

Wee Aar Constructive Builders Vs. Delhi Jal Board and anr.

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Court : Delhi

Decided On : Jul-09-2004

Reported in : 2004(2)ARBLR418(Delhi); [2005]125CompCas869(Delhi); 112(2004)DLT613; 2004(75)DRJ685

Judge : Mukundakam Sharma, J.

Acts : Arbitration and Conciliation Act - Sections 2, 3(1), 22, 34 and 46; Delhi Water Board Act, 1998

Appeal No. : O.M.P. No. 219 of 2001

Appellant : Wee Aar Constructive Builders

Respondent : Delhi Jal Board and anr.

Advocate for Def. : Suresh Tripathi, Adv. for R-1/DJB

Advocate for Pet/Ap. : Rajender Aggarwal, Adv. for; Harish Malhotra, Adv

Judgement :

Mukundakam Sharma, J.

1. The respondent awarded a work contract in favor of the petitioner for construction of additional staff quarters at Varun Niketan near Haiderpur Water Treatment Plant. During the execution of the aforesaid contract disputes arose

between the parties. The aforesaid contract contained an arbitration clause being Clause 25 which reads as follows:-

'CLAUSE 25.

ARBITRATION CLAUSE:

01. 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 as to any other question, claim, right, matter or thing whatsoever in any way arising out or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or the execution or failure to execute the same whether arising during the progress of the work or after completion or abandonment thereof, shall be referred to the sole arbitration of the Commissioner, Municipal Corporation of Delhi, or any person nominated by the Commissioner on his behalf. The award of the arbitrator shall be final, conclusive and binding on all parties to this contract.

xx xx xx '

2. Since the aforesaid disputes arose out of or in connection with the contract containing the said arbitration clause, the said disputes were referred to Shri B.R. Taneja by the Chief Executive Officer of the Delhi Jal Board, the respondent No.1, appointing him as a sole arbitrator. The learned sole arbitrator entered into the reference and called for claims and counter-claims and other relevant documents. The parties submitted their claims and counter-claims and also their replies to the claim upon which the learned arbitrator heard the parties and thereafter passed his award on March 15, 2001. Being aggrieved by the aforesaid award passed by the arbitrator, the petitioner herein has filed the present petition under section 34 of the Arbitration and Conciliation Act.

3. The first submission of the learned counsel appearing for the petitioner is that the arbitrator was not validly and properly appointed. In support of the said

contention the counsel referred to and relied upon the provisions of clause 25 being the arbitration clause which has already been extracted above. Relying on the same it was submitted that the disputes were to be referred to the sole arbitration of the Commissioner, Municipal Corporation of Delhi, or any person nominated by the Commissioner on his behalf as provided in the said clause. It is submitted that even in spite of the said clause, reference of the disputes have been made by the Chief Executive Officer of the Delhi Jal Board, although he is not the persona designata named in the contract and, therefore, the arbitrator was not validly and properly appointed.

4. I have considered the aforesaid submission of the counsel appearing for the petitioner. On going through the records I find that the petitioner herein never raised any such objection before the learned arbitrator and instead submitted to the jurisdiction of the said arbitrator appointed by the Chief Executive Officer of the Delhi Jal Board. It also filed its statement of claims and also replies to the counter-claims wherein no such objection as sought to be raised regarding jurisdiction was raised. The petitioner participated in the proceedings without challenging jurisdiction of the arbitrator. After participating in the proceedings for a considerable time, for the first time on October 18, 2000 the petitioner sought to challenge the appointment of the arbitrator on the ground that the arbitrator was not validly appointed. The learned arbitrator considered the said objection and gave a ruling on the same. He has held that the objection regarding the jurisdiction of the arbitrator should have been challenged and raised at the first hearing. He also held that according to the Delhi Water Board Act, all assets and liabilities of Delhi Water Supply and Sewage Disposal Undertaking have been transferred to the Delhi Jal Board.

