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**Court : Delhi**

**Decided On : Apr-30-1997**

**Reported in : 1997IVAD(Delhi)127; 1997(2)ARBLR196(Delhi); 70(1997)DLT322; 1997(42)DRJ290**

**Judge : A.D. Singh, J.**

**Acts : [Arbitration Act, 1940](#) - Sections 34**

**Appeal No. : Suit No. 866A of 1987**

**Appellant : Delhi Transport Corporation**

**Respondent : People Co-operative Labour and Construction Society Ltd.**

**Advocate for Pet/Ap. : A.K. Singh,; R.L. Pal and; Shellan Kumar, Advs**

**Judgement :**

**Anil Dev Singh, J.**

(1) The parties entered into an agreement for construction of Rest House, Information Centre T.K. Booths, Advance Booking Section, Bus-queue shelters, Nodal Point at Punjabi Bagh, New Delhi and earth filling boundary wall. Disputes arose between the parties which were referred for adjudication of Shri Swami

Dayal, Chief Engineer (Retd.) CPWD. The Arbitrator made and published his Award on 18th March, 1987. This Award has been challenged by the respondent in respect of Claims No. 1 to 5, 7, 9 and 10 by means of the application being I.A. No. 564/89. Mr. Lakhanpal, learned counsel appearing for the respondent submitted that-

1.The Award is a nullity having been made by the arbitrator after the expiry of four months from the date of entering upon reference.

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3.The Award was based on no evidence.

4.The Arbitrator proceeded ex parte without issuing a notice to the respondent of his intention to proceed as such.

Inso far as the first objection of the learned counsel for the respondent is concerned, certain facts need to be stated :

ON29th April, 1986, the Chairman-cum-Managing Director of Dtc, made a reference of the claims of the petitioner to the above said Arbitrator for adjudication. On 3rd May, 1986, the Arbitrator accepted the appointment and issued directions to the parties to file their claims. On 19th May, 1986, the respondent wrote a letter to the Arbitrator stating that the Arbitrator should not proceed with the matter as it had no faith in him. However, the Arbitrator proceeded with the matter and on 4th June, 1996, the petitioner filed its statement of claim. On 9th June, 1986, the Arbitrator sent a letter to the respondent to file its reply. Instead the respondent herein, filed a suit being Suit No. 62/86 for permanent injunction for restraining the Arbitrator from proceeding with the matter. In that suit the trial court passed an order of status quo thus preventing the Arbitrator to proceed with the arbitration. Subsequently, on 4th December, 1986, in an application filed by the petitioner under Section 34 of [Arbitration Act, 1940](#), the suit was stayed and the Arbitrator was permitted to proceed with the matter. Despite this order the respondent did not appear before the Arbitrator. Consequently, on 24th December, 1986, the Arbitrator took the effective

adjudicative step of hearing the petitioner. Ultimately, the Arbitrator made and Published his Award on 18th March, 1987. The question is whether the award is within time. It seems to me that 24th December 1986 being the date when the Arbitrator took for the first time effective adjudicative step of hearing the petitioner, should be taken as the date from which the period of four months prescribed for making the award ought to be reckoned. In *M/s Jolly Steel Industries Pvt. Ltd. vs . Union of India and another*, : AIR1979 Bom214 , it was held that the Arbitrator cannot be said to have entered upon the reference unless some effective act in furtherance of the work of arbitration commences. The Bombay High Court in this regard observed as follows :

Thus, arbitration proceeding consists of two stages. One such stage consists of merely ministerial acts while the second stage consists of effective adjudicative acts in furtherance of the work of arbitration, namely of proceedings to decide controversies in between the parties, whether arising out of the main dispute or procedural aspects in the disposal thereof. The arbitrator cannot be said to have entered on the reference unless the second stage can be said to have been reached somehow or the other. Looked at from this point of view it is impossible to hold that the arbitrator had entered on reference on 17.11.1971 when nothing had happened on this date beyond the arbitrator issuing notices to the parties to file their statement of claims. The resume of events in this case indicates that no effective step was taken by the arbitrator, till the hearing of the disputes commenced on 21.2.1972. Each one of the earlier stages covered merely some or the other of the ministerial acts such as issuing of notices, acceptance of statement of claims and adjourning the case to suit the convenience of the parties, 21st February 1972 must be held, on the facts and in the circumstances of the case, to be the date on which the arbitrator had entered on reference. The award dated 15.5.1972 was within four months prescribed under Clause 3 of Sch. I of the Arbitration Act. In this view of the matter, the finding recorded by the learned Judge on this point is liable to be set aside. @BTINDENT = I am in respectful agreement with the view taken by the Bombay High Court that the Arbitrator enters upon reference not when he accepts the office, or when he issues notice to the parties to appear and file statement of their claims but when he takes an effective adjudicative act like hearing the parties and applying his mind to the matters in

dispute.

