Mr. Jai Singh Vs. Delhi Development Authority and anr.

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Court : Delhi

Decided On : Nov-15-2002

Reported in : 2003(66)DRJ677

Judge : S.K. Agarwal, J.

Acts : Indian Contract Act - Sections 54 and 73; Arbitration Act - Sections 29

Appeal No. : S.No. 1587/1994 and IAs. 10855-56/2001

Appellant : Mr. Jai Singh

Respondent : Delhi Development Authority and anr.

Advocate for Def. : Anusuya Salwan, Adv.

Advocate for Pet/Ap. : Mandeep Singh Vinayak, Adv

Judgement :

S.K. Agarwal, J.

This order will disposes of objections filed by respondent-Delhi Development Authority (for short 'DDA') challenging the Arbitrator's award dated 3rd June, 1994, which is sought to be made as a rule of the court.

1. Facts in brief are that petitioner is a contractor carrying on business under the sole proprietorship concern M/s. J.S. Constructions; DDA awarded a contract for

construction of 496 MIG houses at Mansarovar Park including internal development thereof to the petitioner; during execution of the contract disputes arose between the parties and as per agreement, Engineer Member DDA vide letter No. EM2 85/91/arbn.11950-54 dated 14th September, 1991 appointed Shri S.S. Kaimal as the sole Arbitrator to decide and make an award in respect of disputes falling within the purview of Clause 25 of the contract (hereinafter the 'The agreement'); on 3rd June, 1994, the Arbitrator gave his award directing the DDA to pay to the claimant/petitioner Rs. 5,07,106/- (Rupees five lacs seven thousand one hundred six only) towards full and final settlement of all his claims along with simple interest @ 12% per annum. DDA challenged the award and filed several objections, inter alia, on the ground that the Arbitrator ignored various clauses including clause No. 25 of the agreement and the letters exchanged between the parties during the execution of the work. The claimant/petitioner filed an affidavit by way of reply to the objections.

2. I have heard learned counsel for parties and have been taken through the record.

3. The principle on which the Court can interfere with the award passed under the Act are now well settled by several authoritative pronouncement of the Apex Court i.e. (i) when there is a violation of the principles of natural justice; (ii) when there was apparent error on the face of the award; (iii) when the Arbitrator has ignored a clause in the agreement prohibiting dispute of the nature entertained; and (iv) when the award on the face of it is base don proposition of law which is erroneous. Reference in this regard can be made to the recent Supreme Court decision in Shyam Aggarwal v. Union of India, : [2002]SUPP1SCR148 .

4. Learned counsel for the DDA argued that although the objections against all the claims have been filed but she would not press for the objections against claim Nos. 1 to 14. I find that the award of the Arbitrator in respect of the claims is justified in the light of documentary evidence produced by the claimant. As no error apparent on the face of the record could be pointed out and these claims are upheld. However, learned counsel pressed objections in respect of the following claims and it would be convenient to deal with the objections claim-wise.

CLAIM No. 15:

5. The claimant claimed Rs. 85,883.35 towards refund of amount deducted for alleged deficiencies as compensation payable for the bad work. The arbitrator partly allowed the aforesaid claim by ordering payment of Rs. 54,023/- in favor of the claimant holding that deductions in respect of item Nos. 1, 2, 4, 5, 6, 10 & 11 were not called for since these items were executed as per specification after scrutiny of the deduction items in Exhibit C-59A.

6. During the proceedings, claimant claimed that deductions were not related to the alleged deficiencies were not mentioned in the completion certificates issued by the DDA in R-6 and that no notice as envisaged by Clause 14 of the Agreement was given. On the other hand, DDA relying upon Clause 25B pleaded that deductions were duly sanctioned by the Superintending Engineer from running bills while the work was in progress and showing deductions were filed before the Arbitrator. DDA in reply to the said claim has pleaded as under:

'The reduction/deduction items were initiated because of poor workmanship/sub-standard work done by the claimant during execution of work. The adjustment of reduction/education items has been done in the running account bills duly accepted by him. The claimant was fully aware of the defects, sub-standard work. Observation of Quality Control Cell were also furnished to the claimant. In this context R-6, 7 and 12 may also be referred. More over this claim is not tenable before the Arbitrator as per Clause 25(B) of the agreement.'

7. The excepted matters in the agreement are generally excluded from the purview of the arbitration. Reference in this regard may be made to the decision of the Supreme Court in Food Corporation of India v. Shreekanth Transport : [1999]3SCR699 . It was held as under:

'3. 'Excepted matters' obviously, as the parties agreed, do not require any further adjudication since the agreement itself provides a named adjudicator--concurrence to the same obviously is presumed by reason of the unequivocal acceptance of the terms of the contract by the parties and this is where the Courts have found out lacking in its jurisdiction to entertain an application for reference to arbitration

as regards the disputes arising there from and it has been the consistent view that in the event the claims arising within the ambit of excepted matters, question of assumption of jurisdiction of any arbitrator either with or without the intervention of the Court would not arise. The parties themselves have decided to have the same adjudicated by a particular officer in regard to these matters; what are these exceptions, however, are questions of fact and usually mentioned in the contract documents and forms part of the agreement as such there is no ambiguity in the matter of adjudication of these specialised matters and termed in the agreement as the excepted matters.'