5. I have considered the aforesaid preliminary objection in the light of the documents placed on record. The petitioner did not challenge the appointment of the arbitrator at the very initial stage and instead submitted to his jurisdiction by filing its claims and counter-claims, and therefore, in the light of the said facts I hold that the principles of waiver and acquiescence are applicable to the facts of the present case and, therefore, the petitioner is not entitled to raise the aforesaid plea. Even otherwise, the respondent was earlier known as Delhi Water Supply

and Sewage Disposal Undertaking which was a part of the Municipal Corporation of Delhi, and by virtue of the legislation called the Delhi Water Board Act, 1998, it was renamed as Delhi Jal Board, which became an independent statutory legal entity. In terms of section 46 of the Act, all properties, assets and liabilities under the control of the Delhi Water Supply and Sewage Disposal Undertaking immediately before the effective date would and did vest in the Board. Section 2(b) of the said Act defines 'Board' meaning the Delhi Water Board established under sub-section (1) of section 3 and includes any member, officer or employee of the Board to whom the Board may delegate its powers under section 22. By resolution adopted on April 17, 1998, the Chief Executive Officer of the Board was delegated the powers that were earlier vested with the Commissioner, Municipal Corporation of Delhi. A conjoint reading of the aforesaid provisions makes it crystal clear that the Chief Executive Officer substituted the Commissioner, M.C.D., in the new organisation, i.e., the Delhi Jal Board, and consequently in the contract the word 'Commissioner' has to be substituted and read as 'the Chief Executive Officer'. In that view of the matter, I hold that the plea raised by the petitioner challenging the jurisdiction of the Chief Executive Officer in appointing the arbitrator is not only barred by the principles of waiver and acquiescence but the same also has no merit.

6. The next contention that was raised by the counsel appearing for the petitioner is that the learned Arbitrator went beyond his power and jurisdiction in awarding the compensation as against claim No.3. It was pointed out that the learned arbitrator has assessed compensation of Rs.11,06,901/- under claim No.3. As the said claim was awarded under the provisions of clauses 2 and 3 of the contract agreement, it was submitted that the aforesaid clauses 2 and 3 of the contract agreement were not arbitrable particularly in view of the decision of the Supreme Court in Vishwanath Sood v. Union of India and another, : [1989]1SCR288 . In order to appreciate the aforesaid contention I have perused the award passed by the learned arbitrator as against claim No.3. The said claim was a claim for recovery for levy of compensation of an amount of Rs.11,06,901/-. The claim was made on the ground that the petitioner had delayed the work right from the beginning and did not take up the work in right earnest. therefore, the procedure as envisaged under the provisions for levy of compensation under the contract

agreement was complied with by the respondent and thereafter as per clause 2 of the contract agreement, compensation @ 10% of the estimated cost was levied against the petitioner and an amount of Rs.11,06,901/- was claimed from the petitioner under the aforesaid claim. The petitioner contested the said claim contending inter alias that the said claim is not valid as the respondent delayed in taking the decisions and thereforee the department should not have imposed penalty when the contract was rescinded on November 19, 1997 by which date the contract had come to an end in view of the aforesaid recession of the contract. The learned arbitrator considered the rival contentions and thereafter held that although the date of completion of the work was stipulated in the contract, the petitioner did not even start the work and thereforee the department had no other alternative but to rescind the contract and get the balance work done at the risk and cost of the petitioner. It was further held that the said action of the respondent was according to the provisions of clauses 2 and 3 of the contract agreement and, thereforee, levy of compensation was considered to be valid and as per the contract agreement. On the aforesaid ground the learned arbitrator allowed the claim of the respondent to the extent of Rs.11,06,901/-.

7. It was also contended by the counsel appearing for the petitioner that since the aforesaid claim was on the basis of clauses 2 and 3 of the contract agreement, the said claim was not arbitrable and, thereforee, the said part of the award is required to be set aside and quashed. Clauses 2 and 3 of the contract agreement would require extraction for appropriate appreciation of the aforesaid contentions:-

CLAUSE 2

'The time allowed for carrying out the Work as entered in the tender shall be strictly observed by the Contractor and shall be reckoned from the date on which the order to commence work is given to the contractor. The work shall through out the stipulated period of the contract be proceeded with all due diligence (time being deemed to be of the essence of the contract on the part of the contractor), and the contractor shall pay as compensation an amount equal to one percent, or such smaller amount as the Municipal Corporation (whose decision in writing shall be final) may decide, the amount of the estimated cost of the whole work as shown

by 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 bond in all cases in which the time allowed for any work exceeds one month, to complete one-fourth of the whole of the work before one-fourth of the whole time allowed under the contract has elapsed; one half of the work before one half of such time has elapsed; and three fourths of the work before three fourths of such time has elapsed. In the event of the contractor failing to comply with this condition he shall be liable to pay as compensation an amount equal to one percent or such smaller amount as the Municipal Corporation (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 percent on the estimated cost of the work as shown in the tender.'

