

Ashok Ohri Vs. Delhi Development Authority and anr.

Ashok Ohri Vs. Delhi Development Authority and anr.

SooperKanoon Citation : sooperkanoon.com/692160

Court : Delhi

Decided On : Oct-17-1996

Reported in : 1997(1)ARBLR181(Delhi); 64(1996)DLT700

Judge : M.K. Sharma, J.

Acts : [Arbitration Act, 1940](#) - Sections 14

Appeal No. : Suit No. 1626-A of 1993

Appellant : Ashok Ohri

Respondent : Delhi Development Authority and anr.

Advocate for Pet/Ap. : C.M. Soma Sekharan,; S.K. Chandwani and; V.K. Sharma, A

Judgement :

M.K. Sharma, J.

(1) Disputes and differences having arisen between the petitioner and respondent No. 1, the said disputes were referred for the decision of respondent No. 2 in terms of the Arbitration Clause. The Arbitrator appointed admittedly is a technical person. The Arbitrator entered into the references on 3.7.1991 when he issued notices to the parties to file their claims. After hearing the parties and considering the evidence on record, the Arbitrator made his award on 12.7.1993 and published

the same. After publication of the aforesaid award, the petitioner filed a petition in this Court under Section 14 of the Arbitration Act. In this petition, the petitioner has prayed for filing of the arbitration agreement together with the proceedings and also the award.

(2) In pursuance of the notice issued by this Court, the Arbitrator filed his award Along with the records of the arbitration proceedings on receipt of which, notice was issued to the respondents asking him to file objections, if any, within the statutory time limit. On service of notice, the respondent No. 1 filed its objection under Sections 30 and 33 of the Arbitration Act challenging the award in respect of almost all the claims decided by the Arbitrator.

(3) Mr. M. Somasekharan, Counsel appearing for the petitioner states before me that so far as the petitioner is concerned, he has not filed any objection against the award and that the award passed by the Arbitrator be made Rule of the Court and a decree may be passed in terms of the award.

(4) Mr. V.K. Sharma, Counsel appearing for the respondents, on the other hand, submits before me that the objections taken by the respondents as against the award passed by the Arbitrator are valid and justified. In support of his submissions, the learned Counsel for the respondents has drawn my attention to the averments made in the objection petition to the award made by the Arbitrator claim wise and made submissions thereon. Accordingly, I propose to deal with the said objections raised and submissions made by the Counsel for the respondent on various claims.

(5) So far Claim No. 1 is concerned, the claim was in respect of non-payment of security deposit and unlawfully withholding the same. The claim was made to the extent of Rs. 35,000.00 . As against the aforesaid claim, the Arbitrator has awarded an amount of Rg. 25,331.00 on the ground that the security deposit paid by the petitioner is liable to be refunded and recovered after the rescission of the contract. The Arbitrator held that the respondent No. 1 was not justified in rescinding the contract. The rescission of the contract of the petitioner having been found to be unjustified and illegal, it is obligatory on the part of the respondent No. 1 to return the security deposit and therefore, the finding of the Arbitrator in

respect of the aforesaid claim is held to be justified.

(6) So far the Claim No. 2 is concerned, the learned Counsel for the respondent No. 1 submits that the conclusion of the Arbitrator in respect of para (1) of Claim 2 that an extra amount to the extent of Rs. 20,475.00 is payable to the petitioner is without any reason. According to him the said conclusion has been reached by the Arbitrator without considering the statement and/or evidence, namely, the Measurement Book.

LEARNED Counsel appearing for the petitioner, on the other hand, submits that the conclusion arrived at by the Arbitrator is based on reasons and that according to the Arbitrator work of stage 7 was completed in respect of tank in Sector 'A', and the same being a finding of fact cannot be interfered with or re-appreciated by the Court.

(7) In respect of Claim No. 2 para (II), according to the teamed Counsel appearing for respondent No. 1, the decision of the Arbitrator for awarding Rs. 19,222.00 at market rates against the aforesaid head is without any reason and the same does not indicate the thought process of the Arbitrator. According to the Counsel, Clause 29 requires the Arbitrator to give reasons for his award. The learned Counsel appearing for the petitioner submits that the decision of the Arbitrator for awarding Rs. 19,222.00 as against the aforesaid head does contain reasons.

