

P.C. Sharma and anr. Vs. Delhi Development Authority

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Court : Delhi

Decided On : Feb-22-2006

Reported in : 2006(1)ARBLR403(Delhi); 129(2006)DLT290; 2006(88)DRJ171

Judge : Sanjay Kishan Kaul, J.

Acts : [Arbitration Act, 1940](#) - Sections 20, 30 and 33; ;[Indian Contract Act, 1872](#) - Sections 73 and 74

Appeal No. : CS (OS) No. 520A of 1997

Appellant : P.C. Sharma and anr.

Respondent : Delhi Development Authority

Advocate for Def. : Deepak Khadaria, Adv. for ; Sangeeta Chandra, Adv.

Advocate for Pet/Ap. : Ravi Gupta; Sandeep Sharma,; Manu Bansal and ; Ankit Jain

Judgement :

Sanjay Kishan Kaul, J.

IA No. 10247/1997(under Sections 30 & 33 of the [Arbitration Act, 1940](#))

1. The petitioner was awarded the Contract for construction of category 3 SFS Houses at Sarita Vihar, Sector-1 in pursuance to Agreement No. 10/EE/CPD V/84-

85 by the respondents. The work was completed but there was a delay of 43 months in the completion of the work. The petitioner raised certain claims and since the same were disputed by the respondent the petitioner filed a petition under Section 20 of the [Arbitration Act, 1940](#) (hereinafter referred to as the said Act) before this Court. In the said proceedings Shri S.P. Kapil was appointed as the Sole Arbitrator to enter upon reference and adjudicate the disputes in view of the existence of Clause 25 of the general terms & conditions of the Contract being the Arbitration Clause. The Arbitrator made and published his award on 20.2.1997. The respondent aggrieved by the same has filed the present objections under Sections 30 & 33 of the said Act.

2. Learned counsel for the respondent initially made an attempt to take this Court through each of the claims to contend that the said claims must be examined by this Court. Such a course of action is not permissible in view of the fact that this Court does not sit as a Court of appeal to examine and reappraise the evidence and facts on record. So long as the view taken by the Arbitrator is a plausible view it is not for this Court to interfere with an award merely because this Court may come to another equally plausible view. In the absence of the award being absurd, the award is not liable to be interfered with. In this behalf reference may be made to the judgment of the Supreme Court in *Sudarsan Trading Co. v. Govt of Kerala* : [1989]1SCR665 and *Arosan Enterprises Ltd. v. Union of India and Anr.* 1999(3) Arb LR 310.

3. It is also necessary to put at rest a controversy which is sought to be raised about the award being not a reasoned award. The award undoubtedly is cryptic but in my considered view cannot be said to be devoid of reasons. An Arbitrator is not like a judge who has to write a judgment and thus the parameters for determining whether an award is a reasoned award is not akin to a judgment. In this behalf the judgment of the Division Bench of this Court in *DDA v. Bhagat Construction Co. Pvt. Ltd.*, 2004 (3) Arb LR 481 may be referred to. This question has also been recently considered in CS (OS) No. 995A of 1995 titled *Shri D.C. Kapur v. DDA and Anr.* decided on 8.2.2006. The judgment of the Apex Court in *Goa, Daman & Diu Housing Board v. Ramakant V.P. Darvotkar* : [1991]3SCR904 was taken note of and this Court agreed with the view expressed by Hon'ble Mr.

Justice Vikramajit Sen in Suit No. 21-A of 1996 Shri Anil Garg v. DDA and Ors. decided on 17.12.1999. The legal position which emerges is that so long as an Arbitrator was mindful of the contention raised and has considered the same it cannot be said that there is absence of reasons. Learned single Judge in Shri Anil Garg case (Supra) observed as under:

If, by merely referring to the rival contentions and their documents, without more, the Arbitrator in that case had been held to have given a reasoned award, where a similar practice is adopted in other cases, it would more than sufficiently comply with the need of disclosing the trend of the thought process of the Arbitrator.

4. If the aforesaid parameters are applied to the present case, it cannot be said that the award is not a reasoned award.

5. It is in view of the aforesaid parameters that some of the claims specifically sought to be urged by the learned counsel for the respondent have to be considered.