8. Clause 14 of the agreement envisaged a fixed amount of compensation calculated at percentage basis of the estimate costs for the bad work. The decision of the Superintending Engineer in respect of the same made final. The Arbitration Clause 25 in the Agreement starts with the opening phrase 'except where otherwise provided in the contract', thus excluding from arbitration, certain matters and disputes, provisions in respect of which have been made else-where or otherwise in the contract. Further Clause 25B of the Agreement reads as under:

'CLAUSE 25B. The decision of Superintending Engineer regarding the quantum of reduction as well as justification there of in respect of rates for sub standard work which may be decided to be accepted will be final and would not be open to arbitration.'

9. In view of the above, question of awarding compensation for the bad workmanship is outside the purview of the Arbitrator. The decision of the Superintending Engineer in this regard is final. The decision of the Superintending Engineer under the clause was binding on the Arbitrator. The question, whether deductions rightly made or not should have raised before Superintending Engineer at the relevant time. The aforesaid claim of the claimant was outside the purview of the arbitration proceeding being an excepted matter. The Arbitrator could give award in respect of this claim. This view also finds support from the decision of the Division Bench of this court in DDA v. Sudhir Brothers : 57(1995)DLT474 . Thus, Arbitrator acted totally without jurisdiction while holding that deductions for certain items, were not called for or that these items were carried out as per specification.

thereforee, the award passed in respect of the claim No. 15 is set aside.

CLAIM No. 16:

10. The claimant claim Rs. 1,60,500/- as payment under Clause 10CC for escalation in prices for the work done during the stipulated period. The Arbitrator partly allowed the aforesaid claim by ordering payment of Rs. 17,674/- @ Rs. 5.18 of the value of the award amount of Rs. 34,470/- in respect of claim Nos. 1 to 6, 9, 11, 15 and 17.

11. For the reasons noticed earlier, as the award passed by the Arbitrator in respect of the claim No. 15 has been set aside, thereforee, the payment under Clause 10CC has to be proportionately reduced. It comes to Rs. 14,838/- instead of Rs. 17,636. Otherwise, reasoning adopted under this claim does not call for any interference. The award passed by the Arbitrator in respect of the claim No. 16, thereforee, is modified to this extent.

CLAIM No. 17:

12. Under this claim, the claimant claimed Rs. 15,000/- towards over charge in respect of issue of S.C.I. Pipes and the Arbitrator has awarded Rs. 14,279/- in favor of the claimant. This is on the basis of appreciation of the material available before the Arbitrator and does not call for any interference. The award of the Arbitrator under this claim is upheld.

CLAIM Nos. 18 & 19:

13. The claimant claim Rs. 12 lacs for loss of profitability on account of prolongation. The contract stipulated the date for completion as 18.12.1986 and the recorded date of completion is 25.8.1988. This, there is admitted delay of about 20 months. Considering the respective argument, the Arbitrator held as under:

'In view of the above, the continued breaches on the part of the respondent in fulfilling contractual obligations and reciprocal promises are established, justifying relief under Section 54 read with Section 73 of the Indian Contract Act. Out of

delay of 20 months, I am not inclined to allow compensation for first 6 months in view of provision of Clause 10 of the agreement and for the remaining 14 months I allow compensation at Rs. 6,000/- p.m. totalling to Rs. 84,000/- considering the nature and quantum of work. I have allowed Rs. 5000/- p.m. for engineer and compensatory staff. Keeping the provisions of Clause 36 in view, and another Rs. 1,000/- p.m. for tools and plants etc.'

'I, thereforee, award an amount of Rs. 84,000/- against claim No. 18. The extent of work done during the prolonged period of 20 months is about Rs. 60.0 lacs. The ends of justice would be met by awarding Rs. 60,000/-, which I do against claim No. 19.'

14. The Arbitrator, thus, partly allowed the aforesaid claim and ordered payment of Rs. 84,000/- as against claim No. 18 and Rs. 60,000/- to the extent of the work done during prolonged period of 20 months. The Arbitrator has given his own reasons for coming to the aforesaid conclusions. The petitioner incurred overhead expenses during the extended period thereforee, those expenses have to reimbursed unless there is a specific clause denying him such benefit. This part of the award is accordingly upheld.

CLAIM No. 20:

15. The claimant claim for pre-suit pendentelite and future interest @ 20%. The Arbitrator had awarded 12% except those claims under 18, 19 and 21 from 20.9.1991 till 3.6.1994 the date of making and publishing this award. The Award is as under:-

I award interest at 12% p.a.:-

i) On awarded amounts except those under claim Nos. 18, 19 & 21 from 20.9.1991 till 3rd June, 1994 the date of making and publishing this award and

ii) and on awarded amounts from 3rd June, 1994 the date of award till payment of decree by the competent court whichever is earlier.'

16. No effective objection is taken against the award of interest by the DDA. No ground for interfering with the same is made out. This part of the Award is also upheld.

For the above reasons, the objections are partly allowed. The award passed by the Arbitrator in respect of the claim No. 15 is set aside and in respect of claim No. 16 is modified. The award in respect of the remaining claims, passed by the Arbitrator is made as a Rule of the Court. Accordingly, let a decree be drawn. The petitioner shall also be entitled to interest @ Rs. 12% p.a. from the date of the decree till the date of realisation in terms of Section 29 of the Arbitration Act.