

M/S. Mohan Construction Co. Vs. Delhi Development Authority and anr.

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Court : Delhi

Decided On : Aug-17-2011

Judge : Sanjay Kishan Kaul; Rajiv Shakdher, Jj.

Acts : [Arbitration Act, 1940](#) - Sections 14, 17, 29, 30, 33

Appeal No. : FAO (OS) No.141 of 1998

Appellant : M/S. Mohan Construction Co.

Respondent : Delhi Development Authority and anr.

Advocate for Def. : Ms. Anusuya Salwan; Ms. Renuka Arora; Ms. Neha Mittal, Adv.

Advocate for Pet/Ap. : Mr. Sunil K. Mittal; Mr. Kshitij Mittal; Mr. Pranav Rishi, Adv.

Judgement :

1. The appellant/contractor was awarded the work of construction of 560 MIG houses at Pitampura, Pocket A(P) including internal development by the DDA/respondent No.1 vide contract agreement No.3/EE/N.D.I/85-86. The agreement contained an arbitration clause, being clause No.25. The appellant/contractor claimed that it concluded the work satisfactorily though the time period for completion of the project was greatly extended on account of delay & laches on the part of respondent No.1 and thus had various claims against

respondent No.1. On the arbitration clause being invoked, disputes were referred to the sole arbitration of Mr. R.C. Malhotra vide letter dated 20.6.1990. Subsequently, the DDA also sought reference of certain counter claims which were also referred to the arbitrator vide letter dated 30.04.1992 and the appellant contractor's additional claims were also referred vide letter dated 30.06.1992.

2. It may be noticed that as per the original award of work dated 12.3.1985 the work was to be completed within nine (9) months but the time period for execution of the work was extended and ultimately the work was completed on 10.3.1988.

3. The arbitrator made and published the award on 29.4.1993. The appellant/contractor filed an application under Sections 14, 17 & 29 of the [Arbitration Act, 1940](#) (hereinafter referred to as the said Act) for making the award rule of the Court. Respondent No.1 filed objections. These objections were partly allowed in terms of the impugned judgement dated 27.3.1998 of the learned single Judge against which the present appeal has been preferred.

4. Learned counsel for the appellant, in view of the aforesaid facts confined his submissions to the claims awarded by the arbitrator set aside by the learned Single Judge.

Claim No.1(a): Refund of Security Deposit

5. The appellant/contractor sought refund of the security deposit which was deducted by the DDA. The award notes that the provisional completion certificate was recorded in terms of clause 6 of the contract agreement as the work was completed on 10.3.1988 and the bill was required to be finalized within six (6) months of the completion of the work and security was to be released within one (1) month thereafter, i.e. by 10.10.1988. The defence of respondent No.1 was that as per clause 17 of the contract the security deposit became due for release within six (6) months after the completion of the work or on the finalization of the bill, whichever was later, but since there were defects in the work and the reduction items were yet to be sanctioned, the bill could not be finalized. The appellant/contractor contended against non-finalization of bill for long period since action regarding defects, if any, was to be taken within six (6) months of the

completion of the work. This amount was awarded by the arbitrator.

6. The impugned order, however, proceeds on a different footing as a defence was sought to be raised by respondent No.1 that the case was covered under clause 46 of the agreement, which reads as under: "Security deposit shall not be refunded till clearance certificate from the Labour Officer is obtained by the contractor."

7. It is an undisputed fact that the appellant/contractor had not and till date has not obtained any clearance certificate from the Labour Officer. It is this clause which has weighed with the learned single Judge in recording a finding that the arbitrator went beyond his jurisdiction by not adhering to clause 46. However, it has been observed that the moment the contractor obtains and files certificate in terms of clause 46 from the Labour Officer, the security deposit would be refunded failing which it would carry interest.

8. Learned counsel for the appellant pointed out that the aforesaid plea was raised for the first time in the objections filed under Sections 30 & 33 of the said Act and had this been the plea before the arbitrator, the appellant/contractor would have obtained the certificate. He submits that after lapse of such a long period of time it would be difficult to obtain the certificate. He also emphasized that the objective of this clause has to be kept in mind which was to meet an eventuality in case the Labour Officer lodges any claim which is not even the case of the DDA.

9. In our considered view, there can be no doubt that the appellant/contractor was required to furnish such a certificate as per the terms of the contract (clause 46). Thus, the appellant/contractor should be aware of the consequences thereof and non-supply of the same would naturally require respondent No.1 to detain the security deposit.