6. Learned counsel for the respondent referred to claim No. 1 on account of rebate in payment in respect of regular monthly bills and it is the contention of the learned counsel for the respondent that the petitioner failed to submit the bills within time and thus the respondent cannot be blamed for the delay in making payments and in claiming the rebate. In fact the submission is that the petitioner did not even raise the bills. This very questions has been considered in CS (OS) No. 28A of 1991 titled Sanyukt Nirmata v. DDA and Anr. decided on 29.11.2005 and the relevant clauses in this behalf being Clause 7 has been considered. This Court has come to a conclusion that Clause 7 cannot be read in isolation and must be read along with Clause 8 and reading of the aforesaid two Clauses requires that the Contractor has to submit each monthly running bill on or before the date fixed by the Engineer-in-Charge. Thus the pre-requisite of the submission of the bill is the date to be fixed by the Engineer-in-Charge. The dates have not been fixed and in fact in almost all the matters it has been found that no such date is fixed and the calculations are made by the respondent and the payments made on that basis.

7. In view of the aforesaid view taken by this Court, in my considered view, it is not open for the learned counsel for the respondent to impugn the said claim.

8. Learned counsel for the respondent referred to claims 3, 5 & 6 which have been dealt with together and relate to the deductions made from the running bills as also the final bill. Learned counsel initially sought to rely on Clause 25-B but could not dispute the position that the said clause stands deleted. Learned counsel however submitted that it was still open to the respondent to show that the deductions have been rightly made by leading evidence in this behalf. In this behalf, learned counsel has referred to Exhibit R-32, which is a chart giving the details of the amounts withheld. The total amount withheld is thus stated to be Rs. 1,06,680/-. The petitioner was admittedly released an amount of Rs. 70,000/- as refund out of this amount so detained. The Arbitrator has taken note of the aforesaid aspects and the fact that Clause 25-B could not be relied upon. The Arbitrator found that in view of Rs. 70,000/- paid the balance amount would be Rs. 36,680/-. However apart from this the Arbitrator has found an amount of Rs. 1,93,042.06 due on account of deductions and reduction items.

9. The reliance placed by both the parties is on Clause 14. The said Clause deals with the amount and compensation payable in case of bad works. The Clause itself requires a notice to be served on the Contractor for setting right the defects of the works and it has been held in *Nav Bharat Construction Co. v. Delhi Development Authority* : 66(1997)DLT431 followed in *Narain Das R. Israni v. Delhi Development Authority* 2005 VIII AD (Delhi) 556 that such a notice is thus a pre-requisite before Clause 14 can be resorted to. The Arbitrator has found on facts that no notice under Clause 14 of the Agreement was issued and it is in view thereof that the deductions made by the respondent on account of such alleged bad quality of work has been disallowed. The view taken by the Arbitration is thus in conformity with the views expressed in *Nav Bharat Construction* (Supra) and would not thus call for any interference.

10. The next submission of the learned counsel for the respondent is in respect of claim No. 4 dealing with the bank guarantee charges and incidental expenses for its revalidation. Learned counsel for the respondent submits that under the

Contract it is the responsibility of the petitioner and thus there can be no question of the respondent bearing the charges of the same. However a reading of the award and the claim shows that it is the extra bank guarantee charges for the extended period of time which have been awarded by the Arbitrator as the bank guarantee ought to have been released earlier. Thus it cannot be said that the petitioner was liable to keep the bank guarantee alive even for the period when the Contract was delayed on account of the respondent and thus the petitioner is not entitled to the amount.

11. It may be noted at this stage that one aspect which permeates the award and which has affect not only in this Claim but all other claims is that a categorical finding has been arrived at that the inordinate delay of 43 months in execution of contract was on account of the factors attributable to the respondent. Once this conclusion is arrived at all consequences which flow have to be on account of the respondent.

12. The plea was sought to be raised about claim No. 7 dealing with the cost of Yamuna sand supplied for execution of Agreement item No. 1.3. In this behalf learned counsel has referred to Clause 12 (iii) to contend that it is the CPWD 1981 rates which should be applicable and not the rates given by the petitioner. The Arbitrator has found that the rate analysis relied upon by the respondent of the relevant item did not form part of the Contract documents. This is a pure finding of fact and can hardly be gone into by this Court.

13. Learned counsel further contends that claim No. 8 has been wrongly awarded on account of the fact that ornamental grills were included within the parameters of Contract as para 3.11 of the Special Conditions & Specifications makes no distinction between plain and ornamental grills. Learned counsel for the petitioner on the other hand has referred to Clause 6.6 of the conditions of Schedule of Quantities which prescribe the nature of work to be done. The said Clause in the present case prescribe plain grills to be installed. Learned counsel for the petitioner thus submits that it is this Clause which has been taken note of by the Arbitrator and applying the principle of contra preferentem, the general stipulation contained in para 3.11 referred to above is over ridden by Clause 6.6 where a

specific nature of work to be performed has been provided for.

