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**Court : Delhi**

**Decided On : May-13-2002**

**Reported in : 2002(3)ARBLR508(Delhi); 99(2002)DLT593; 2002(64)DRJ252**

**Judge : J.D. Kapoor, J.**

**Acts : [Arbitration and Conciliation Act, 1996](#) - Sections 34; ;[Arbitration Act, 1940](#) - Sections 30, 33, 81 and 85(2); Indian Contract Act - Sections 73 and 74**

**Appeal No. : Suit No. 1555A/1996 and is 2002/1997**

**Appellant : Krishna Construction Co.**

**Respondent : Delhi Development Authority and ors.**

**Advocate for Def. : Anusuya Salwan, Adv.**

**Advocate for Pet/Ap. : Sandeep Sharma, Adv**

**Judgement :**

**J.D. Kapoor, J.**

1. Admittedly one of the Clauses of the agreement between the parties namely Clause 25 provided that subject to the provisions of the [Arbitration Act, 1940](#) or any tatutory modification or re-enactment thereof and the rules made there under and for the time being in force shall apply to the arbitration proceedings under this

clause.

2. The old Act of 1940 was repealed and substituted by the Arbitration and Conciliation Act of 1996. The new Act came into force on 25.1.1996. Admittedly arbitration proceedings took place under the old Act of 1940 but the award was made after the enforcement of new Act of 1996. It was made and published on 10.5.1996.

3. Under the old Act the Award was liable to be set aside under the provisions of Sections 30 & 33 of the Act. After being noticed, an aggrieved party was required to file objections challenging the award within thirty days. Under the new Act, award can be challenged under the provisions of Section 34 of the Act. The objections for setting aside the award are required to be filed within three months of making of the award. Under the old Act unless and until award is made rule of the court it did not attain the status of a decree whereas under the new Act the award is executable as a decree unless it is challenged under Section 34 of the Act and is set aside.

4. Since the objections against the instant award were filed under Sections 30 & 33 of the old Act of 1940, the same, according to Mr. Sandeep Sharma, learned counsel for the petitioner are liable to be dismissed being not maintainable particularly in view of decision of the Supreme Court in Rani Construction delivered in Thyssen Sthalunion GMBH v. Steel Authority of India Ltd. : AIR 1999 SC3923 wherein legality of an agreement that the parties would be governed by any subsequent statutory modification or re-enactment thereof and the rules made there under which is non-existent and is not even in the omb when old Act is holding the filed was upheld.

5. It is contended with vehemence that in view of aforesaid decision of the Supreme Court the objections should have been filed under Section 34 of the new Act and not under Sections 30 & 33 of the old Act and since the objections under Section 34 of the New Act were required to be filed within three months of the making of the award, the instant objections cannot be entertained being not maintainable and barred by time.

6. In order to appreciate the contention of Mr. Sharma, the observations of the Supreme Court need to be reproduced. These are as under:-

'Parties can agree to the applicability of the new Act even before the new Act comes into force and when the old Act is still holding the field. There is nothing in the language of Section 85(2)(a) which bars the parties from so agreeing. There is, however, a bar that they cannot agree to the applicability of the old Act after the new Act has come into force when arbitration proceedings under the old Act have been commenced though the arbitration agreement was under the Old Act. therefore where arbitration clause in the contract which reads that 'subject to the provisions of the contract to the contrary as aforesaid, the provisions of the Indian [Arbitration Act, 1940](#) or any statutory modification or re-enactment thereof and the rules made there under and for the time being in force shall apply to all arbitration proceedings under this clause', the expression 'for the time being in force' mean thereby that provision of that Act would apply to the arbitration proceedings which will be in force at the relevant time when arbitration proceedings are held, that clause containing the arbitration agreement in the said case does not admit of interpretation that the case is governed by the provisions of the [Arbitration and Conciliation Act, 1996](#).'

7. As is apparent, the limited question before the Supreme Court was whether the parties can agree to the applicability of the statute which is yet to come into existence. Such an agreement has been held to be valid.

8. The Supreme Court has upheld the validity of such an agreement between the parties alone as it was vehemently contended that no party can agree to the applicability of the statute which is yet to come into existence. By taking such a view, the Supreme Court in my opinion did not intend to hold that all objections filed by the parties under Sections 30 & 33 of the old Act would be rendered nugatory or non-existent particularly when such objections have been filed pursuant to the notice of the court calling upon the parties to file objections within the prescribed period of thirty days before award is made rule of the court or that the aggrieved party should be left remediless.

