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Dsa Engineers Vs. Housing and Urban Development (Hudco)

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Court : Delhi

Decided On : Sep-26-2008

Reported in : 2008(4)ARBLR347(Delhi)

Judge : Mukul Mudgal and; Manmohan, JJ.

Acts : Arbitration and Conciliation Act, 1996 - Sections 31(7) and 37; Delhi High Court Act - Sections 10; Interest Act; Arbitration Act, 1940

Appeal No. : FAO(OS) 109/2004

Appellant : Dsa Engineers

Respondent : Housing and Urban Development (Hudco)

Advocate for Def. : P.N. Kumar and; Anurag Kumar, Advs.

Advocate for Pet/Ap. : Chetan Sharma, Sr. Adv. an; S.K. Tiwari, Adv

Disposition : Appeal dismissed

Judgement :

Manmohan, J.

1. The present appeal has been filed under Section 37 of the Arbitration and Conciliation Act, 1996 read with Section 10 of the Delhi High Court Act against the judgment dated 21st April, 2004 in OMP No. 367 of 2001 whereby the Award

passed by the Arbitral Tribunal with regard to Appellant's Claims 2A and 5 has been set aside.

2. The relevant facts of this case are that the Appellant was awarded a contract by the Respondent Corporation for external services (plumbing) under agreement dated 10th June, 1992. The agreement was to be effective from 3rd April, 1992 that means from the date of award of the work and was to be completed within 130 days i.e. by 9th August, 1992.It is the Appellant's case that due to various reasons solely attributable to the Respondent like delay in providing drawings, delayed decisions, hindrances at site and delay in payments of bills, the contract was completed only on 12th December, 1995.Since the disputes arose between the parties, the matter was referred to arbitration and by unanimous Award dated 30th June, 2001 the Arbitrator awarded a sum of Rs. 34 Lakhs along with the interest to the Appellant.

3. On objections being filed by the Respondent Corporation, learned Single Judge vide the impugned order set aside the Award only with regard to Claims 2A and 5.While Claim 2A was towards loss of overheads due to delay in completion of the contract, Claim 5 was for payment of interest.

4. The relevant portion of the judgment passed by the learned Single Judge is reproduced here in below for ready reference:

7. The next objection that is raised by the counsel appearing for the respondent is in respect of the award passed by the arbitral tribunal in respect of the claim No. 2-A which is towards loss of overheads. Total claim of the petitioner on the aforesaid head was for an amount of Rs. 84,01,234/- as against which the learned tribunal has awarded an amount of Rs. 18,83,392/-. The aforesaid award passed by the learned tribunal is challenged by the respondent on the ground that no such award could have been passed by the learned tribunal as provided for under prohibitory exemption clauses, namely, 55, 57 and 66 of the agreement....

9. I have given my careful consideration to the aforesaid contention. The aforesaid clauses which are extracted hereinabove clearly provide that no compensation whatsoever either for delay in making available any area of work or for any altered,

additional or substituted work or for any other such circumstances would be allowed. It is clearly and unambiguously laid down that no compensation or over run charges are payable to the contractor and that the contractor was not entitled to claim any compensation or over run charges whatsoever for any extension granted. The aforesaid clause definitely is a prohibitory clause and no such amount for over run charges could have been directed to be paid by the learned tribunal in view of the settled position of law as laid down by the Supreme Court, to which reference is already made.

10. It was submitted by the counsel appearing for the petitioner that according to the aforesaid clauses no compensation was payable only if the delay was for a reasonable period but if the said period overruns more than 15 to 25% of the contract period, then the aforesaid clauses cannot be said to be operative. I am, however, unable to accept the aforesaid contention, for under the aforesaid clauses owners have been given the liberty to give extension for completion of the contract for a reasonable period but no extra amount is payable as compensation when such extension are granted. In the aforesaid clauses, there was an absolute bar for payment of any amount towards extra and overhead charges and the said clauses cannot be said to be qualified by the words 'reasonable period'. The aforesaid award passed by the learned arbitral tribunal is found to be beyond its powers and jurisdiction and, therefore, the said award is set aside....

14... In the present case, I have extracted the provisions of Clause 20.1 which categorically prohibits payment of interest on any amount due to the contractor against earnest money, security deposit, interim or final bills or any other payments due under the contract. therefore, the said clause prohibits payment of interest on any amount which is found due and payable under the aforesaid contract. Whatever interest is levied by the learned tribunal is the amount which according to it was due and payable to the contractor. therefore, on the aforesaid sum found due and payable, no interest could have been awarded by the arbitral tribunal in view of Clause 20.1 and in the light of ratio of the aforesaid decisions of the Supreme Court. There exists between the parties an agreement which prohibits grant of interest. The Supreme Court has also clearly held that if the terms of the contract expressly stipulate that no interest would be payable, then

the arbitrator would not get the jurisdiction or right to award interest even notwithstanding the provisions of the Interest Act. Power to grant interest by the arbitrator emanates from the statutory provisions but the same is always subject to the agreement between the parties as laid down by the Supreme Court in the aforesaid decisions. In that view of the matter the award passed by the learned tribunal awarding interest at the aforesaid rate to the petitioner is found to be in violation of the agreed terms and conditions. The aforesaid prohibitory clause applies in full force and, therefore, in view of the ratio of the aforesaid decisions of the Supreme Court the award in respect of the aforesaid claim towards payment of interest also stands set aside....

