

Kumar Construction Co. Vs. Delhi Development Authority and anr.

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Court : Delhi

Decided On : Jul-28-2006

Reported in : 2006(3)ARBLR265(Delhi); 132(2006)DLT667

Judge : Manju Goel, J.

Acts : [Arbitration Act, 1940](#) - Sections 14, 28, 30 and 33; [Arbitration and Conciliation Act, 1996](#) - Sections 85

Appeal No. : CS(OS) No. 2478-A/2001 and is 4279/2002

Appellant : Kumar Construction Co.

Respondent : Delhi Development Authority and anr.

Advocate for Def. : Anil Sapra, Adv.

Advocate for Pet/Ap. : B.K. Dewan, Adv

Judgement :

Manju Goel, J.

1. Suit No. 2478-A/2001 is an application under Section 14 of the [Arbitration Act, 1940](#) (in short 'The Act') for directing respondent No. 2-Mr.Som Dev to file the Award and proceedings in the arbitration between the petitioner and respondent No. 1, the Delhi Development Authority (in short 'DDA'). The petitioner contended

that the petitioner intended to challenge the Award. The Award in question was made on 5.10.2001. The application under Section 14 of the Act was filed on 25.10.2001. On 19.12.2001 objection under Sections 30 and 33 of the Act was filed, which was registered as is 4279/2002.

2. The dispute between the parties was over the contract for construction of Convenient Shopping Centre at Gulabi Bagh, Delhi which was granted to the petitioner vide Agreement No. 9/EE/ND-X/DDA/88-89 between the petitioner M/s Kumar Construction Company and the DDA dated 25.10.88/25.11.88. The petitioner had to file a petition for appointment of an Arbitrator. The respondent/DDA appointed an Arbitrator during the pendency of that suit, being Suit No. 462-A/1990. The Arbitrator subsequently made the Award on 18.3.1992. The Arbitrator dealt with the claim of the contractor, namely the petitioner, and also with the counter-claim of the DDA and an Award was published on 18.3.1992. The Award was filed in the Court. The petitioner/contractor raised objections to the Award. These were registered as Suit No. 1645-A/1992 and Suit No. 205-A/1994 and is 2097/1994 and were decided on 27.10.1996. The Arbitrator found that the counter-claim No. 1 viz. payment of Rs. 4,64,038/- on account of work being done at the risk and cost of the contractor was premature and should be dealt with at appropriate time when actual expenditure incurred for doing the work at the risk and cost of the contractor was available. therefore, on conclusion of the work fresh appointment of the Arbitrator was demanded by the DDA by letter dated 11.4.2000 and, hence, the appointment of the present Arbitrator. For the present Award, therefore, it is the DDA who is the claimant. The claim was for a sum of Rs. 4,10,965/- on account of work done at the risk and cost of the contractor. The impugned award is passed on this claim of DDA.

3. The impugned Award finds that the contractor did not complete the work and so the contract was rescinded and then the work was got done at the risk and cost of the contractor.

4. The Arbitrator further found that the DDA had proved the breach of contract on the part of the contractor. Further the Arbitrator held that the contractor should have executed the work to the extent possible till the stipulated date of completion

as per the agreement but he, in fact, abandoned the work. The claimant/DDA filed details that they suffered the loss to the tune of Rs. 4,10,965/- by getting the work completed at extra percentage of about 30.45%. It was held that the DDA was also responsible for the initial delay of five months in issuing of structural drawings. The contractor, therefore, could not be held to be solely responsible for the delay. The Arbitrator applied the thumb rule for linear proportion and awarded the claimant a sum of Rs. 2,39,730/-. After adjusting the security deposit of Rs. 20,000/-, the DDA was entitled to Rs. 2,19,730/-.

5. The objections raised by the petitioner during the hearing may be enumerated as follows:

a) The Arbitrator violated the rules of natural justice.

b) The DDA was responsible for the breach and, hence, the DDA was liable to pay damages, not the contractor/petitioner.

c) The Award was made beyond the period of four months provided by Section 28 read with the implied conditions of arbitration agreement given in the First Schedule of the [Arbitration Act, 1940](#).