9. In my view the effect and ratio of the judgment of the Supreme Court in Thyssen case is not that the objections if filed under Sections 30 & 33 of the old Act pursuant to the notice of the court are to be thrown away. At the most substance of the objections preferred by a party have to be decided and determined on the anvil of principles laid down under Section 34 of the New Act and that too with the exception that limitation for filing objections under Section 34 will not be applicable in such a case and delay if any, shall always be condonable if these have been filed within 30 days of the notice issued under the old Act.

10. Merely because parties agree to the applicability of the New Act which is yet to come into force while the old Act is holding field does not mean that right of the parties stand foreclosed for all times to come even if the award is per se bad even when examined on the touchstone of the provisions of new Act.

11. If such a view is taken that the objections filed by an aggrieved party pursuant to the notice issued by the court and under the misbelieve and wrong legal advice are not worthy of given a glance it would result in monstrous injustice. The only benefit the opposite party can derive from such a lapse on the part of the aggrieved party, his counsel and the court is that the objections or challenge to the award shall be seen and determined on the anvil of substituted provisions i.e. Section 34 of the New Act. This course alone can serve not only the interests of justice but also would not leave a party remedyless or in lurch.

12. There is no gainsaying the fact that any wrong advice by the counsel cannot put a party to such a jeopardy that it is left remedy less. In the given facts the objections to the award were maintainable under Section 34 of the new Act of 1996 as the parties had by virtue of Clause 25 agreed that they would be governed by any statutory modification or re-enactment of the Arbitration Act of 1940 and the rules made there under.

13. It appears the respondents were labouring under the belief that since the proceedings before the Arbitrator were held under the old Act though award was made after the enforcement of New Act, the remedy under the old Act by way of assailing it under Sections 30 & 33 of the Old Act was available though this plea was erroneous but was advised by the counsel representing the respondent.

14. Not only proceedings were held under the Old Act but the Arbitrator also made it clear that he was making the award under the old Act. So much so notice of this court under the Old Act called upon the respondent to file objections, if any, within 30 days. The notice sent by the court in this regard is as under:-

'WHEREAS Sh. Om Prakash the Arbitrator has filed the award dated 10.5.1996 delivered by the said Arbitrator with arbitration proceedings in Court in disputes inter se respondent and petitioner for being made a rule of the court. The suit is fixed for hearing on 28.4.1987 at 11.00 A.M. before the Registrar of this Court.

You are hereby called upon to file objections, if any, in accordance with law to the said award within 30 days of the service of this notice.

Take notice that your failure to do so as stated above would entail the consequences enjoined by law.'

15. The aforesaid circumstances show that not only the Arbitrator followed old Act but the court also issued notice under the wrong presumption that award has been made under the old Act and the objections are to be filed under the Old Act.

16. Under the old Act of 1940 the award was liable to be set aside if the Arbitrator or Umpire had misconducted himself or the proceedings or if the award had been made after the issue of the Court superseding the arbitration or after the arbitration proceedings had become invalid Section 35 or if the award had been arbitrarily made. The validity of the award was also challengeable under Section 33. The misconduct of the Arbitrator was by judicial decisions given a wide meaning encompassing not only a misconduct by the Arbitrator himself but also factual misconduct or a legal misconduct. So far as the factual misconduct was concerned it mainly confined to the arena where the Arbitrator ignored to consider a material fact or document or evidence which when taken into consideration would have affected the award significantly or had the effect of upturning it, so far as the legal misconduct was concerned the Arbitrator was held to be committing such a misconduct if the legal proposition propounded by him was on subsequent examination found to be wholly unsound.

17. The other misconduct that encompassed in its fold was the traversing of the Arbitrator beyond the terms of the agreement which meant usurping the jurisdiction or if he chose to give his own meaning to the terms of the agreement. Rightly so as the authority of the Arbitrator stems from the agreement. He is a creature thereof and not over it. Thus any award by the Arbitrator which was found to be beyond the terms of the agreement it was held to be a nullity. It did not mean that the Court was given the powers to examine or scan the award as an Appellate Court.

18. Down the lines and over the period the judicial decisions had cautioned the Court not to reappraise or reappraise the evidence and the material and not to find faults as to the finding of facts arrived at by the Arbitrator even if such a finding was erroneous. The object was to preserve the sanctity of the award as the parties chose their own person in whom they had unflinching faith as to impartiality and competence and therefore parties could not be allowed to at subsequent stage assail their impartiality or the competence in adjudging their disputes. There was also unvarying unanimity on the point that unless and until the error was writ large over the face of the award or the error of law or fact was apparent on the face of the award the award should not be interfered with.