5. Mr. Chetan Sharma, learned Senior Counsel for the Appellant firstly submitted that Clauses 55, 57 and 66 did not constitute prohibitory clauses qua overheads on account of overrun of the project. According to him, the said clauses would not apply when the delay in completion of project was attributable to a basket of factors namely delay in issue of drawings, delayed decisions, hindrances at site and delay in payment of dues/bills. He further submitted that in any event, the said clauses cannot be interpreted to mean that if there was unreasonable delay entirely attributed to the Respondent Corporation still the Appellant would not be entitled to any claim towards loss of overheads.

6. Mr. Chetan Sharma further submitted that Clause 20.1 does not constitute a prohibitory clause qua award of interest. In this connection he referred to judgment of Hon'ble Supreme Court in the case of Board of Trustees for the Port of Calcutta v. Engineers-De-Space-Age reported in : AIR 1996 SC2853 as well as State of U.P. vHarish Chandra & Co. reported in : (1999)1SCC63 and two judgments of learned Single Judges of this Court in the cases of Thermospares India v. B.H.E.L. reported in (2006) 3 R.A.J. 495 (Delhi) and M/s. Bharat Heavy Electricals Ltd. v. Globe Hi-Fabs Ltd. reported in 113 (2004) DLT 205. Mr. Chetan Sharma emphasised that the impugned judgment itself had been found to be per incuriam by another learned Single Judge in the case of Thermospares India (Supra).

7. Since the controversy with regard to overheads revolves around interpretation of Clauses 55, 57 and 66 of the Agreement executed between the parties, it would

be relevant to reproduce the same here in below:

55.0 Possession of Site

55.1. The owner will make available to the Contractor the Site or the respective work fronts to enable the Contractor to commence and proceed with the execution of Works in accordance with the agreed programme. If there is delay in making available any area of work, the owner shall on the recommendations of the Architect and the Consultant grant reasonable extension of time for the completion of work. The Contractor shall not be entitled to claim any compensation, whatsoever on this account.

55.2. The portion of the Site to be occupied by the Contractor shall be indicated by the Engineer at Site. The Contractor shall on no account be allowed to extend his operations beyond these areas.

57. Extension of Time:

57.1. If the works are delayed by force majure, suspension of work by the owner, serious loss or damage by fire, ordering of altered, additional or substituted work or other special circumstances other than through the default of the contractor, as would fairly entitle the contractor to an extension of time and which in the discretion of the owner is beyond the control of Architects and the Contractor, then upon the happening of any such even causing delay, the contractor shall within 10 days of the happening of even give notice thereof in writing to the Engineer, stating the cause, and the anticipated period of delay, then in any such event, Managing Director on the recommendations of the Architect and the Consultant may give a fair and reasonable extension of time for completion of work.

57.2. Such extension shall be communicated to the Contractor by the Engineer in writing. The Contractor shall not be entitled to claim any compensation or over run charges whatsoever for any extension granted.

66.0 CLAIMS:

66.1 The Contractor shall send to the Executive Director (E & T)/Consultant/Engineer/Architect once every month an account giving particulars, as full and detailed as possible of all claims for any additional payment to which the Contractor may consider him-self entitled and of all extra or additional work ordered in writing and which he has executed during the preceding month.

66.2 No claim for payment for any extra work or expense will be considered which has not been included in such particulars. The owner may consider payment for any such work or expense where admissible under the terms of the Contract. If the Contractor has at the earliest, practicable opportunity notified the employer in writing that he intends to make a claim for such work and expense and it is certified by the Consultant in consultation with the Architects that such payment was due.

66.3 Any claim which is not notified in two consecutive monthly statements for two consecutive months shall be deemed to have been waived and extinguished.

8. On a plain reading of the aforesaid Clauses, we are of the view that if there is any delay on account of Respondent Corporation, then the Appellant is entitled to only extension of time for completion of contract but not for any overhead charges. Therefore, in our opinion, the Appellant is not entitled to claim any compensation or overhead charges due to delay in completion of contract.

9. As far as the issue of reasonableness of the aforesaid clauses is concerned, we are of the view that the arbitrators are creature of their agreements and their jurisdiction flows from the agreement and the reference order. The Apex Court in catena of cases has held that an Award contrary to contractual provision constitutes a jurisdictional error and such an Award is likely to be set aside. In this context, it may be relevant to refer to one of such judgments of the Hon'ble Supreme Court namely New India Civil Erectors (P) Ltd. v. Oil & Natural Gas Corporation reported in : [1997]2SCR86 .The relevant portions of the said judgment are reproduced here in below:

9...It is axiomatic that the arbitrator being a creature of the agreement, must operate within the four corners of the agreement and cannot travel beyond it. More

particularly, he cannot award any amount which is ruled out or prohibited by the terms of the agreement. In this case, the agreement between the parties clearly says that in measuring the built-up area, the balcony areas should be excluded. The arbitrators could not have acted contrary to the said stipulation and awarded any amount to the appellant on that account. We, therefore, affirm the decision of the Division Bench on this score (claim 6).

