laxmi Narayan, their Lordships of the Supreme Court (page 349) held that the right to sue accrues when the defendant has clearly and unequivocally threatened to infringe the right asserted by the plaintiff in the suit. Every threat by a party to such a right, however ineffective and innocuous it may be cannot be considered to be a clear and unequivocal thereat so as to compel him to file a suit. Whether a particular threat gives rise to a compulsory cause of action depends upon the question whether that threat effectively invades or jeopardises the said right.

13. Cause of action in substance denotes and determines the starting point of limitation. It is a settled proposition that this question depends upon the facts and circumstances of each case. This would require the court to determine the nature of dispute or difference and thereafter examine as to when the cause of action accrued.

14. Another legal proposition may be noted. In the decision reported as Purser and Co. v. Jackson 1976 (3) All. E.R. 641, it was held that in arbitration proceedings it was the terms of reference of the arbitration which determined the issue which the arbitrator had to decide. Accordingly, if a particular issue was included in the terms of reference, parties would be estopped by the doctrine of rest judicata from

raising that issue in subsequent arbitration proceedings even though the Arbitrator had made in award in relation to that issue.

15. That takes me back to the first dispute between the parties which formed the subject matter of a reference resulting in award dated 25.1.1987 being published by Sh. D.P. Goel, Arbitrator.

16. It is true that in so far as the claim of the petitioner was concerned, perusal of the award would reveal that the learned Arbitrator was adjudicating on the substituted items as well as extra work beyond deviation limit prescribed under the award.

However, while dealing with the counter claims of DDA, learned Arbitrator pronounced as under:-

'Counter Claims:

COUNTER CLAIM NO. 1: Respondents claim tentative amount of Rs.4,40,000.00 on account of final bill (in minus) which is yet to befinalised.

Engineer Member, DDA through his memo No.: LM2(37)82/Arbn/14835-38 dated 19.12.85 referred this counter claim. On examination of the details in the Statement of Facts, the counter claim consists of the following:

(a) Work done since previous bill(Recovery due to minus bill). Rs. 73,630.00(b) Recovery of income tax. Rs. 4,714.00(c) Recovery of cement. Rs. 8,320.00(d) Penal rate recovery of cement. Rs. 1,20,400.00(e) Penal rate recovery of turn steel. Rs. 74,626.00(f) Penal rate recovery for mild steel. Rs. 22,197.00(g) Penal rate recovery for G.I. pipes. Rs. 8,925.00(h) Penal rate recovery for SCI pipes. Rs. 19,646.00(i) Recovery of rebate for final bill. Rs. 25,000.00(j) Recovery of work executed at risk Rs. 73,265.00and cost. + 4,588.00 Rs. 4,36,311.00(a) Recovery of Rs.73,630.00 on a/c of minus bill.

It is contended by respondents that the bill is in minus primarily due to sanction of the reduction rate statement in respect of marble work, amounting to Rs.5,28,597.21 for reduction rate against marble work. Marble work was executed

under the continuous supervision and in the clear view of the respondent's representative secured advances, running bill payments were made against this item by the respondents. No notice of defective/bad work of these defect was over issued to the claimants either during the progress of the work or within the defect liability period of six months. Respondents have, after a lapse of over two years after the actual date of completion as recorded by the respondents themselves, have issued the reduction rate statement without compliance to the requirements of clause 14 of the contract. It is thus clear that the respondents' contention is not correct in this regard. Thus the reduction rate sanctioned by the respondents for marble work for Rs.5,28,587.21 is rejected. Wit this deletion of the reduction rate statement, the contractor's bill for the work done since previous bill will be in plus and as such the claim of the respondents for Rs.73,630.00 on account of the minus final bill is hereby rejected.

The awards made here below against the recoveries claimed by the respondents, shall be adjustable against this amount of final bill.

(b) Recovery of income tax : Rs.4,714.00

Claimants agree to the recovery of income tax @ 2% as per the income tax Act. Further, deduction of income tax @ 2% shall also be made by the respondents from the final bill based on the amount of the final bill. Presently, recovery of Rs.4714.00 on account of final bill is admissible and the counter claim is awarded to this extent, in favor of the respondents.

(c) Recovery of cement: Rs.8320.00

Respondents during the arguments stated that no recovery on single rate was due and the claim was not pressed by the respondents and hence the same is rejected.

(d) Penal rate of recovery of cement: Rs.1,20,400.00

During arguments, the respondents reduced their claim against penal rate recovery to Rs.88,290.00 which corresponded to excess consumption of 154 MT of cement. The claimants have argued that excess cement was consumed in

excess thickness of topping layers and after accounting for reasonable wastage, the cement consumption is found within the permissible limit and thus penal rate recovery was not admissible and hence the counter claim of the respondents is rejected.