19. However, under the Act of 1996 the challenge to the award has been narrowed down considerably. Under Section 34 of the Act the award is liable to be set aside if it suffers from the following vices:-

i) If it deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration.

ii) If it contains decisions on matters beyond the scope of submission to arbitration but this is subject to the condition that if the decision on matter is submitted to arbitration can be separated from those not so submitted only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside.

iii) If the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties. iv) If the subject matter of the

dispute is not capable of submission by arbitration.

v) If the award is in conflict with the public policy of India. The statute also explains that an award is in conflict with the public policy of India if the making of the same was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81.

20. However Section 75 is a confidentiality Section meaning thereby that the conciliator and the parties shall keep confidential matters relating to the conciliation proceedings and this confidentiality shall extend to the settlement agreement except where its disclosure is necessary for the purpose of implementation and enforcement.

21. Section 81 puts an embargo upon the parties to the arbitration from relying on or introducing evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings the view expressed or suggestions made by the other party in respect of a possible settlement of the dispute; or admissions made by the other party in the course of the conciliation proceedings or the proposals made by the conciliator or the fact that the other party had indicated his willingness or accept a proposal for settlement made by the conciliator.

22. As is apparent from the aforesaid provisions the aggrieved party can challenge the award if it is beyond the terms of submission which in other words beyond the terms of the agreement and secondly if it is in conflict with the public policy.

23. Having arrived at this conclusion I now set down to determine the objections filed under Sections 30 & 33 of the Old Act deeming them objections under Section 34 of the New Act.

24. The solitary objection which falls within the realm of Section 34 of Act of 1996 is that claim No. 1 which was on account of compensation for losses and damages suffered due to prolongation of contract period was barred by Clause 10CC of the term of the agreement. The relevant extracts of the award are as under:-

'If the prices of materials and store (not being actually supplied through services rendered at fixed rates by the department in accordance with Clauses 10 & 34 thereof) and/or wages of labour required for execution of the work increase the contractor shall be compensated for such increase as per provisions detailed below and the amount of the contract was accordingly be varied subject to the condition that such compensation for escalation in prices shall be available only for the work done during the stipulated period of contract including such period on which the contract is validity extended under provisions of Clause 5 of the contract without any action under Clause 2 and also subject to the condition that no such compensation shall be payable for the work for which the stipulated period of completion is six months or less. Such compensation for escalation in the prices of materials and labour when due shall be worked out based on the specific formula. The formula has been provided in the said application.

25. Admittedly the execution of the contract was prolonged on account of delay in giving the site, delay in issuing the foundation, drawings, delay in deciding plinth level of the building, delay in issue of the material, delay in supply of drawing and delay in electric and colour selection. The aforesaid delays were squarely on the part of the respondent DDA. There was delay of 15 long months. It was contended before the learned Arbitrator by the respondent that the claimant can seek compensation under Clause 10CC and not under any other formula which is not covered under the terms and conditions of the contract. The learned Arbitrator has not only not dealt with this objection of the respondent but has wrongly taken the refuge under Section 73 of the Indian Contract Act which stipulates the payment of damages in case of breach of contract. It is further contended that after having held the respondent responsible for the aforesaid delays the learned Arbitrator was bound by Clause 10CC of the terms and conditions and adjudge the claim of the petitioner on the basis of the formula provided there under and not on any other provisions.

26. On the contrary Mr. Sharma has contended that in the absence of a specific plea with regard to the governing Clause 6, Clause 10CC cannot come to the rescue of respondent. According to Mr. Sharma it was incumbent upon the respondent to say in so many words that 'the learned Arbitrator has traversed

beyond Clause 10CC of the agreement in assigning the damages on the basis of the principles contained in Section 73 of the Indian Contract Act.'

27. Main thrust of arguments of Mr. Sharma is that the damages contemplated under Clause 10CC are not the damages which have been claimed and awarded by way of claim No. 1. Damages claimed by the petitioner by way of claim No. 1 were on account of pay of Engineer, watch and ward, head offices, and other heads and supervisory and other staff.

28. As against this, Mr. Anusuya Salwan has contended that escalation claims on account of delay means escalation of price of material and wages of staff employed by the contractor and any other kind of escalation which is either statutory or otherwise. So far as the expense incurred by the contractor during the prolonged period is concerned that do not come within the meaning of escalation clause. According to Ms. Salwan to determine compensation due to fault of the respondent one has to fall back upon at the relevant clause which in this case is Clause 10 CC.