(8) I have given my thoughtful consideration to the respective submissions of the learned Counsel appearing for the parties. The Arbitrator has found that stage 7 work was completed in respect of tank in Sector 'A'. However, the Counsel for the respondent has pointed out that the Measurement Book which was placed before the Arbitrator disclosed that the stage 7 works include works like providing and fixing pipes and steel sheds had not been completed and, therefore, it could not have been said that the work in respect of water tank in Sector 'A.' was completed.

(9) It is admitted position of the parties that the said Measurement Book was produced before the Arbitrator. The amount that has been awarded by the Arbitrator was payable only when the work relating to stage 7 was completed in respect of tank in Sector 'A'. The objection of the respondents shows that as per

Mb No. 1745 at page 21, the seventh stage regarding providing and fixing pipes and steel sheds have not been completed and thus it appears that there is an error apparent on the face of the record in the findings arrived at by the Arbitrator in respect of this claim and, therefore, I have no other option but to set aside the said finding of the Arbitrator against the aforesaid head awarding Rs. 20,475.00 .

(10) In respect of Para No. (II) of Claim No.2, Clause 29 of the agreement provides that the Arbitrator for his conclusions arrived at has to give reasons. On perusal of the findings recorded by the Arbitrator in respect of the aforesaid decision, I find that the Arbitrator has failed to indicate his thought process and has failed to give reasons and that he has arrived at the conclusion that the cost of the steel reinforcement in walls has been assessed at Rs.19,222.00 at market rates. The Arbitrator has failed to indicate as to what was the prevailing market rate of steel at that relevant point of time and for what quantity of steel he has awarded the aforesaid amount. Accordingly, the aforesaid award passed in Para (ii) of Claim 2 is also liable to be set aside, which I hereby do.

(11) Coming to the next claim of Claim No. 2, i.e., para (III) thereof, I find that reasons have been recorded by the Arbitrator for coming to the conclusion for awarding Rs. 4,245.00 . This Court while dealing with the award of the Arbitrator is not empowered to look into the sufficiency of reasons and, therefore, I uphold the aforesaid award of the Arbitrator.

(12) So far Claim No.3 of the award is concerned, the Arbitrator has computed profits at the rate of 10 % of cost of work to be reasonable and accordingly has awarded Rs. 26,903.00 in favor of the petitioner against the aforesaid head. While accepting the contract and executing the same, the contractors naturally expect certain profits to be made out of the aforesaid contract and the Supreme Court in the case of M/s. A.T. Brij Pal Singh and Bros. v. State of Gujarat has held profits at the rate of 15 % of total cost of work to be reasonable. In view of the aforesaid decision of the Supreme Court, the award of profits at the rate of 10 % of total cost of work by the Arbitrator in the present case is held to be reasonable and justified and accordingly, I uphold this award as well.

(13) Coming to Clause No-5, the petitioner has claimed Rs. 90,000.00 , on account of damages due to prolongation of the contract as against which the Arbitrator has awarded Rs. 55,060.00 in favor of the petitioner against the aforesaid head. It is submitted by the learned Counsel for the respondent that for arriving at the aforesaid conclusion, the Arbitrator has failed to give reasons and his conclusions are abrupt and without any basis. The learned Counsel appearing for the petitioner, however, refutes the aforesaid submission and submits that die aforesaid decision of the Arbitrator is based on evidence which was produced by the petitioner marked as Exs. C-27 and C-28. It appears that the petitioner had claimed Rs. 7,700.00 towards the salary of the staff engaged by the petitioner during the prolonged period of the contract and also for elements of Tnp and centering/shuttering as against which it is established that the Arbitrator has awarded an amount of Rs. 4,750.00 per month. Since, the aforesaid conclusion of die Arbitrator is based on evidence on record in the nature of Exs. C-27 and C-28, in my opinion, the award as against the aforesaid claim cannot be held to be illegal or void and accordingly, the same is upheld.