10. Claim 9: The appellant claimed an amount of Rs. 32,21,099.89p under this head, against which the arbitrators have awarded a sum of Rs. 16,31,425. The above claim was made on account of escalation in the cost of construction during the period subsequent to the expiry of the original contract period. The appellant's claim on this account was resisted by the respondent-Corporation with reference to and on the basis of the stipulation in the Corporation's acceptance letter dated 10-1-1985 which stated clearly that 'the above price is firm and is not subject to any escalation under whatsoever ground till the completion of the work'. The Division Bench has held, and in our opinion rightly, that in the face of the said express stipulation between the parties, the appellant could not have claimed any amount on account of escalation in the cost of construction carried on by him after the expiry of the original contract period. The aforesaid stipulation provides clearly that there shall be no escalation on any ground whatsoever and the said prohibition is effective till the completion of the work. The learned arbitrators, could not therefore have awarded any amount on the ground that the appellant must have incurred extra expense in carrying out the construction after the expiry of the original contract period. The aforesaid stipulation between the parties is binding upon them both and the arbitrators. We are of the opinion that the learned Single Judge was not right in holding that the said prohibition is confined to the original contract period and does not operate thereafter. Merely because time was made the essence of the contract and the work was contemplated to be completed within 15 months, it does not follow that the aforesaid stipulation was confined to the original contract period. This is not a case of the arbitrators construing the agreement. It is a clear case of the arbitrators acting contrary to the specific stipulation/condition contained in the agreement between the parties. We, therefore, affirm the decision of the Division Bench on this count as well (claim 9).

10. Consequently, keeping in view the aforementioned terms of the present agreement, we are in respectful agreement with the finding of learned Single Judge that no compensation can be granted to the Appellant on account of any delay in execution of the contract.

11. As far as Mr. Sharma's submission with regard to award of interest is concerned, we are of the view that Clause 20.1 of the Agreement specifically prohibits award of interest to the Appellant with regard to any payment due under the contract. The relevant Clause 20.1 of the Agreement is reproduced here in below:

Clause 20.1:- No interest shall be payable on any money due to the contractor against earnest money, security deposit, interim or final bills or any other payments due under this contract.

12. Since the present Award is governed by the Arbitration and Conciliation Act, 1996, Section 31(7)(a) would apply to the parties. The said Section is reproduced here in below for ready reference:

31. Form and contents of arbitral award...

(7) (a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

13. In our view, the aforesaid Section makes clear that party autonomy prevails and preserves the parties' right to agree what powers, if any, the arbitral tribunal shall have as regards the award of interest. In other words, the powers of the tribunal are flexible and can be made greater or narrower, more by agreement of the parties. Russell on Arbitration, twenty-first edn., 1997, page 295 para 6-140 fn. 71 has referred to Socony Mobil Oil Co. v. West of England Ship Owners Mutual Insurance Association Ltd (The 'Padre Island') (No. 2) [1989] 1 Lloyd's Rep. 239

CA, wherein it was held that the intention to exclude interest need not be contained in the arbitration clause itself, provided it can be construed as part of the arbitration agreement. It is pertinent to mention that Section 31(7)(b) of the Arbitration and Conciliation Act, 1996 provides for payment of interest for a period post award. However, the said Sub-section (b) in contrast to Sub-section (a) does not give the parties an option to contract out of the interest leviable for a period post award.

14. As we have already reached the conclusion that Clause 20.1 prohibits grant of Award of interest to the Appellant, the Arbitral Tribunal, in our view, did not have the power or jurisdiction to award either pre-reference or interest pendente lite.

15. The judgments of the Hon'ble Supreme Court in the cases of Board of Trustees for the Port of Calcutta (Supra) as well as State of U.P. v. Harish Chandra & Co. (Supra) would be of no assistance to the Appellant as the said judgments deal with an award which was governed by the old Arbitration Act, 1940 , which did not contain a provision like Section 31(7)(a) of the Arbitration and Conciliation Act, 1996.Even the judgment of learned Single Judge in M/s. Bharat Heavy Electricals Ltd. (Supra) proceeds on the basis that there was no contractual provision in the said case which debarred payment of interest on the money withheld by the employer after it became due. Therefore, the said judgment cannot offer any assistance to the Appellant. As far as judgment of Thermo spares India (supra) is concerned, we are of the view that the said judgment though holds the impugned judgment to be per incuriam, it itself did not consider the impact of the provision of Section 31(7)(a) of Arbitration and Conciliation Act, 1996 as Thermos pares was a case under the old Arbitration Act, 1940.

16. Consequently, we are in respectful agreement with the learned Single Judge that the Arbitral Tribunal in the present case could not have awarded interest to the Appellant.

17. Therefore, the present appeal being devoid of merits is dismissed but with no order as to costs.

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