6. On the point of violation of natural justice, it averred as under:

The petitioner vide his communication dated 1.2.2001 requested the Arbitrator that certain documents which were in the custody of the respondent be ordered to be produced which were vital for decision of the controversy. The Arbitrator did not order the DDA to produce the same. The petitioner thereafter again requested for production of the documents on various dates up to 29.6.2001. The Arbitrator vide his communication dated 28.5.2001 directed the parties to appear on 30.5.2001 at 4.30 P.M. but the said letter was received only on 1.6.2001. The petitioner on 12.6.2001 informed the Arbitrator about the receipt of the letter on 1.6.2001 and explained his default to appear. The Arbitrator vide his order dated 11.6.2001 fixed the next date of hearing on 2.7.2001 at 3.30 P.M. From 29.6.2001 to 12.7.2001 the petitioner was ill. By a letter dated 29.6.2001 annexed with a medical certificate, the petitioner requested the Arbitrator to adjourn the matter. The letter was duly

received by the Arbitrator. The Arbitrator, however, proceeded ex parte on 2.7.2001 and reserved the Award by violating the principles of natural justice. The proceedings dated 2.7.2001 was dispatched on 9.7.2001 which the petitioner received on 13.7.2001. The petitioner immediately made an application for setting aside the ex parte proceedings. The Arbitrator ignored the same and thus violated the principles of natural justice.

7. All the objections are countered by the DDA/respondent. DDA has further raised the question of applicability of [Arbitration Act, 1940](#) by saying that the Award was made under the new Act i.e. the [Arbitration and Conciliation Act, 1996](#), and therefore, the objection under Sections 30 and 33 of the [Arbitration Act, 1940](#) is not maintainable.

8. So far as the objection regarding applicability of the Act of 1940 is concerned, suffice it to say that the dispute between the parties initially arose in the year 1991 and appointment was made under that Act. It was only for the part of the dispute which could not be adjudicated upon at that time that further proceedings of arbitration was required. Section 85 of the [Arbitration and Conciliation Act, 1996](#) specifically provides that the [Arbitration Act, 1940](#) shall apply to arbitral proceeding which commenced before the Act came into force unless otherwise agreed to between the parties. The arbitral proceedings commenced in 1991. Hence, the Award has been rightly filed in Court and the objection under Sections 30 and 33 of the [Arbitration Act, 1940](#) is maintainable.

9. The Arbitrator does not seem to have maintained the proceedings sheet. However, he maintained the attendance sheet which shows that the contractor (respondent before the Arbitrator) put in appearance before the Arbitrator on 28.11.2000, 12.1.2001 and 2.2.2001. Along with Mr.S.K.Gupta, some other person called Mr.Vijay Narang also appeared with the petitioner/contractor on 2.2.2001. Thereafter the petitioner did not appear on the dates of hearing on 14.3.2001, 20.4.2001, 3.5.2001 and 30.5.2001.

10. The letters exchanged between the petitioner/contractor and the Arbitrator are on record. The first letter of the contractor on record is dated 3.11.2000 in which it is submitted that for unavoidable reasons it could not be possible to submit the

CSF and, accordingly, time be granted at least up to 16.12.2000. The next letter is of 28.11.2000 seeking further time to file CSF by 31.12.2000 on the ground that the arbitration counsel Mr.R.D.Mittal was not maintaining good health. The Arbitrator addressed a letter to both the parties on 27.12.2000 stating therein that the respondent (petitioner/contractor) had requested for time to file CSF and his counsel was not well and, therefore, he was given chance till 31.12.2000 and the next date of hearing was fixed for 12.1.2001 at 2.30 p.m. The next document is an application from Mr.B.K.Dewan, advocate for petitioner, asking for an adjournment on 12.1.2001. The next letter of the Arbitrator dated 30.1.2001 addressed to both the parties says that the arbitration came up for hearing on 12.1.2001 at 2.30 p.m. when the contractor requested for an adjournment as he had to engage a new counsel and, therefore, the next date of hearing was fixed for 2.2.2001 at 3.00 p.m. On 2.2.2001 the petitioner/contractor filed written statement. The Arbitrator fixed the case for hearing on 9.3.2001 and informed the parties by letter dated 20.2.2001. However, the date was subsequently changed by letter dated 27.2.2001 by which the fresh date fixed was 14.3.2001 at 3.00 p.m. The subsequent letter of the Arbitrator dated 10.4.2001 stated that the arguments would be heard regarding objections raised by the contractor on 20.4.2001 at 4.00 p.m. The next document is of 23.4.2001 wherein the Arbitrator records that on 20.4.2001 the contractor did not come and, therefore, hearing could not proceed. The adjourned date was then declared as 3.5.2001 at 4.30 p.m. On 3.5.2001 the Arbitrator received a request for adjournment from the contractor by post and, therefore, adjourned the hearing to 30.5.2001. This is recorded in the letter dated 28.5.2001. On 30.5.2001 the contractor again remained absent and the claimant requested for ex parte proceedings. The Arbitrator recorded this in the letter dated 11.6.2001. The Arbitrator also informed the parties that next date of hearing was fixed for 2.7.2001 when both parties were directed to ensure their presence, failing which ex parte proceedings would be taken. On 2.7.2001 the contractor again asked for adjournment which is evidenced by the letter dated 29.6.2001 saying that the petitioner-Mr.S.K.Gupta was not physically well and had been advised bed rest up to 12.7.2001. At the same time, a request was made not to fix any further date till certain documents were delivered to the contractor. This letter was accompanied by a medical certificate. The next document is dated 9.7.2001 wherein the

