**Parmar Construction Co. Vs. Delhi Development Authority**

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**SooperKanoon Citation** : sooperkanoon.com/691709

**Court** : Delhi

**Decided On :** Nov-01-1995

**Reported in** : 1995(35)DRJ516

**Judge** : Devinder Gupta, J.

**Acts** : Arbitration Act, 1940 - Sections 30

**Appeal No.** : Interim Application No. 2796 of 1993 and Suit No. 243 of 1993

**Appellant** : Parmar Construction Co.

**Respondent** : Delhi Development Authority

**Advocate for Pet/Ap.** : P.C. Markanda,; Naresh Markanda and; V.K. Sharma, Advs

**Judgement** :

**Devinder Gupta, J.**

(1) Objections by Delhi Development Authority are against the award made and published on 13th November, 1992 by Shri Shyam Narayan, the Sole Arbitrator on the disputes pertaining to the execution of the work of redevelopment scheme of Kingsway Camp (SH;Construction of Sw drains at Outran Lines) awarded vide agreement No.3/EE/CD.VLL/85-86.

(2) The objections are against the rejection of D.D.A's counter claim and against the award made in claimants' favor for claim Nos.1 to 4 and 6. Against its counter claim the objector laid a claim for Rs.79,408.00 towards compensation levied under clause 2 of the agreement on account of delay in the completion of the work.

(3) The arbitrator placing reliance upon the decision of the Supreme Court in Vishwa Nath Sood v. Union of India, : [1989]1SCR288 , held the quantum of levy to be non-arbitable. The arbitrator held that the power of Superintending Engineer had been kept outside the scope of arbitration but its justification is covered by Arbitration Clause which had been referred for adjudication. Going into the merits of the counter claim the arbitrator held that the Executive Engineer/Superintending Engineer took an unbalanced view in a hurry and levied 5 % compensation although delayed performance was accepted without making clear the intention to levy damages. D.D.A. was held to have waived its right to claim compensation. Thus the counter claim was rejected.

(4) Though the arbitrator was right in holding that quantum of levy of compensation, in view of the decision in Vishwanath's case (supra)was non-arbitable but went wrong in making further observations that justification thereof is covered by arbitration clause. The arbitrator further went wrong in observing that the counter claim of the respondent is not justified and was thus wrong in rejecting the same. In view of the ratio of the decision in Vishwa Nath's case (supra), the arbitrator could not have gone into the merits of the levy of compensation. In terms of clause 2 of the agreement, in case the Delhi Development Authority considered that it was entitled to the amount towards compensation, since it was a matter outside arbitration, it could recover the said amount in accordance with law from the claimant instead of asking the arbitrator to include the said amount in his award. The findings of the arbitrator are not in consonance with the decision in Vishwa Nath's case (supra). It will be for the Delhi Development Authority to take appropriate steps for enforcing its claim, as it may be deemed fit and proper in accordance with law. The matter regarding levy of compensation or its justifiability could not have been referred for adjudication by the arbitrator and arbitrator also would not get any jurisdiction to enter into the merits or demerits of the

compensation. In Delhi Development Authority v. Sudhir Bros, : 57(1995)DLT474 , a Division Bench of this Court considered such an objection and held that arbitrator in such like situation has no jurisdiction to go into the merits of the levy of compensation by the Superintending Engineer. The award to this extent of the arbitrator, wherein he has gone into decision of the Engineer was set aside. In the instant case also the award of the arbitrator to the extent to which the arbitrator held the counter claim as not justified is liable to be set aside with liberty reserved to the Delhi Development Authority to recover the said amount of compensation from the claimant by taking recourse to such other proceedings as may be permissible in law.

(5) As regards claims No.1, 2, 4 and 6, the objections of the respondent are that the arbitrator was required to give reasons for the award. While rejecting the recovery of Rs.9,177.00 on account of extra item, the arbitrator failed to assign any reason, thereforee, there is an error apparent on the face of the record in so far as claim No.1 is concerned. Claim No.2 was for Rs.2,47,611.00 on account of payment due under clause 10-C of the agreement. The objection is that details of the amount were filed by the claimant on the last date of hearing, namely, 22nd September, 1992 before the arbitrator and the arbitrator proceeded to make his award on that basis alone, without affording any opportunity to the objector to rebut the same. The arbitrator also failed to give any justification in awarding the amount of Rs.35,233.68 in claimants' favor. Award under claim No.3 for a sum of Rs.13,092.00 by way of security deposit and Rs.86,908.00 by way of bank guarantee is also challenged as without any justification or reasoning. Claim No.4, it is alleged that the arbitrator ought to have given details of various sub heads under which he considered proper to make an award instead of making the award of a lumpsum amount of Rs.2,13,742.00 . Without indicating as to how much amount had been awarded against each of the heads and on what basis, the award is vitiated being totally erroneous and unjustified. Under claim No.5, award of pendente lite and future interest is also challenged by the objector on the ground that the arbitrator was not empowered to grant future interest and his award suffers on account of error apparent on the face of the record.

(6) The award of the arbitrator is a reasoned one and reasons have been assigned for making award against each claim. Learned counsel for the objector, during the course of arguments, dealt specifically with each claim and questioned the findings recorded by the arbitrator thereupon.