(14) As against Claim No.7, the Arbitrator has awarded simple interest at 14 % per annum with effect from 3.7.1991 till the date of payment or decree whichever is earlier. Counsel appearing for die respondent No.1 submits that 3.7.1991 is not the date of entering into reference by the Arbitrator and the actual date should have been 28.12.1992 when the first effective hearing before the Arbitrator had taken place.

I am unable to agree with the submission of the learned Counsel for the respondent No.I. The date on which the Arbitrator could be said to have entered into the reference would be 3.7.1991 in view of the fact that on that date, the Arbitrator had issued notice to the parties to file their claims. In arriving at the aforesaid conclusion, I am supported by the decision of the Supreme Court in The Secretary to the Govt. of Orissa and Another v. Sarbeswar Rout, reported in : AIR 1989 SC2259 in which the Supreme Court has held that in arbitration proceedings as soon as the Arbitrator indicates his willingness to act as such, the proceeding must be held to have commenced. It was further held that the Arbitrator by directing the parties to file their written statements of claim, could be said to have

clearly indicated that he accepted the offer to arbitrate. The proceeding must, thereforee be deemed to have been instituted not later than the date of passing such orders.

In that view of the matter, the Arbitrator was fully justified in granting interest to the petitioner with effect from 3.7.1991 to date of payment or decree, whichever is earlier.

(15) Coming to the counter claims raised by the respondents before the Arbitrator, I have been taken through the aforesaid counter claims as also the award passed by the Arbitrator thereon. So far. Counter Claims Nos. 1, 2 and 5 are concerned, I find that the Arbitrator has considered the claims of the respondent No.1 in true perspective and has given his valid reasons for rejecting the said claims. I do not find any error apparent on the face of the records in the said findings and, thereforee, I uphold the awards in respect of the aforesaid Counter Claims Nos. 1,2 and 5.

COUNSEL appearing for the respondent No. 1, however, vehemently submits that in respect of Counter Claim No. 3 the Arbitrator was not justified in rejecting the aforesaid counter claim. He, further submits that so far the said counter claim is concerned, the same falls within the excepted matter and, thereforee, the Arbitrator instead of rejecting the counter claim should have allowed the respondent No. 1 to agitate the same in the appropriate Forum as has been held by the Division Bench of this Court.

I have also heard the learned Counsel for the petitioner on this aspect. The decision of the Division Bench referred to by the learned Counsel for the respondents is in Dda v. Sudhir Bros. in F.A.O. (OS) No. 104/94disposed of on 15.12.1994, reported in 1995(32) Del R J 366.1n the said case, the Division Bench of this Court has held that the entire procedure adopted by both the parties was totally unwarranted in view of the fact that the claim falls within the excepted matter and was liable to be agitated in a suit. It has been further held that 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. On the facts and circumstances of the case, the Court held that there is no other 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. 5,69,743.00 was not payable by the contractor.

Following the ratio of the aforesaid decision of the Division Bench which is binding on me, I set aside the award passed by the Arbitrator in respect of Counter Claim No. 3 holding that it would be for the respondent No. 1 to recover the said amount claimed in Counter Claim No. 3 in whatever manner it is open to it. In the light of the aforesaid Division Bench decision, I further direct that 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 respondent No.1 seeks to recover the said amount of compensation from the contractor, it would be open to the contractor (petitioner) to raise all such contentions which he may deem fit. It is made 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 the parties.

(16) In view of the aforesaid findings recorded by me, I set aside that part of the award passed by the Arbitrator in respect of Paras (1) and (II) Claim No. 2 and Counter Claim No. 3. In respect of the remaining part of the award passed by the Arbitrator in respect of Claim Nos. 1, Para (III) of 2,3,4,5 and 7 and Counterclaims Nos. 1,2 and 5, I uphold the same on the grounds and reasons set out above. In aforesaid view of the matter, I remit back the award passed in respect of Claim Nos. 2(1) and 2(11) to the Arbitrator for his reasoned decision. Since the matter has been pending for a long time, the Arbitrator shall give the award in respect of the said claims within four months from the date of issuing of notice to the parties. So far, the award in respect of other claims, which I have upheld, the same may be made a Rule of the Court.

(17) Let a decree be prepared in terms of the preseritjudgment. In addition, the petitioner shall also be entitled to interest at the rate of 15 % per annum from the date of decree till the date of realisation.