(e) Penal rate recovery for turn Steel: Rs.74,626.00

Respondents during arguments confirmed that their claim relate to penal rate recovery for 18.745 MT which has been consumed by claimants beyond the permissible variation. Respondents submitted the calculations for over weight of bars to the extent of 7.125 MT. The penal rate recovery is thus admissible under clause 42 for 9,620 MT only. Hence counter claim is partly justified to the extent of Rs.38,576.00 (Rupees thirty eight thousand, five hundred and seventy six only) and is thus awarded in favor of the respondents.

(f) Penal rate recovery for Mild Steel Rs.22,197.00

Respondents claimed that penal rate recovery for 5.286 MT of mild steel was required to be made as the same was used in excess beyond the permissible variations. As per the records of the respondents, 1.509 MT is adjustable against the over weight bars.

Thus, a penal rate recovery for 3.687 MT of mild steel is admissible. Accordingly, the counter claim is partly justified to an amount of Rs.14,047.00 (Rupees fourteen thousand and forty seven only) and is thus awarded in favor of the respondents.

(g) Penal rate recovery for G.O Pipelines Rs.8,925.00

The consumption of 15mm GI pipes have been found in excess of permissible variation by 892.55 m. The penal recovery of Rs.8925.00 as claimed by the respondents is justified. Hence counter claim for an amount of Rs.8,925.00 (Rupees eight thousand, nine hundred and twenty five only) is awarded in favor of the respondents.

(h) Penal rate recovery for SCI pipes: Rs.19,646.00The calculation for theoretical consumption should account for the different modes of measurements at the time

of issue and for the completed item. After accounting for these differences, 89.72 m of 100 mm dia and 316.06m of 75 mm dia SCI pipes are found to be consumed in excess of the permissible variation which is recoverable at penal rate. /thus, the penal rate recovery of Rs.12,037.00 (Rs. twelve thousand and thirty seven only) and is awarded in favor of the respondents.

(i) Recovery for rebate for the final bill: Rs.25,000.00

As the respondents failed to finalise the final bill within the period of six months for availing of the rebate, the respondents are not entitled for recovery of the rebate. Counter claim of the respondents for Rs.25,000/- is thus hereby rejected.

(j) Recovery on account of the work executed at risk and cost: Shaft covers: Rs.73,265.00

As the `steel work trade' had exceeded the deviation limit, the rate for further work were payable under clause 12A at the prevailing market rates to the claimants. Thus any rates paid for this work at market rates would be payable to the claimants also. Thus, no recovery is admissible on this account. The counter claim for Rs.73,265.00 is thus hereby rejected.

(k) Recovery on account of work done at risk and cost- for cleaning snowcem spots etc. Rs.4,588.00

The claimants were responsible to deliver the premises without any spots, dropping etc. Hence the expenditure of Rs.4,588.00 incurred by the respondents on this account is recoverable from the claimants. The counter claim of the respondents is thus found fully admissible and thus an amount of Rs.4,588.00 (Rupees four thousand, five hundred and eighty eight only) is hereby awarded in favor of the respondents.'

17. A perusal of the award pertaining to the counter claim of DDA would reveal and establish that in the context of claims (c) to (j) of counter claim No.1 the learned Arbitrator decided on the amount recoverable by DDA in respect of supply items and thereforee, per necessity decided the issue of consumption.

18. Issue of consumption of supply items was adjudicated by the learned Arbitrator on theoretical quantities of consumption as per contract. Learned Arbitrator rejected some of the sub heads of the claim and permitted adjustments for some.

19. It is obvious that the issue of finalisation of the bill came within the 4 corners of the counter claim of DDA.

20.There is force in the submission of Sh. Anil Sapra, learned counsel for DDA that since decision on counter claim of DDA would have automatically resulted in finalisation of the bill of the petitioner, petitioner did not press for a second reference.

21. A perusal of the award of the learned Arbitrator pertaining to counter claim of DDA undisputably shows that the learned Arbitrator took note of the quantity of supply items and the quantities accounted for in the completion of the contract and thereafter issue of penal rates for recovery was adjudicated upon. The process of adjudication has resulted in an adjudication between the parties in respect of the completed works.

22. No second reference could be made pertaining to the same substratum of disputes.

23. Though strictly speaking the bar of limitation may not hit the petitioner, but keeping in view the fact that the work was completed in May 1982 and the first reference was made on 20.7.1982, coupled with the fact that the counter claim of DDA encompassed the issue of finalisation of the bill of the petitioner, the first award inherently decides the claim of the petitioner for the work done as per contract. Thus a second round of litigation would be barred by constructive rest judicata.

24. The petition under Section 20 is accordingly held to be barred by principles of rest judicata and is accordingly dismissed.

25. No costs.

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