

Delhi Development Authority Vs. Hindustan Construction Corporation Engineers and Contractors

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Court : Delhi

Decided On : Sep-12-2001

Reported in : 94(2001)DLT502; 2002(61)DRJ299

Judge : Mr. Devinder Gupta and; Mr. Sanjay Kishan Kaul, JJ.

Acts : [Arbitration Act, 1940](#) - Sections 20, 30, 33 and 39; Indian Contract Act - Sections 70

Appeal No. : FAO(OS) 143/2001 and CM 3742001

Appellant : Delhi Development Authority

Respondent : Hindustan Construction Corporation Engineers and Contractors

Advocate for Def. : Mr. Vijay Kishen and ; Mr. Vikram Jaitley, Adv.

Advocate for Pet/Ap. : Ms Anusuya Salwan, Adv

Disposition : Appeal dismissed

Judgement :

ORDER

Sanjay Kishan Kaul, J.

1. The award of the work of construction of LIG Houses at Hastal by the appellant to the respondent vide agreement no. 19/EE/HD-9/86-87 gave rise to disputes resulting in proceedings under section 20 of the [Arbitration Act, 1940](#). Mr. H.R. Khanna, retired Judge of the Supreme Court of India was appointed the sole arbitrator by order dated 31.3.95 of the learned Single Judge and an Award dated 24.4.96 was published by the Learned Arbitrator.

2. The learned arbitrator granted numerous opportunities to the appellant to file a reply but the appellant did not avail of the same. However, a communication dated 6.12.95 was sent to the learned arbitrator on behalf of the appellant stating that the claim was barred by time. Thus except to the extent of raising the plea of limitation, the proceedings before the learned arbitrator went almost uncontested.

3. The award was filed in this court and on notice being served on the appellant of filing of the award, objections to the award were filed. The learned Single Judge vide impugned order dated 5.2.2001 dismissed the objections filed under sections 30 and 33 of the [Arbitration Act, 1940](#) and the award was made a rule of the court. The learned Single Judge has recorded that despite ample opportunities the appellant did not enter appearance to contest the claim on merits and most of the objections taken by the appellant are on merits of the case. The further plea, advanced on behalf of the learned counsel for the appellant before the learned Single Judge claiming that the learned arbitrator had looked into some matters which were beyond his jurisdiction, was also considered by the learned Single Judge but the said contention was also rejected on the ground that since no objections were raised before the learned arbitrator, he same were not required to be looked into. The appellant has preferred this appeal aggrieved by the said judgment and order of the learned Single Judge dated 5.2.2001.

4. In this appeal under section 39 of the [Arbitration Act, 1940](#) various grounds have been raised but it is an admitted position on record that the same relate to the merits of the controversy and are thus not required to be looked into either by the learned Single Judge or by us in appeal. Ms. Anusuya Salwan, learned counsel for the appellant, however, contends that at least the issue of jurisdiction needed to be examined. Such plea has been raised in respect of claim no. 3 and 4

which deal with the additional payment over agreement rate on account of the rise in the cost of labour and construction material and the fact that the contract was delayed on account of the alleged conduct of the appellant. It is stated that this objection was specifically taken as objection number 'X' of the objections filed on behalf of the appellant before the learned Single Judge. The objection is that payments have already been made under clause 10(CC) as per the terms and conditions of the agreement and only that payment was admissible and nothing over and above the said payment could be awarded by the learned Single Judge. It is submitted by the learned counsel for the appellants that as the escalation was provided in terms of the escalation clause 10(CC), the learned arbitrator had no jurisdiction to make any award over and above this amount.

5. The learned counsel for the appellant has sought to support her submission with the Division Bench judgment of this court in DDA vs. U Kashyap 1999 (1) A L.R. 88. The same clause 10(CC) was interpreted by the Division Bench of this court and the Division Bench came to the conclusion that the arbitrator had exceeded this jurisdiction in making the award by adopting a formula different from the one set out in clause 10(CC) of the agreement. The Division Bench strongly relied on the judgment of the Supreme Court in Associated Engineering Company vs. Government of Andhra Pradesh & Anr. 1991(2) A L.R. 180. The Supreme Court was of the view that where an escalation clause is provided in the contract which gives the specific formula for calculation of such escalation, the arbitrator has no jurisdiction to alter the formula and must make an award in accordance with the formula.

6. The learned counsel for the appellant has also relied upon a recent Division Bench judgment of this court in DDA v. K C Goyal & Company 2001 II AD (Del) 116. The Division Bench relying upon the Associated Engineering Company's case (supra) and the DDA vs. U. Kashyap's case (supra) came to the conclusion that an Award contrary to the agreed formula under clause 10(CC) would be erroneous and would amount to arbitrator committing legal misconduct by going beyond the provisions of clause 10(CC).

7. Mr. Vijay Kishen, learned counsel for the respondent on the other hand, has opposed the appeal specially on the ground that there is no reason to interfere with the impugned order dated 5.2.2001 since the appellant did not even care to contest the arbitration proceedings. It is thus contended that it is not permissible in law for the learned Single Judge or the appellate court to go into the merits of controversy. Insofar as the plea arising from lack of jurisdiction in terms of clause 10(CC) is concerned, the learned counsel has urged that the said clause is not automatically applicable. The learned counsel has read out the said clause 10(CC) to contend that the same would be applicable 'only for the work done during the stipulated period of contract including such period for which the contract is validly extended under provisions of clause 5 of the contract without any action under clause 2 ...' It is thus submitted that the own case of the appellant is not that the contract was ever extended beyond the stipulated period. The learned counsel has contended that the clause cannot be appreciated in isolation without application to the facts of the case and the necessary factual material should have been placed and the plea raised before the learned arbitrator if the appellant wanted to plead that the calculations to be made only in terms of clause 10(CC).