14. In my considered view the Arbitrator cannot be faulted on this account and has taken a particular view which cannot be said to be implausible. In fact when the nature of grills are specifically provided as plain grills, it cannot be said that any other nature of grills required to be so provided would be included within those specifications. Para 3.11 is dealing with the general conditions and specifications while para 6.6 deals with the specific items and the nature of the items to be provided. I thus find no merit in this plea of the learned counsel for the respondent.

15. Learned counsel for the respondent submits that claim No. 12 has been wrongly accorded which is in respect of the work done at the upper floor for items 3.7 & 3.8. In this behalf learned counsel has referred to Clause 3.15 of the specifications and conditions and Clause 9 of the application of specification. Clause 9 provides that rates quoted for the items of schedule should cover work on all floors and heights and no claim would be entertained for different heights. Clause 3.15 provides that the rates quoted by the Contractor shall hold for work at all heights and depths and the Contractor shall not be paid anything extra for maintaining in good condition all the work executed till completion of the entire work. Clause 3 of the Schedule of the quantities deals with the centering & shuttering and reinforcement of work. In different sub paras of the sub-clause the work has to be done up to specified floor levels as provided in the Contract. In Clauses 3.7 & 3.8 no such floor level is specified. The Arbitrator has found the claim justified.

16. A reading of the aforesaid clauses would thus show that where there is no provision made for work to be carried out by description of floors there is no restriction on the extent of the work to be done on the basis of the height. Thus wherever the clause itself provides the extent to which a particular work has to be done up to a particular floor, any extra work done would be liable to be compensated. It is however not disputed that Clauses 3.7 & 3.8 had not provided for the extent of the floor. In my considered view thus the inference cannot be drawn that any extra amount is payable to the petitioner. I find merit in this plea as the award is contrary to the contract and is thus set aside.

17. Learned counsel for the respondent referred to claims 17, 20 & 22 to advance the plea that there is no reason disclosed for awarding the said claims. This aspect has already been considered hereinabove while discussing the nature of the award and the fact that the complete matter was considered by the Arbitrator though detailed reasons may not be set out for the same. I thus find no merit in this plea.

18. Learned counsel for the respondent has referred to claim No. 26 to contend that the same is identical to the issue discussed in claim No. 12 and thus must be set aside. Learned counsel for the petitioner however points out that the award has been allowed on the basis of CPWD Book of Specification 1997 which according to Clause 3.1.1 of the specifications and conditions is made applicable to the Contract in question. Learned counsel has also referred to the judgment of the learned single Judge in S.A. Builders v. DDA 1998 (2) Arb. LR 472 where the same issue was considered. It was observed in paragraphs 3 & 4 as under:

3. This claim related to the award for extra item for plastering external walls of height beyond 10 metres. The Arbitrator while deciding this claim has held that in terms of C.P.W.D. Specification 1977 Vol.1 page 327 external plastering at a height of over 10 metres the contractor is entitled to an extra rate of Rs. 1.28 sq.mtr. in terms of the Delhi Schedule of Rates, 1974 Item 1974 Item 66 page 127 including enhancement under Clause 12. The Arbitrator, therefore, held that as the quantity of work above the height of 10 metre was 12260 sq.m. as reported by the Executive Engineer the claimant was entitled to a sum of Rs. 15,693.

4. Mr. Sharma on behalf of D.D.A. has objected to the award of this amount and the reasons given by the Arbitrator. It is contended by Mr. Sharma that under Clause 3.15 of the Specifications and Conditions of the Contract the rates quoted by the contractor were to hold for work at all heights and depths and that the contractor was not to be paid anything extra for maintaining in good condition all the work executed till completion of the entire work. It is, therefore, the contention of Mr. Sharma that as rates quoted by the contractor were to be held for work at all heights and depth the petitioner was not entitled to the extra rate for having done plastering above the height of 10 metres. In my view, the contention of Mr. Sharma

is wholly fallacious Under Clause 3.1.1 of the agreement, C.P.W.D. Specification for the works at Delhi Vol. I and Vol. II 1977 with correction slips up to the date of receipt of tender were applicable for execution of the work. In view of this clause in the Specifications and Conditions, in my view, the petitioner was entitled to extra rates for having worked above 10 metres heights. Clause 3.15 is not applicable to the present case. Moreover, after the Arbitrator has given reasons for the petitioner to be entitled to the award of the said amount, in my view, this Court will not sit as a court of appeal of the conclusions of the Arbitrator by re-examining and reappraising the evidence considered by the Arbitrator. In my view, therefore, no case has been made out for setting aside the award in respect of this item.

