Hans Construction Co. Vs. Delhi Development Authority

Hans Construction Co. Vs. Delhi Development Authority

SooperKanoon Citation : sooperkanoon.com/691960

Court : Delhi

Decided On : Jul-30-1996

Reported in : 1996VAD(Delhi)268; AIR1997Delhi68; 1996(38)DRJ371

Judge : Anil Dev Singh, J.

Acts : Arbitration Act, 1940 - Sections 20

Appeal No. : Suit No. 3803A of 1992 and Interim Application No. 12346 of 1992

Appellant : Hans Construction Co.

Respondent : Delhi Development Authority

Advocate for Pet/Ap. : P.N. Kumar,; Anurag Kumar and; Inderjit Siddhu, Advs

Judgement :

Anil Dev Singh, J.

(1) This is a petition under section 20 of the Indian Arbitration Act, 1940. The facts as reflected in the petition are as under:- The petitioner, a registered partnership firm, entered into a contract with respondent Delhi Development Authority for the work of construction of multi- storeyed building at plot No.1,2 and. 5 of the District Centre, Janakpuri, New Delhi. Work was awarded to the petitioner on February 13, 1990 and was to be completed within a period of six months from the date of the commencement of the work which was to be reckoned from the 10th day of the

award of the work. It is not disputed by the petitioner that the work could not be completed within the stipulated date viz. August 22, 1990. It is however, the case of the petitioner that the work was delayed because of the various hindrances created by the respondent in the execution of the work. The concerned Executive Engineer by letter dated April 9, 1992 granted provisional extension of time for completion of the work up to April 30, 1992 subject however, to the right of the respondent to levy compensation on the petitioner under clause 2 of the agreement. According to the petitioner Superintending Engineer had agreed to the grant of provisional extension for completing the work without levy of compensation. Ultimately the work was rescinded by the respondent under clause 3 of the agreement on April 30, 1992. On September 15, 1992 the Superintending Engineer in exercise of powers under clause 2 of the agreement, held the petitioner liable to pay a sum of Rs.5,89,034.00 by way of compensation for the delay in the execution of the work. The petitioner by letter dated September 22, 1992 called upon the respondent to withdraw the letter dated September 15, 1992 and in the event of failure to withdraw the same, it required the respondent to refer the matter to arbitration. On failure of the respondent to react to to the aforesaid request, the petitioner moved the instant application under section 20 of the Arbitration Act.

(2) The petitioner in para 13 of the application has raised two disputes, which are as follows:- A) Whether the respondent/Delhi Development Authority is entitled to levy compensation under Clause 2 of the Agreement having rescinded the contract under clause 3 prior to the invocation of Clause 2? * The Arbitrator is to determine the dispute in question. Justified or not, if so, to what extent? B) Whether the respondents are justified in levying of Rs.5,89,034.00 by way of compensation under clause 2 when having not reserved any right, and having not following the requisite ingredients of the said clause when there being no breach of contract by the petitioner firm?

(3) As is apparent, these two disputes raised by the petitioner are matters which are connected with clause 2 of the agreement. Learned counsel appearing for the petitioner urged that the above mentioned disputes should be referred to Arbitration in accordance with clause 25 of the agreement. He submitted that

disputes raised by the petitioner are covered by the said clause.

(4) I have considered the submission of learned counsel for the petitioner. In order to appreciate the submission of learned counsel, it will be necessary to examine clause 2 and clause 25 of the agreement. These clauses read as under:- 'Clause 2: Compensation for 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 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 the 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 per cent, 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 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-fourth 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 fourth of the work, before three fourth of such time has elapsed. However, for special jobs 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 be liable to pay 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.'

'CLAUSE25: 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 instructions hereinbefore mentioned and as to the quality of workmanship or materials used on the work or so as to any other question, claim, right, matter or thing whatsoever, in any way arising out of or relating the contract, designs, drawings, specifications, estimates, instruction, orders on 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 Chief Engineer, Member Delhi Development Authority.....'

(5) A perusal of clause 2 clearly shows that the time allowed for carrying out the work by the contractor is to be strictly observed. The time has been made the essence of the contract and is required to be reckoned from the 10th day after the date on which the order to commence the work was issued to him. The clause further requires the contractor to proceed with the work with all due diligence and in the event of failure in this regard it has been made liable to pay compensation to be determined by the Superintending Engineer whose decision in writing has been made final. In the matter of determining the questions whether the contractor delayed the execution of the work and if so, what amount of compensation should be levied falls within the jurisdiction of the Superintending Engineer and his decision cannot be tested by the Arbitrator appointed under clause 25 of the agreement. Clause 25 opens with the words 'Except where otherwise provided in the contract'. Thus the implication is that all the questions and disputes excepting the ones mentioned in the opening phrase thereof are to be referred to the sole arbitration of the person appointed by the Chief Engineer. The opening line of the clause is significant. Where ever in the agreement the decision of a designated authority in a matter has been made final, the same has been take out from the province of the Arbitrator. The bar is specific and explicit. The Supreme Court in Vishwanath Sood vs . Union of India & another : [1989]1SCR288 had an occasion to examine clauses similar to the aforesaid clause 2 and 25. In this regard it was held as follows:-