CLAUSE 3

'In any case in which under any clause or clauses of this contract the contractor shall have rendered himself liable to pay compensation amounting to the whole of his security deposit (whether paid in one sum or deducted by Installments or committed a breach of any of the terms contained in Clause 19-B) the Municipal Engineer, on behalf of the Municipal Corporation shall have power to adopt any of the following courses as he may deem best suited to the interest of the Corporation:

a) To rescind the contract of (which rescission notice in writing to the contractor under the hand of the Municipal Engineer shall be conclusive evidence) and in which case the security deposit of the contractor shall stand forfeited, and be absolutely at the disposal of the Corporation.

b) To employ labour paid by the Municipal Works Department and to supply materials to carry out the work, or any part of the work, debiting the contractor with the cost of the labour and the price of the materials (as to the amount of which cost and price a certificate of the Municipal Engineer shall be final and conclusive against the contractor), and crediting him with the value of the work done in all

respects in the same manner and at the same rates as it had been carried out by the contractor under the terms of his contract; the certificate of the Municipal Engineer as to the value of the work done shall be final and conclusive against the contractor.

c) To measure up the work of the contractor, and to take such part thereof as shall be unexecuted out of his hands, and to give it to another contractor to complete, in which case any expenses which may be incurred in excess of the sum which would have been paid to the original contractor if the whole work had been executed by him (of to the amount of which excess the certificate in writing of the Municipal Engineer shall be final and conclusive) shall be borne and paid by the original contractor, and may be deducted from any money due to him by the Corporation under the contract or otherwise or from his security deposit or the proceeds of sale thereof or a sufficient part thereof.

Contractor remains liable to pay compensation, if action not taken under Clause 3.

In the event of any of the above courses being adopted by the Ex. Engineer, the contractor shall have no claim to compensation for any loss sustained by him by reason of his having purchased or procured any materials, or entered into any engagements or made any advances on account of, or with a view to the execution of the work or the performance of the contract. And in case the contract is rescinded under the provision aforesaid the contractor shall not be entitled to recover or be paid any sum for any work thereforee actually performed under this contract, unless and until the Ex. Eng. will have certified in writing the performance of such work and the value payable in respect thereof, and he shall only be entitled, to be paid the value so certified.'

8. The arbitration clause which is also relevant for deciding the aforesaid plea has already been extracted above. A bare look at the said arbitration clause and clause 2 would indicate that they are exactly similar to the clauses which came up for interpretation before the Supreme Court in Vishwanath Sood (supra) where Clause 25 was the arbitration clause which opened with the words 'Except where otherwise provided in the contract..'. In the case in hand, the arbitration clause also opens with the same words with the same expression 'Except where

otherwise provided in the contract..'. Clause 2 of the present contract is almost similar to clause 2 of the agreement which was involved in the case of Vishwanath Sood (supra). After noticing the aforesaid two clauses, the Supreme Court in the case of Vishwanath Sood (supra) held 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. It was also held that the question of awarding compensation under clause 2 was 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. The arbitration clause being clause 25 in the present case starts with similar opening phrase excepting 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. Levy of compensation is one of such matters. After considering clauses 2 and 25, the Supreme Court in the case of Vishwanath Sood (supra) held that the conclusion is irresistible that the amount of compensation chargeable under clause 2 is a matter which has to be adjudicated in accordance with that clause and which cannot be referred to arbitration under clause 25. Having considered the aforesaid decision indepth and also the facts of the present case including the two clauses involved in the present case I am also of the considered opinion that the compensation to be levied under clause 2 of the present contract is also a matter which has to be adjudicated in accordance with the said clause and the same cannot be a subject-matter of arbitration and cannot be referred to arbitration under clause 25. The aforesaid conclusion is irresistible particularly in view of settled position of law as laid down in the case of Vishwanath Sood (supra) which was also followed by the Division Bench of this Court in Delhi Development Authority v. M/s. Sudhir Brothers 1995 (2) ALR 306.