19. In view of the aforesaid observations, the matter being no different, the contention of the respondent cannot be accepted.

20. The next claim in question is claim No. 27 dealing with extra incidental expenses on procurement of department stores. This claim is based on the fact that there was delay in supply of materials and certain extra expenses had to be incurred by the petitioner. The plea of the respondent was that there was no material which was placed to justify the claim and in the absence of any evidence and material the Arbitrator cannot award an amount on mere conjectures.

21. A perusal of the claim petition and the material show that the petitioner has failed to file any supporting material and the allegations were also extremely general in nature. Though as observed aforesaid it is not the function of this Court to sit as a Court of appeal yet if an award is made without any material being placed on record merely on conjecture I am of the considered view that the same cannot be maintained. This claim is set aside.

22. Claim No. 28 relates to compensation on account of idle staff and machinery for four days from 21.4.1987 to 24.4.1987 during the currency of the Contract. The amount awarded is Rs. 4,614/- but learned counsel for the respondent states that even though the amount is not much the matter is one of principle since the amount is awarded only on account of the allegation that there was stoppage of cement supply for execution of work for these four days. Learned counsel for the respondent submits that the other work could have been carried on and such

compensations ought not to have been granted.

23. There can be no doubt that if the machinery remains idle or the work cannot be performed a Contractor is entitled to amount. However the period in question was during the currency of Contract where apparently the cement was not made available. There is no case made out that no other work could be carried out or the work had stopped. Learned counsel for the petitioner however states that the major work at that stage was the work of cement which had to be done.

24. A reading of the award shows that other than stating that this amount should be paid there is no reason given for the same. The Arbitrator has merely held that the claim is justified without even reference to the consideration of the pleas raised by the parties and in view of the fact that the same pertain to the period of the Contract, there is no finding recorded that no other work could be carried out, I am not inclined to sustain the amount and the claim is set aside.

25. Claim No. 29 is on account of compensation for idle staff and machinery during the period the Contract. Learned counsel for the respondent states that there is no Clause in the Contract providing for such payment. I am unable to accept the plea of the learned counsel for the respondent for the reasons that if the delay is attributable to the respondent and the machinery is lying idle at the site it was certainly open for the Arbitrator to award the amount under Sections 73 & 74 under the [Indian Contract Act, 1872](#). This aspect has been considered in the judgment of Narain Das R. Israni (Supra). In CS (OS) No. 1706/1989 titled Prem Chand Sharma & Co. v. DDA and Anr. decided on 8.11.2005 it has been held that this award is separate from any award which may be made under Clause 10CC. Thus the increase in material and labour cost during the currency of the Contract is different from issue such as idle labour and machinery at site, the loss of profitability arising from the failure of the Contractor to be able to utilise the same due to the same lying at the site etc.

26. The Arbitrator while awarding the claim has noticed that the amount has been determined after perusing the documents submitted by both the parties and thus the material has been considered by the Arbitrator. The amount claimed is the same as what has been awarded. I am not inclined to interfere with this award.

27. Learned counsel for the respondent submits that the award in respect of claim No. 30 on account of reimbursement of salary to staff and other incidental charges for under utilisation of money is not sustainable in view of the fact that amounts have been awarded under Clause 10CC. The total amount paid under Clause 10CC is stated to be over Rs. 37 lakh.

28. Learned counsel for the petitioner contends that in addition to the delay of the handing over of the site, the petitioner was subject to many hindrances on account of delay in the supply of steel, cement, panel, door shutters, G.I. Pipes, etc. Learned counsel for the petitioner referred to the claim petition to contend that this amount has been awarded for the period during 6.1.1986 to 31.12.1987 and thereafter from 1.1.1988 up to actual date of completion.

29. In my considered view if there are establishment and other charges which are other than increase in rates of labour and material for the same period of time, the amount can be awarded. However what has to be considered is whether there was any overlapping in the amount what has been awarded under this claim and what has awarded under Clause 10CC. It cannot be disputed that once the mechanism of Clause 10CC is made available under the Contract, in respect of those items in issue being increase in labour and material charges for the relevant period of time the only mechanism to be applied is of Clause 10CC and of no other. In this behalf judgment of the Division Bench in DDA v. S.S. Jetley 2000 VII AD (Delhi) 743 may be referred to where it is held that the Contractor is entitled to damages only as per Clause 10CC.