Arbitrator records that the contractor had made a request for postponement of hearing but ex parte proceedings were taken up on 9.7.2001 and oral hearing was concluded. The claimant was directed to file non-judicial stamp papers worth Rs. 75/- along with 10 additional sheets for making and publication of the Award. The contractor/petitioner then sent the letter dated 13.7.2001 asking for setting aside the ex parte proceedings. Arbitrator made his Award on 5.10.2001. The question is whether the Arbitrator has violated the rules of natural justice.

11. It does not require any further analysis than the narration of facts given above to say that the contractor/petitioner had no intention to appear and participate in the arbitration proceedings. After the first two hearings the petitioner did nothing than seeking adjournments after adjournments on one pretext or the other. It is clear from the above narration that the petitioner/contractor had even engaged a counsel-Mr.B.K.Dewan. Mr.B.K.Dewan, however, did not put in appearance except once. The contractor never made any grievance about failure on the part of Mr.B.K.Dewan to represent the petitioner/contractor. On the dates the contractor himself was unwell, he could have deputed his advocate or his associate-Mr.Vijay Narang to appear before the Arbitrator. The petitioner/contractor did none of the two.

12. There is clear indication of the fact that the Arbitrator had given sufficient opportunities to the petitioner/contractor till it became clear and evident that the contractor did not intend to take part in the arbitration proceedings. therefore, it was no more necessary for the Arbitrator to either adjourn the proceedings again and again or to set aside the ex parte proceedings that had already been taken. I do not find violation of the principles of natural justice in taking ex parte proceedings.

13. So far as the second objection that it was the DDA which was responsible for the breach and, hence, it was the DDA which was liable to pay damages or that the contractor was not liable to pay damages is concerned, it can be safely said that this is a question on merit. The present objection to the Award cannot be dealt with as an appeal. In fact, when the first Arbitrator had ruled that this claim (which was counter claim before him) could be appropriately decided only when the work

was complete, it was implied that the contractor would have to pay damages on account of the work being done at the risk and cost of the contractor. This part of the Award was upheld by this Court in the earlier objection which was decided on 27.10.1996. therefore, the question who was in breach is now barred by the principles of constructive rest judicata. The quantum of damages to be paid has been calculated by the Arbitrator according to his own wisdom by applying the principles of linear proportion. It cannot be said that his calculation is perverse or in any way illegal. This Court, therefore, cannot set aside the Award on this objection.

14. The final question is as to whether the Award has to be set aside because it was passed beyond the period of four months provided by the implied conditions of the arbitration agreement. Section 28 of the Act provides that the time can be extended by this Court. On behalf of the DDA it is prayed that the time be now extended by this Court. It is to be noticed that in the objection petition there is no grievance expressed for the Award being made beyond the period of four months. It was only during the arguments that the objection is taken. Even when the arbitration proceedings were in progress and the petitioner / contractor repeatedly took adjournments, he never raised the objection to the continuance of arbitration proceedings on the ground that four months period had come to an end. It is clear that the petitioner/contractor himself delayed the proceedings. The Arbitrator had followed the rules of natural justice and arrived at a finding on the basis of the material placed before him. I, therefore, find no difficulty in extending the time and to bring the matter to an end. The time is, therefore, extended.

15. In view of the foregoing, the objection petition being is 4279/2002 is dismissed and the Award is made a Rule of the Court. Suit No. 2478A/2001 also stands disposed of. A decree-sheet be drawn up in terms of the award.