9. Counsel appearing for the respondent however, sought to distinguish the facts of the present case from that of the Vishwanath Sood (supra) by relying on the decision of the Supreme Court in General Manager, Northern Railway and another v. Sarvesh Chopra, : [2002]2SCR156 . However, the distinction that was sought to be made out by the respondent appears to me to be only imaginary and without any merit and basis. The case of General Manager, Northern Railway (supra) was

rendered by the Supreme Court on facts which are dissimilar not only from Vishwanath Sood (supra) as held by the Supreme Court but also from the facts of the present case. In the case of Vishwanath Sood (supra) also, clause 2 of the contract envisages determination of the amount of compensation for the delay in the execution of work only by the Superintending Engineer whose decision in writing was final. Similar is the case under clause 2 of the contract involved in the present case. Since the aforesaid clause provides a departmental or in-house remedy and attaches finality to the decision thereof to be an excepted matter, therefore the ratio of the decision laid down in the case of the Vishwanath Sood (supra) is fully applicable to the facts of the present case. Accordingly, it is held that the arbitrator acted totally without jurisdiction in going into the aforesaid question of levy of compensation as the said issue was not arbitrable in view of the language in clause 2 of the contract which attaches finality to the decision of the appropriate authority, namely, the Executive Engineer. As the award in respect of the said claim was rendered without jurisdiction the same shall have to be set aside and quashed, which I hereby do. The aforesaid claim and the amount as claimed shall, however, be governed in accordance with the ratio of the decision laid down by the Supreme Court in Vishwanath Sood (supra).

10. The next contention was in respect of the award rendered by the learned arbitrator as against claim No.4. As against the aforesaid claim for recovery of extra cost towards the work executed by engaging another agency, an amount of Rs.44,84,058/- was held recoverable and payable by the petitioner. The aforesaid claim was based upon clause 3 of the contract agreement which stipulates and empowers the respondent to rescind the contract, to employ labour, to carry out the work debiting the contractor, to measure up the work of the contractor and to take such part thereof as shall be unexecuted out of his hands and to give it to another contractor to complete the same in which case any expense which might be incurred in excess of the sum which would have been paid to the original contractor if the whole work had been executed by him, would be borne and paid by the original contractor. The said contract agreement also provides that in such cases the contractor shall have no claim to compensation for any loss sustained by him, and that in case the agreement had been rescinded the contractor shall not be entitled to be paid any sum for any work actually performed. The said

clause 3 also provides that the amount of cost of the labour and price of the materials which could be debited by the Municipal Engineer, a certificate has to be given by the said Engineer which shall be final and conclusive against the contractor. A certificate in writing is also to be given by the Municipal Engineer with regard to the measure up of the work of the contractor and to take such part thereof which is unexecuted and to give the same to another contractor to complete, and that the said certificate under the said clause is also held to be final and conclusive. In the present case, the Municipal Engineer sought to take action under the provisions of clause 3 of the contract. During the course of the aforesaid exercise certificates have also been issued by the said engineer. The said certificates are final and binding as stipulated in the said clause. Action taken in exercise of the aforesaid power of the Engineer is kept outside the scope of arbitration by using the opening words and expression in clause 25. In view of the aforesaid position, the certificates issued and the action taken by the Municipal Engineer would be final and binding and cannot be made a subject-matter of arbitration. It cannot be said that any dispute has arisen out of the aforesaid actions taken and therefore the said claim is not arbitrable at all. The award passed by the arbitrator is, therefore, held to be without jurisdiction on similar grounds as observed while deciding the issues raised as against claim No.3. The award passed as against claim No.4 is set aside with the observation and direction that action could be taken by the respondent in accordance with ratio of the decision rendered by the Supreme Court in the case of Vishwanath Sood (supra).

