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Mohan Construction Vs. Union of India (Uoi) and ors.

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Court : Delhi

Decided On : Aug-29-2008

Reported in : 2008(3)ARBLR609(Delhi); 2008(106)DRJ859

Judge : Hima Kohli, J.

Acts : Arbitration Act, 1940 - Sections 15, 16 and 30; Indian Contract Act, 1872 - Sections 74

Appeal No. : CS(OS) 2130A/1995

Appellant : Mohan Construction

Respondent : Union of India (Uoi) and ors.

Advocate for Def. : V.K. Tandon, Adv.

Advocate for Pet/Ap. : Sandeep Sharma, Adv

Judgement :

Hima Kohli, J.

CS (OS) No. 2130A/1995 & IA No. 12226/1995 (objections under Section 15, 16 and 30 of the Arbitration Act, 1940)

1. By way of the present order, this Court proposes to dispose of the objections filed by the objector UOI against an award dated 29.6.1995. The disputes

adjudicated upon by the learned Arbitrator arise out of a contract entered into between the objector UOI and the petitioner contractor for the work of construction of Camp Jail, Phase II at Tihar Jail, Delhi including the development works in respect of which, a contract was executed between the parties on 28.11.1980. In the course of executing the work, as disputes and differences arose between the parties, the petitioner contractor invoked the arbitration clause contained in the contract. As a result, the respondent appointed an Arbitrator to adjudicate the disputes between the parties. The Arbitrator entered upon reference on 29.4.1991. The petitioner contractor raised 10 claims against the objector UOI, whereas the objector UOI raised 17 counter claims. After considering the respective claims and counter claims of the parties, the learned Arbitrator directed the objector UOI to pay the petitioner contractor a sum of Rs. 2,59,376/- plus interest, as awarded against claim No. 9 after adjusting certain recoveries directed to be made against the petitioner contractor. Aggrieved by the aforesaid award, the objector UOI has filed the present objections.

2. Counsel for the objector UOI states that the Arbitrator has misconducted the proceedings by not giving any finding on counter claim No. 8 and holding that the Arbitrator has no power to go into the levy of compensation under Clause 2 of the agreement. It is stated that the Superintendent Engineer had directed the petitioner contractor to pay a sum of Rs. 4,39,641/- to the objector UOI and that while rendering the award, the aforesaid amount ought to have been directed to be paid by the petitioner contractor to the objector UOI or adjusted against the balance payment. The aforesaid objection is devoid of merits as it is the settled position that levy of compensation cannot be a subject matter of arbitration Refer DDA v. Sudhir Brothers 1995 2 ALR 359. The said fact was duly noticed by the Arbitrator at page 4 of the award. The aforesaid objection is, therefore liable to be rejected.

3. The second plea raised on behalf of the objector UOI is that the learned Arbitrator misconducted the proceedings by accepting the new partnership in place of the old partnership firm. He submits that the learned Arbitrator ought to have taken notice of the fact that for some time, both the firms were in existence on 7.3.1988 and thus the petitioner contractor being a new firm, was not entitled to

make any representation on behalf of the earlier partnership firm and on this ground alone, the claims raised by the petitioner firm ought to have been rejected.

4. While dealing with the aforesaid preliminary objection raised by the objector UOI in this regard, the learned Arbitrator observed in the award that vide office order dated 5.5.1988, the Director General (Works), CPWD had already approved the re-constitution of the petitioner firm and agreed to the petitioner firm taking over the assets and liabilities of the old firm. The submission of the petitioner contractor to the effect that the Director General (Works), CPWD gave his approval to the re-constitution so that the old firm could be dissolved, was also noticed. After taking note of the aforesaid submissions to the effect that approval was granted by the Director General (Works), CPWD on 5.5.1988, the learned Arbitrator arrived at a conclusion that the substitution of the re-constituted firm in place of the old partnership firm was in order. There appears no illegality or error apparent on the face of the record in respect of the aforesaid finding that deserves interference. In these circumstances, the aforesaid objection taken to the award is rejected.

5. Counsel for the objector UOI next submits that the learned Arbitrator erred in holding that risk and cost action under Clause 3 of the agreement does not subsist against the petitioner contractor and that it is entitled to refund of sum of Rs. 1 lakh which was forfeited by the objector UOI as security amount as the contract had been rescinded by the objector UOI. It is contended that the learned Arbitrator ought to have held that the action taken by the objector UOI under Clause 3 of the agreement was justified and thus he ought to have allowed forfeiture of the security amount of Rs. 1 lakh.

6. The aforesaid issue has been dealt with by the learned Arbitrator at page 4 of the award. After culling out the background of the case and the manner in which the work under the contract proceeded, it was held that legally, risk and cost action taken by the objector UOI under Clause 3 of the agreement could not subsist against the petitioner contractor as the objector UOI failed to make time for completion of the work, an essence of the contract, by giving reasonable time for performance of balance work after removing the impediments/ hindrances at the site.