(7) The scope of interference to the arbitrator's award in such like case where objections are to the effect that the same is bad on the ground of error apparent on the face of the record is limited. Arbitrator's award both on facts and law is final. Court cannot review and correct any mistake in his adjudication unless objection is to the legality of award which is apparent on the face of it. An error of law apparent on the face of the record means that you can find in the award or a document actually incorporated thereto some legal proposition which is the basis of the award, which you can then say is erroneous. It is not permissible to refer to any other document to show that the award is erroneous. Court cannot substitute its own decision for that of the arbitrator. Assessment of evidence is a matter within the province of the arbitrator.

(8) Claim No.1 was for Rs.68,345.00 on account of final bill. Claimant's case was that on 13th April, 1988, the respondent informed that final bill was ready but the amount was not paid despite several reminders. Withholding of Rs.9.177.00 as penalty and recovery of Rs.432.90 in the final bill on account of unsanctioned extra items in excess of theoretical consumption was also objected to by the claimants on the plea that it was against the provision of Clause 12 and 42 of the agreement. It was not disputed that the respondents had worked out the final bill of Rs.70,218.00 from which Rs.9,177.00 had been with- held for want of sanction of Engineer-in-Charge andRs.1,573.00 for income tax, Rs.432.90 for penal recovery of steel thereby leaving a balance of Rs.59,035.00 . The arbitrator on going through the respective contentions of the parties held withholding of Rs.9,177.00 for over 5 years and penal recovery as not justified saying:

'Perusal of Clause 12 of Agreement reveals that if the Engineer-in-Charge who alone has power to order extra items for which rates are to be sanctioned, in accordance with principles laid down therein. Superintending Enginee's sanction may be departmental requirement, but not as per Clause 12 stipulation. Hence

with-holding of Rs.9,177.00 for over 5 years after completion is not justified. Theoretical consumption of Steel is governed by Clause 42(iii) of Agreement, according to which the theoretical consumption should be based on design requirement or as authorised by Engineer-in-charge, including authorised lap pages plus 5% wastage due to cutting into pieces, over which plus 5% or minus 4% shall be allowed as variation, due to wastage being more or less. Die-wise theoretical consumption is not contemplated in this Clause, which might be required to see, if any particular dia. has been used in excess of actual issue or there has been no adequate consumption of a particular dia. as compared to quantity issued, so as to find out misuse of Steel. But the idea of allowing separate percentage for wastage and variation is to cover for wastage being more or less in a particular diameter, on account of odd sizes of requirements or issues and this is to be applied to overall quantity (and not dia-wise).'

(9) There is nothing wrong in the reasonings assigned by the arbitrator. Also for the 2nd claim delay in completion was held to be not attributable to the claimant and entitlement to payment under clause 10-C was held justified in view of the decision of this Court in M/s.Metro Electric Co., New Delhi v. Delhi Development Authority, New Delhi Air 1980 Delhi 266. The argument that claimant filed revised statement only on 22nd September, 1992 and no opportunity was allowed to rebut the same is not tenable in view of the proceedings recorded on that date, which allowed time to the respondent to rebut the same. It was not done. The submission of the respondent that reasons are not assigned is also factually not correct.

(10) Against the fourth claim due to prolongation of contract period for Rs.26,17,000.00, the arbitrator allowed a sum of Rs.2,13,742.00 only, after recording findings of fact, which are based on material on record and are not challengeable. The reasons assigned are:

'SCRUTINISING claims on this basis, entire period of 16.64 months is to be reduced to actual period of suspension, which would hardly be 8.5 months for non-approval of Deviation and 3.3 months on account of shortage of Cement from 1.11.86 to 31.1.87 and delay in payments, as recommended by Executive Engineer. Thus the prolongation period would get reduced from 16.64 months to

11.8 months, when no work could be carried out. Balance period was needed to complete the additional work. Disallowing 15% contractor's profit on actual expenses on above overheads, the amount would get reduced to Rs.3,05,346.00 and for 11.8 months, the figure would work out to Rs.2,13,742.00 , which the Claimants had to incur, without deriving any revenue, during idle period of 11.8 months.'

(11) The argument, that the claim was under five sub heads but award is consolidated one without dealing with each sub-head separately or saying that to what extent amount separately under each head is awarded, thereforee, the award is vitiated; is also not tenable. Elaborate reasons have been assigned dealing with each sub- head separately. Claim under the three sub-heads was found to be maintainable, which was to the extent of Rs.3,51,147.00 for the entire period as claimed. It was held to be justifiable only for a shorter period and thus after making proportionate reduction the amount awarded was arrived at. It is not shown that the agreement required the arbitrator to make award separately for the amounts under separate sub-heads. Award for a consolidated amount thus is not bad.

(12) The objections, in view of the above, to the award made in claimant's favor are liable to be dismissed.

(13) In the result objections are partly allowed. Award as modified is made a rule of court and decree in terms thereof for a sum of Rs.3,30,412.68 is passed in favor of the claimant against the respondent with interest @ 13% p.a. on Rs.1,16,670.00 from 27th September, 1991 till the date of award and on Rs.3,30,412.68 from the date of award till payment. Decree be drawn accordingly.