Viewing the position in the light of the above principle. I am of the opinion that the Arbitrator rendered his Award within the statutory period of four months. Assuming that the Arbitrator entered upon the reference on 4th June, 1986 when the statement of claim was filed by the Dtc, even then the Award of the Arbitrator would be within time as from 17th June, 1986 to 4th December, 1986, the proceedings before the Arbitrator remained stayed. Excluding the time during which the proceedings remained stayed before the Arbitrator, the Award would be in time. In this view of the matter the 1st objection of the learned counsel for the respondent is rejected.

INso far as the plea of the learned counsel for the respondent that the Arbitrator was not justified in setting the respondent ex parte without issuing a notice to the respondent informing it about his intention to proceed ex parte against it for its failure to appear before him is concerned, the same is without force. The Arbitrator had been requiring the respondent to appear in the matter. Besides the Arbitrator by his order dated June 9, 1996, a copy of which was sent to the parties by registered A.D. post, required the respondent to file its counter statement of facts and counter claim by June 26, 1986, and at the same time warned the respondent that its failure to do so will result in taking of ex parte proceedings against it. This should have been sufficient notice to the respondent about the intention of the Arbitrator. In any event, the respondent cannot be heard to say that no formal notice was given to him in this regard as the respondent had in its communications dated 10th January, 1987, 27th January, 1987, 4th February, 1987 and 18th February, 1987, had expressed lack of faith in him and, therefore, was not ready to appear before him. In view of the stand taken by the respondent in the above said letters, the respondent cannot be heard to say that the Arbitrator did not give him the requisite notice. Accordingly, this plea of the learned counsel for the respondent is also rejected. The other objections raised by the respondent relate to the award on the individual claims of the petitioner.

Under claim No. 1, the Arbitrator awarded a sum of Rs. 1,16,717.25 against the claim of Rs. 1,50,000.00 on account of advance given to the respondent on 8th

August, 1985, I have gone through the Award. The Arbitrator has given reasons for arriving at the conclusion that the petitioner is entitled to a sum of Rs. 1,16,719.25. The reasonableness of the reason cannot be examined. Accordingly, the determination of the Arbitrator in regard to Claim No. 1 is upheld.

In so far as Claim No. 2 is concerned, the contention of the learned counsel for the respondent is that the Arbitrator was not competent and exceeded his jurisdiction to award a sum of Rs. 83,354.00 on account of compensation for delay in completion of the work. Learned counsel invited my attention to clause 2 of the agreement, dealing with the subject of payment of compensation for delay in completion of the work, as also clause 25 thereof dealing with arbitration. Similar clauses came up for consideration before the Supreme Court in *Viswanath Sood vs. Union of India and another*, : [1989]1SCR288 , in which it was held that since the decision of the Superintending Engineer in regard to the matter relating to the payment of compensation on account of delay has been made final by clause (2) of the agreement, the matter pertaining to compensation on that account was not capable of being referred to an arbitrator for adjudication in view of the opening words of the arbitration clause, viz., 'except where otherwise provided in the contract. This view was followed by a Division Bench of this Court in *Delhi Development Authority vs. M/s. Sudhir Brothers*, 1995 (23) Arb.L.R.306. Having regard to these decisions, I am of the opinion that the Arbitrator was not right in granting the compensation to the respondent on account of the delay in completion of the work. Accordingly, the Award of the Arbitrator in respect of the claim No. 2 is set aside. However, it will be open to the petitioner to take recourse to such remedies as may be available to it, for the recovery of the said amount of Rs. 83,355.00 on account of the alleged delay in completion of the work.

As far as the Award in respect of claims No. 3, 4, 5, 9 and 10 is concerned, the learned counsel for the respondent has not been able to point out any defect or illegality in the Award of the Arbitrator. Accordingly, the Award in regard to the said claims is affirmed. @BTINDENT = Under claim No. 7, the Arbitrator has awarded a sum of Rs. 500.00 on account of cost of a selve. I have perused the record and I find that there is no evidence in support of the claim of the petitioner. Accordingly, the Award of the Arbitrator in respect of this claim is set aside.

In conclusion the Award is made Rule of the Court to the extent indicated above and a decree in terms thereof is hereby passed. In case the respondent does not make payment within eight weeks, the petitioner will be entitled to interest at the rate of 14 per cent per annum from the date of decree till realisation of the decretal amount. Inso far as the determination of the arbitrator on claim No. 7 is concerned, the same is set aside.

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