29. Clause 10 CC provides for assessing compensation on account of escalation in prices of material and wages of labourer and other employees. It is contended that since the delay results in prolongation of the contract, the contractor is entitled for compensation towards expenses incurred by him for keeping the entire staff including Engineer in employment as contractor cannot release the staff engaged in execution of the contract for a short or intermittent duration. If it is done, the execution of the work will not only take more time but is likely to go haywire.

30. According to Mr. Sharma, claim No. 1 by no stretch of imagination comes under Clause 10 CC and therefore, the finding of the Arbitrator in this regard is neither beyond the terms of submission nor beyond the terms of agreement. While distinguishing the ratio of DDA v. U. Kashyap 1999 (1) Arb LR 88 and relying upon the DDA v. S.S. Jaitley 2001 Arb LR 289 Mr. Sharma has contended that the claim on account of expenditure to be incurred on account of idle labour staff, machinery, sanitary and other requirements like electricity, and waters during the prolonged period of contract and to keep the regular establishment at site till the work is completed is a claim which does not come within the parameter of Clause 10 C.C.

It was held that such a claim is as per Sections 73 and 74 of the Contract Act. It entitles a party to claim damages of the loss suffered due to breach of the contract by the opposite party. As is apparent from the aforesaid view taken by this Court the breach on the part of the respondent was a prolongation of the contract on account of fault on the part of the respondent DDA. The close perusal of the Judgment shows that the claimant was held entitled to claim on account of the aforesaid heads because Clause 36 of the agreement required the claimant to keep regular establishment.

31. To appreciate the contention of Mr. Sharma, Clause 36 of the agreement needs to be reproduced, reads as under:-

'The contractor shall employ the following technical staff during the execution of his work:-

1. One Graduate Engineer, when the cost of work to be executed is more than Rs. 5 lacs, with at least five years experience Diploma holders in Engineering with at least ten years experience in a reputed concern or government department will be treated at par with graduate Engineer.

2. One qualified diploma in Engineering (Overseas) when the cost of work to be executed is more than Rs. 2 lacs and up to Rs. 5 lacs.

The technical staff should be available at site, whenever required by Engineer, in Charge to take instructions.

In case the contractor fails to employ the technical staff as aforesaid he shall be liable to pay a sum of Rs. 2,000/- for each month of default in the case of Graduate Engineer and Rs. 1,000/- for each month of default in the case of Diploma holder.'

32. As is apparent from the aforesaid Clause Graduate Engineer is only required when the cost of the contract is more than Rs. 5 lacs and qualified diploma engineer are required only when the cost of work is more than Rs. 2 lakhs and up to Rs. 5 lakhs.

33. There is no doubt that the claim of the petitioner by way of claim No. 1 was not on account of escalation. If the cause for delay is entirely that of the respondent the load of blame cannot be shifted to the contractor. For such a delay the contractor is entitled for compensation. Clause 10CC takes care of only compensation on account of escalation of prices of material and wages for the employees and other staffs whereas compensation on account of delay either in giving site or issuing material etc. is distinct. In the instant case the contractor has to be compensated for keeping its entire establishment ready for the execution of the contract. The delay on the part of any of the parties amounts to breach of the contract. It is more so where time is essence of the contract.

34. Once there is a breach of the contract and there is no specific clause in the agreement for dealing with such a situation, the provisions of the Indian Contract Act come into play. In this case there was a delay of 15 months for which the contractor had to be compensated. The compensation on this account has been worked out by the Arbitrator to the tune of Rs. 77,806/- whereas the petitioner preferred a claim to the extent of Rs. 4,70,000/-. The Arbitrator has given a lumpsum award. Though the petitioner-claimant had produced documentary evidence about the expense incurred by them yet the amount of the claim preferred by the petitioner was not found to be fully justified.

35. Law does not prohibit the Arbitrator from Awarding lumpsum amount. The amount of Rs. 77,806/- awarded by the Arbitrator against the claim of Rs. 4 lacs and odd awarded by the Arbitrator shows that the Arbitrator had applied his mind for arriving at this figure. Even otherwise from conservative estimate the contractor must have incurred the expenses to the aforesaid tune during the period of 15 months.

36. Courts have been advised not to interfere with the findings of fact of the Arbitrator even if he arrive at erroneous conclusion. Unless he ignores material document which is vital for just and fair decision award should not be disturbed.

37. For the foregoing reasons, the objections are devoid of merits and are dismissed. The award is made rule of the Court. The suit is decreed for Rs. 2,08,319.20/- with pendente lite and future interest @ 12% p.a. from the date of

award till realisation. Decree sheet be prepared accordingly.

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