30. The Division Bench of this court in DDA v. K.C.Goel & Company 2001 AD Delhi 116 has held that in view of Clause 10CC no other claim on this account would be permissible. This judgment of the Division Bench has been recently followed by this court in CS(OS)2822/94 titled Bedi Constructions v. DDA and Anr. decided on 10.11.2005. while discussing the aforesaid judgments and other judgments it has been held that once the formula of Clause 10CC is provided for and is relied upon by the petitioner, it is that formula alone which should have been applied and no amount other than that formula could have been granted. Award to that extent is, thus, set aside.

31. The Division Bench of this court in DDA v. Jagan Nath Ashok Kumar 89 (2001) DLT 668 held that the procedure prescribed therein was mandatory and this judgment has been followed in Narain Das Israni's Case (Supra).

32. Learned counsel for the respondent sought to draw the attention of this Court whereby a reference has been made to the additional expenses/compensation on account of increase in price of material and wages of labour, etc. and submits that this payment has been taken into consideration by the Arbitrator while making the award in respect of this claim. However a reading of the said paragraph shows that what has been noticed by the Arbitrator is the contention of the petitioner while relying on the judgments cited in respect of the said claims that a separate amount can be claimed on account of such hindrances and other expenses apart from the amount it would be entitled to on account of increase in price of material and wages of labour. A perusal of the claim petition thus shows that what has been claimed is not increase in the prices of material and labour but establishment charges, machinery charges, etc. for the period for which the respondent has been held liable for delay. That being the position there is no overlapping element in respect of this claim awarded and claim awarded under Clause 10CC.

33. The plea of the learned counsel for the respondent that there is no reasoning cannot be accepted since again in respect of this claim the Arbitrator has clearly observed that the amount has been awarded after carefully going through the various letters submitted by the claimants and respondents.

34. Learned counsel for the respondent has also impugned the award under Claim 33 which is on account of laws of profitability due to prolongation of the Contract. This claim arises on account of the plea of the petitioner that apart from the expenses incurred on keeping the machinery at the place if this machinery had been put to use in another contract the petitioner would have gained profits from the same. The petitioner has claimed an amount of Rs. 24 lakh worked out on the basis of percentage net profits available on the basis of utilisation of the machinery. The petitioner has been awarded a sum of Rs. 9,65,669/- on this account on the basis of a concession made before the Arbitrator. It is apparent that this amount is calculated on the basis of the percentage of profit which the

petitioner would have earned. As noticed above this aspect has been discussed both in the case of M/s. Prem Chand Sharma & Co. (Supra) and Narain Das R. Israni (Supra) holding that this is separate from the element of machinery lying unutilised and the amount awarded under Clause 10CC.

35. The last aspect is the issue of interest. The Arbitrator has awarded interest @ 11 per cent per annum for the pre-suit period and 18 per cent per annum for pendentalite and future period till the date of decree or date of payment whichever is earlier. After some hearing learned counsel for the petitioner himself confines the claim in respect of pendentalite and future interest up to the date of decree to 12 per cent per annum simple interest.

36. The application stands disposed of.

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35. The award dated 20.2.1997 is made rule of the Court with the modifications that the claim No. 12, 27 & 28 stand set aside and the interest for the pendentalite period and future period till the date of decree shall be @ 12 per cent per annum instead of 18 per cent. The result of this would be that out of the total awarded amount of Rs. 31,96,807/-, the award is sustained for an amount of Rs. 31,05,576/-. The petitioner will be entitled to pre-suit interest @ 11 per cent per annum and pendentalite and future interest till the date of decree @ 12 per cent per annum. The petitioner shall also be entitled to future interest @ 9 per cent per annum. The parties are left to bear their own costs.

36. The decree sheet be drawn up accordingly.

37. It is pointed out that the respondent has deposited in Court a sum of Rs. 94,86,354/- which has been kept in a fixed deposit account and interest would have accrued thereon. However it cannot be disputed in view of the judgment of this Court in Hindustan Construction Corporation v. Delhi Development Authority and Ors. 2002 (65) DRJ 43 that the respondents are not absolved of their liability to pay interest on the principal amount merely by seeking to deposit the same. However the interest earned on the FDR would go to the credit of the respondent

for the purposes of calculations of the amount which would be payable to the petitioner. The Registry to calculate and release the amount due to the petitioner under the Decree. If any balance is lying deposited the same be released to the respondent. Needless to say if some balance amount has to be paid the respondent shall continue to be liable to pay the same. The advocates to assist the Registry in calculations of the amounts.

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