'WE have gone through the judgment of the Division Bench of the High Court and we have also considered the arguments advanced on both sides. With great respect, we find ourselves unable to agree with the interpretation placed by the Division Bench on the terms of the contract. Clause 2 of the contract makes the time specified for the performance of the contract a matter of essence and emphasises the need on the part of the contractor to scrupulously adhere to the time schedule approved by the Engineer-incharge. With a view to compel the contractor to adhere to this time schedule, this clause provides a kind of penalty in the form of a compensation to the Department for default in adhering to the time schedule. The clause envisages an amount of compensation calculated as a percentage of the estimated cost of the whole work on the basis of the number of days for which the work remains uncommenced or unfinished to the prescribed extent on the relevant dates. We do not agree with the counsel for the respondent that this is in the nature of an automatic levy to be made by the Engineer in charge based on the number of days of delay and the estimated amount of work. Firstly, the reference in the clause to the requirement that the work shall throughout the stipulated period of the contract be proceeded with due diligence and the reference in the latter part of the clause that the compensation has to be paid 'in the event of the contractor failing to comply with' the prescribed time schedule make it clear that the levy of compensation is conditioned to some default or negligence on the part of the contractor. Secondly, while the clause fixes the rate of compensation at 1 per cent for every day of default it takes care to prescribe the maximum compensation of 10 per cent on this ground and it also provides for a discretion to the Superintending Engineer to reduce the rate of penalty from 1 per cent. Though the clause does not specifically say so, it is clear that any moderation that may be done by the Superintending Engineer would depend upon the circumstances, the nature and period of default and the degree of negligence or default that could be attributed to the contractor. This means that the Superintending Engineer, in determining the rate of compensation chargeable, will have to go into all the aspects and determine whether there is any negligence on the part of the contractor or not. Where there has been no negligence on the part of the contractor or where on account of various extraneous circumstances referred to by the Division Bench such as vis major or default on the part of the

Government or some other unexpected circumstances which does not justify penalising the contractor, the Superintending Engineer will be entitled and bound to reduce or even waive the compensation. It is true that the clause does not in terms provide for any notice to the contractor by the Superintending Engineer. But it will be appreciated that in practice the amount of compensation will be initially levied by the Engineer-in-charge and the Superintending Engineer comes into the picture only as ome sort of revisional or appellate authority to whom the contractor appeals for redress. As we see it, clause 2 contains a complete machinery for determination of the compensation which can be claimed by the Government on the ground of delay on the part of the contractor in completing the contract as per the time schedule agreed to between the parties. The decision of the Superintending Engineer, it seems to us, is in the nature of a considered decision which he has to arrive at after considering the various mitigating circumstances that may be pleaded by the contractor or his plea that he is not liable to pay compensation at all under this clause. In our opinion the question regarding the amount of compensation livable under clause 2 has to be decided only by the Superintending Engineer and no one else. .....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 the 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.'

(7) In view of the decision of the Supreme Court, it is not possible to hold that the matters pertaining to clause 2 of the agreement arc liable to be referred to

arbitration under clause 25 thereof.

(7) Learned counsel submitted that the Chief Engineer under clause 2 could determine the quantum of compensation but the question whether the petitioner delayed the execution of the work or not is a mailer which falls within the province of the arbitrator. I regret my inability to accept the submission of learned counsel. In order to determine the quantum of compensation under clause 2, the Chief Engineer has necessarily to go into the question as to whether the contractor delayed the execution of the work and if so to what extent. This determination has been made final and has been excluded from the clutches of clause 25 of the agreement. Learned counsel thereforee, is not justified in urging that the arbitrator can determine the question as to whether the contractor delayed the execution of the work or the delay was due to the acts of omission and commission of the respondent itself.

(8) Learned counsel for the petitioner submitted that the Chief Engineer while determining the quantum of compensation did not lake into consideration the various relevant material, namely that the clearance for starting the work of Shopping Centre was given on December 27, 1990, steel & cement were not supplied in time as the same were not available in the store and drawings were made available in regard to a particular item of work on July 21, 1991 etc. In nut-shell the argument of the learned counsel is that the decision of the Superintending Engineer is arbitrary and not in accordance with clause 2. At this stage it needs to be clarified that it may be possible to challenge the decision of the Chief Engineer on the aforesaid grounds in appropriate proceedings but the decision cannot be challenged before an Arbitrator as the same is covered by clause 2 of the agreement. The remedy of the petitioner lies else where.

(9) Having regard to the aforesaid discussion, the application is dismissed but without any order as to costs.