7. The aforesaid finding of the learned Arbitrator is a finding of fact that this Court while examining an award under the provisions of Section 30 of the Arbitration Act, 1940, ought not to interfere with. In Hindustan Iron Co. v. K. Shashikant & Co. : AIR 1987 SC81 the Apex Court had held that the award of the Arbitrator ought not to be set aside for the reason that, in the opinion of the Court, the Arbitrator reached wrong conclusions or failed to appreciate the facts. This well settled proposition of law was reiterated in the decision of the Apex Court in Coimbatore District Podu Thozillar Sangam v. Balasubramania Foundary and Ors. : [1987]3SCR852 where it had been opined that it is only an error of law and not a mistake of fact committed by the arbitrator which can be adjudicated in the application/objection before the Court. If there is no legal proposition either in the award or in any document annexed with the award which is erroneous and the alleged mistakes or alleged errors, are only mistakes of fact and if the award is made fairly, after giving adequate opportunity to the parties to place their grievances in the manner provided by the arbitration agreement, the award is not amenable to corrections of the Court.

8. Similarly, in Hindustan Construction Co. Ltd. v. Governor of Orissa and Ors. : [1995]2SCR441 it was reiterated that the Court cannot re-appreciate the material on the record. It is not for this Court to appreciate the evidence only to arrive at a different conclusion from one that may have been arrived at by the learned Arbitrator. The Arbitrator is the sole judge of the quality and quantity of the evidence and it will not be for the Court to take upon itself the task of being a judge on the evidence before the Arbitrator, even if there is a possibility that on the same evidence, the Court may arrive at a different conclusion than the one arrived at by the Arbitrator, that by itself is not a ground for setting aside the award. Refer: MCD v. Jagannath, Amarnath and Anr. : [1988]1SCR180 . Having examined the material on the record and the evidence adduced by the parties, the learned Arbitrator returned a finding to the effect that the objector UOI was not entitled to forfeit the security deposit. This Court does not find any error in the award insofar as it is held that the petitioner contractor is entitled to refund of the sum of Rs. 1 lakh towards security deposit.

9. Counsel for the objector UOI further submits that the amount of Rs. 2,54,122.80paise awarded by the learned Arbitrator against claims No. 2, 3 and 4 is not justified after rescission of contract as balance work and incomplete items of work were got completed by the respondents at the risk and cost of the petitioner contractor under Clause 3 of the agreement. The aforesaid objection no longer survives in view of the finding given by the learned Arbitrator on the issue of forfeiture of the security deposit, as referred to in the foregoing para. The said objection is therefore held to be devoid of merits.

10. The next objection taken by the objector UOI is that the learned Arbitrator erred in refusing to permit the recovery of Rs. 19,10,000/- out of the final bill of Rs. 20,86,078/- as prepared in the course of arbitration proceedings. He submits that the learned Arbitrator ought to have awarded the sum in favour of the objector UOI on account of work done at the risk and cost of the petitioner contractor. In response, counsel for the petitioner contractor draws the attention of this Court to the findings of the learned Arbitrator in respect of claims No. 2, 3 and 4 as detailed at pages 4 to 8 of the impugned award wherein, the learned Arbitrator has dealt with various items under each of the aforesaid claims and has not only looked at the nature of the work executed by the petitioner contractor, but also the rates applicable in respect of different items while returning a finding in each case separately. It is not for this Court to transgress into the aforesaid area by scrutinizing the nitty gritty of each item of work, which are based on the facts of the case and the material placed on the record, including the documents made available by the parties. These are all purely questions of facts which are beyond the pale of interference by this Court under the provisions of Section 30 of the Act. In any case, there appears no illegality or arbitrariness in the award in this regard which deserves interference by this Court. Accordingly, the aforesaid objection of the objector UOI is held to be misconceived and therefore rejected.

11. It is further urged on behalf of the objector UOI that the learned Arbitrator ought to have allowed the counter claims No. 1 to 4 raised by the objector UOI on account of balance work of development, external sewerage, electricity sub-station and building portion, which was got executed by the department at the risk and cost of the claimant. He submits that on this ground also, the award was liable to

be set aside. In reply, counsel for the petitioner contractor submits that the aforesaid counter claims raised by the objector UOI were considered along with the claims of the petitioner contractor, as is apparent from a perusal of page 2 of the award. He states that as the aforesaid counter claims were based on the claim of the objector UOI that it was entitled to make recoveries from the petitioner contractor on account of work got done at its risk and cost which was rejected, the said counter claims were also rightly rejected by the Arbitrator. As already noted above, the findings of the learned Arbitrator that the risk and cost action of the objector UOI could not subsist against the petitioner contractor, have been upheld. For the same reason, the aforesaid objection raised by the objector UOI is also liable to be turned down.