8. Mr. Vijay Kishen, learned counsel for the respondent has also relied on certain subsequent development to the judgment in the Associated Engineering Company's case (supra) . The learned counsel referred to the order of the Supreme Court in K R Raveendranathan vs. State of Kerala & Another : (1998)9SCC410 where the Supreme Court considered the view taken in case of Sudarshan Trading Company vs. Government of Kerala : [1989]1SCR665 and Hindustan Construction Company Limited vs. State of J & K : AIR 1992 SC2192 and was of the view that the said two judgments were in conflict with the view taken in Associated Engineering Company's case (supra) and thus referred the matter to a three-Judge Bench of the Supreme Court. The three-Judge Bench in the said case thereafter passed an order reported in K R Raveendranathan vs. State of Kerala : (1998)9SCC410 where it was recorded that in the Hindustan Construction Company's case (supra) and Sudarshan Trading Company's case (supra) while dealing with the issue of construction of contract, it has been laid down by the Supreme Court that while purporting to construe the contract the court could not take upon itself the burden of saying that this was contrary to the

contract, and as such, beyond jurisdiction. The Supreme Court thus observed that this is exactly what the court had done in the present case and, therefore, the issue stands covered by this decision. The appeal was thus allowed and the impugned judgment of the Division Bench was set aside. The learned counsel for the respondent was thus submitted that the propositions laid down in Associated Engineering Company's case (supra) have to be read in context of the subsequent development. The learned counsel has further referred to the Division Bench judgment of the Bombay High Court in Shyama Charan Agarwala & Sons vs. Union of India 1999 (1) A. L.R. 483 to contend that once an arbitrator had appreciated the agreement and the clause thereof, even if it is erroneous interpretation, the court cannot set aside the award.

9. Learned counsel for the respondent has lastly referred to the judgment of the learned Single Judge in suit No. 2376/93 M/s. G D Tewari & Company vs. DDA decided on 2.5.95 where the said clause 10(CC) was considered in respect of the plea of the arbitrator having acted without jurisdiction. The learned Single Judge was of the view that the clause 10(CC) was applicable only if the escalation was referable to the period of contract including such period for which the contract is validly extended under provisions of clause 5 of the contract without any action under clause 2 and since there was no extension of the contract within clause 5, clause 10(CC) would have no application and the damages would be calculated on principles of Section 70 of the Contract Act.

10. We have considered the rival submissions advanced on behalf of the parties. We are of the considered view that there is no need to examine the factum of the orders of the Supreme Court in K R Raveendranathan's case (supra) in view of the judgment of the Division Bench of this court in DDA vs. K C Goyal's case (supra) . The prepositions of law laid down both in DDA v. U Kashyap's case (supra) and the subsequent decision in DDA v. K.C. Goyal's case(supra) are still good law and have not been set aside by the Supreme Court in any manner.

11. On the facts of this case it is clear that the plea of the calculation to be made in accordance with the clause 10(CC) was never advanced before the learned arbitrator. In fact the appellant did not even care to attend the arbitration

proceedings throughout and apart from the latter raising the plea of limitation, no response was filed to the statement of claim filed by the respondent. It is a case of total negligence on the part of the appellant in conduct of the arbitration proceedings. The appellant showed total discourtesy to the court and to the learned arbitrator who is a retired Judge of the Supreme Court of India by not attending to the proceedings and assisting the learned arbitrator. In fact the respondent chose to keep away most of the time. We are in agreement with the submissions advanced on behalf of learned counsel for the respondent that clause 10(CC) would not automatically apply and the necessary grounds for its application must be laid before the arbitrator. The clause is applicable when there is a valid extension as per clause 5. There is no such plea raised before the learned arbitrator. The appellant has in fact pleaded to the contrary. We are in full agreement with the observations of learned Single Judge of this court in the case of G D Tewari & Company's case (supra) to the effect that the said clause 10(CC) would be applicable only if the same was referable to the period of contract including such period for which the contract is validly extended under provisions of clause 5 of the contract without any objections under clause 2 and cannot relate to a claim after the expiry of the period of contract when the same would be governed on the principles of section 70 of the Contract Act.

12. We are constrained to make certain further observations having taken note of the manner in which the arbitration proceedings were conducted by the appellant, a statutory body. We are pained to note the negligent manner in which the arbitration proceedings have been conducted on behalf of the appellant where they have not even really joined the arbitration proceedings despite repeated opportunities. The arbitration proceedings were before a retired Judge of the Supreme Court. We are of the considered view that the appellate authority should hold an enquiry into this matter and fix responsibility on the erring official(s). Such enquiry should be completed within a period of three months. A copy of this order be sent to the Vice-Chairman, DDA.

13. We are thus in agreement with the view taken by the learned Single Judge in terms of the impugned order and the appellant being totally negligent in the conduct of the arbitration proceedings is entitled to no relief from this court. The

appeal is dismissed and the interim orders passed on 30.3.2001 stand vacated. The respondent shall also be entitled to costs of Rs. 5,000/-.

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