11. It was also contended by the counsel appearing for the petitioner that the award has been made and published by the arbitrator with a biased mind and without offering adequate opportunities to the petitioner to prove its case. The aforesaid allegation is found to be very vague and uncertain. Not a single instance is shown by the petitioner to prove bias against the arbitrator. The allegation that there is violation of the principles of natural justice is also without any basis and merit. The aforesaid allegations are very vague and no concrete example could be shown and proved by the petitioner in support of the said contention during the course of arguments. The said contentions, therefore, stand rejected.

12. It was also contended by the counsel appearing for the petitioner that the award is otherwise against the terms and conditions of the contract and is against the public policy. It was submitted that under the arbitration clause only those claims could be referred to arbitration which were not falling under the 'excepted category'. In that context reference was made by the counsel to the award rendered by the learned arbitrator as against claim Nos. 3 and 4 in respect of which my reasons and conclusions have already been rendered. Counsel for the petitioner submitted that the arbitrator while awarding claim Nos. 1 and 2 misinterpreted and violated the terms and conditions of the contract and awarded the amount of material on double the issue rate by taking recourse to clause 44 and thereby enforcing the penal provisions without taking any evidence in that regard. In order to appreciate the aforesaid contention I have considered the award passed by the learned arbitrator as against claim Nos. 1 and 2. The learned arbitrator has given cogent reasons for coming to the conclusions rendered in the award as against claim Nos. 1 and 2. The award as against claim Nos. 1 and 2 for recovery of amount is made in terms of clauses in the contract. It is clear from the conditions of the said clauses of the contract that the contractor has to construct suitable godown at the site of work for storing the materials to be safe against theft, fire, dampness, rain, etc. and has to employ watch and ward for the aforesaid purposes. The contract envisages that recovery at twice the issue rate has to be made from the contractor if the material is not returned by the contractor to the department. As a matter of fact, in the present case the learned arbitrator found that 400 bags of cement were issued to the petitioner out of which only 19 bags were consumed and thereafter no further work was taken up by the petitioner. There was a breach of the contract according to the contract agreement and, therefore, the learned arbitrator held that the petitioner is liable to pay the amount at penal rate of recovery for the cement. Similar is the case with regard to steel which was issued to the petitioner. Some quantity of steel issued to the petitioner was consumed at the work while the balance was liable to be returned back. As the same was not returned back, the findings and conclusions arrived at are valid. In that view of the matter I find no merit in the contention of the counsel for the petitioner that the award as against claim Nos. 1 and 2 is required to be set aside. On appreciation of the records I find no reason to set aside the award

rendered in respect of claim Nos. 1 and 2 and the same is upheld.

13. Contention was also raised on behalf of the petitioner in respect of the award passed by the learned arbitrator as against the counter-claims. The counter-claims of the petitioner for site mobilisation, soil testing, structural designs, and testing of piles were rejected on the ground that none of the aforesaid claims were payable under the contract. The said decision has been rendered by the arbitrator after considering the evidence on record and on examining the various clauses of the contract between the parties. It was also held by the learned arbitrator that there was a breach of the contract agreement by the petitioner and, therefore, it is not entitled to be paid in terms of the provisions of the contract. The aforesaid conclusions of the learned arbitrator are findings of facts and in consonance of the terms and conditions of the contract. The said findings do not attract any of the provisions of section 34 for setting aside the award.

14. So far the claims of the petitioner regarding cost of establishment and watch and ward, loss of profit, and idle tools and plants, as raised in counter-claim Nos. 5, 6 and 7, are concerned, the learned arbitrator has given his cogent reasons for rejecting the said claims. I find no material to accept the contention of the counsel appearing for the petitioner that the said award as rendered by the learned arbitrator against the aforesaid three claims is bad in law. Even otherwise, the contract agreement envisages that no such amount is payable to the petitioner. Rejection of the said claims on the ground that such claims are not admissible even according to the terms of the contract is based on interpretation of the clauses of the contract. I find no valid reason to interfere with the said findings.

15. Accordingly, the award rendered by the learned Arbitrator in respect of all other claims, except claim Nos. 3 and 4, is found to be legal and valid and the same is upheld. However, the award rendered by the arbitrator as against claim Nos. 3 and 4 is set aside.

16. The petition filed under section 34 of the Arbitration and Conciliation Act, accordingly, stands disposed of in terms of observations and directions contained hereinabove.