12. Counsel for the objector UOI states that the learned Arbitrator erred in not awarding the double rate recovery to the objector UOI and instead, wrongly reduced the single rate from Rs. 28,707.90paise to Rs. 15,034/-. The issue of double rate recovery has been dealt with by the learned Arbitrator in para 6 of the award, where he held that just as the petitioner contractor could not be held entitled to any recoveries for want of sanction of various items, similarly, the objector UOI was also not entitled to effect double rate recovery for consumption of cement/ steel beyond the tender contract requirements as all the quantity issued had been impliedly consumed in the work and at the end of the contract, there had been no notice from the objector UOI to the petitioner contractor for return of the excess cement as required under the Clause 42 of the agreement. It was further observed that the objector UOI has not placed on record any evidence of it having suffered any loss and thus it was held that the double rate recovery under Section 74 of the Indian Contract Act, 1872, cannot be effected. There is ample justification given by the learned Arbitrator for rejecting the aforesaid claim of the objector UOI. There is no error apparent on the face of the award in respect of the aforesaid finding which is purely a finding of fact and based on the materials available with the Arbitrator. This Court does not deem it appropriate to sit in appeal over any finding of facts returned by the Arbitrator only to arrive at a conclusion, different from that arrived at by the learned Arbitrator, as the findings returned by the learned Arbitrator, is also a possible view in the given facts and circumstances of the case. As a result, the aforesaid objection is also not

sustainable.

13. It is further submitted by the counsel for the objector UOI that the learned Arbitrator wrongly rejected counter claim No. 12 raised by the objector UOI in respect of rectification of defects for which a sum of Rs. 50,000/- was claimed. Apart from making a bald averment to the aforesaid effect, there is no explanation offered by the objector UOI as to what if any is the error apparent on the face of the record while rejecting the aforesaid claim No. 12. In these circumstances, the aforesaid objection is turned down being highly ambiguous and without any foundation.

14. The second last objection raised by the objector UOI is with regard to the finding of the learned Arbitrator in respect of counter claim No. 13 which was with regard to the failure on the part of the petitioner contractor to file his labour reports. It is contended that despite the fact that the contractor had not filed the reports of the labour as stipulated in Clause 19 (D) of the agreement, which mandates a penalty of Rs. 50 on the contractor for failure to file a report on a fortnightly basis, the learned Arbitrator did not take notice of the said position. On the contrary, perusal of the award shows that in para 7, the learned Arbitrator has returned a finding that the petitioner contractor could not be held liable to pay any amount under the aforesaid Clause 19 (D) of the agreement as there was no notice, complaint or levy by the objector UOI in this regard, at any time during the course of execution of the works. The aforesaid finding shows that no evidence was placed before the learned Arbitrator by the objector UOI. This is also a finding of fact which this Court does not deem appropriate to interfere with while exercising its powers under Section 30 of the Act. Hence, the aforesaid objection is also rejected.

15. The last plea taken to assail the impugned award is that the learned Arbitrator ought to have held that a 12 feet high wall had fallen on account of negligence and poor workmanship of the petitioner contractor and hence, he ought to have awarded a sum of Rs. 1,64,900/- in favour of the objector UOI, as raised in its counter claim No. 16. It is stated that the aforesaid amount claimed by the objector UOI was on account of re-construction of the wall. Counsel for the petitioner

contractor submits that the said counter claim was duly considered by the learned Arbitrator who held that no amount could be claimed in this regard as the said wall had fallen due to gales and rain storms. A perusal of the impugned award shows that while rejecting the aforesaid argument raised by the objector UOI, the learned Arbitrator relied on a document being Ex.R/62, which is a letter dated 22.6.1982, issued by the Executive Engineer (PWD) to the petitioner contractor. Taking into consideration the clear admission on the part of the objector UOI that the boundary wall had fallen down at three places due to the gales and rain storms, the learned Arbitrator concluded that the petitioner contractor could not be held liable for the same. The said conclusion appears to be justified and reasonable and based on the material placed on the record. In these circumstances, the aforesaid objection is also not sustainable and is rejected.

16. In view of the aforesaid discussion and the findings as given above, the objections raised by the objector UOI are rejected being devoid of merits. The award dated 29.6.1995, is made rule of the Court. Taking into consideration the fact that in the award, the learned Arbitrator has awarded simple interest @ 12% p.a. from the date of the award to the date of the payment or the decree of the Court, whichever is earlier, it is directed that in case the entire amount is not paid to the petitioner contractor within 30 days from the date of the judgement, the objector UOI shall pay future interest on the amount awarded in favour of the petitioner contractor @ 9% p.a. till realization. Decree sheet be drawn up accordingly. There will be no order as to costs.

17. The file be consigned to the Record Room.

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