10. There are, however, two aspects which may be taken note of - the first is the absence of such a plea before the arbitrator which could have facilitated the appellant/contractor to obtain the certificate at the relevant stage of time, if that was an aspect which was making respondent No.1 detain the security deposit. The second is that on this pretext respondent No.1 cannot appropriate the security

deposit for all times to come. If no intimation has been received from the Labour Officer for a reasonable period of time, there can be no question of detaining the security deposit beyond that time. The work was completed on 10.3.1988. The award came to be passed on 29.4.1993. Thus, at least, on the award being made respondent No.1 should have released the security deposit as by that time more than five (5) years had passed from the date of completion of the work.

11. We are, thus, of the considered view that keeping in mind all these facts & circumstances the detention of the security deposit beyond the date of the award cannot be said to be reasonable or fair especially when respondent No.1 had not cared to raise a specific plea in this behalf before the arbitrator. Thus, the appellant is entitled to the amount in terms of the award on which naturally interest would be payable from the date of the award.

Claim No.1 (e): Expenses incurred by the appellant/contractor for watch & ward for the period beyond completion of the work

12. The appellant/contractor claimed that there was delay on the part of respondent No.1 in handing over flats to the allottees and that the appellant/contractor was required to keep watch and ward staff. The liability for this was sought to be fastened on respondent No.1 as this was not the obligation of the appellant/contractor.

13. The arbitrator has noticed that as per exhibit R-51, which is a completion certificate, the appellant contractor was required to rectify the defects which were observed during the allotment of individual houses. The possession of the flats had to be handed over by respondent No.1 not by the appellant/contractor. The documents filed before the arbitrator revealed that the appellant/contractor was required to maintain watch and ward for some of the flats which was not their responsibility and therefore the arbitrator allowed a part of the claim for `34,000.00.

14. The learned single Judge came to the conclusion that there can be no dispute that the liability for the same had to be fastened on respondent No.1, however, he found that this amount was covered in the claim made by the appellant/contractor

under clause 1(o) and thus no separate award was required to be made in this behalf. He, thus, set aside this award on the ground that a double award has been made in respect of the same claim by awarding the same both as claim No.1(e) and claim No.1(o).

15. Learned counsel for the appellant pointed out to us that claim No.1(o) was only confined to the period up to 10.3.1988, i.e., the actual date of completion and thus, there was no overlapping or duplication as found by the learned single Judge and thus there was no reason to interfere with the award of this claim.

16. In order to appreciate this controversy, we have to examine claim No.1(o). Claim No.1(o) is "infructuous expenditure and damages sustained by the appellant due to various breaches committed by the by respondent No.1 during the execution of the work". It was the claim of the appellant/contractor that on account of breaches of respondent No.1, the work period was prolonged from nine (9) months to about thirty six (36) months. The arbitrator found in claim No.1(n) that the delay in completion of the work was on account of non-fulfilment of contractual obligations by respondent No.1 and the breaches committed by them. Thus, the cause for the delay was laid at the door of respondent No.1.

17. It is quite clear to us that claim No.1(o) was on account of infructuous expenditure and damages sustained by the appellant due to various breaches committed by respondent No.1 resulting in the extension of period of contract. However, claim 1(e) is for watch and ward staff beyond the date of completion of work and thus covers a different period. There is, thus, force in the contention of the learned counsel for the appellant that there was no reason for the learned single Judge to interfere with the award of the learned arbitrator. We may also note that on analysis of the evidence before him the arbitrator awarded only part of the claim.

Claim No.1(n): Difference of reasonable price and the price actually paid

18. The appellant/contractor claimed a sum of `4,25,476.00 being the difference of a reasonable price and price paid. This claim was laid by the contractor as the same is predicated on the plea that on account of non-fulfilment of contractual

obligations by respondent No.1 mainly in supplying the stipulated material in time and not giving timely decisions, the appellant/contractor had to pay the enhanced price in purchases. Respondent No.1 was alleged to have failed to sanction extra and substituted items in time and payments were delayed abnormally resulting in prolongation of the period of completion of work from nine (9) months to thirty-six (36) months. The cost of men and machine increased tremendously during this period of time causing infructuous expenditure. To support this plea, the appellant referred to the various works awarded by respondent No.1 during the prolongation period and has justified a reasonable increase of 25 per cent for which a specific request was made vide exhibit C-68.

19. Respondent No.1, on the other hand, claimed that if the appellant chose, it could have stopped the work but continued to execute the work, which implied that the appellant was willing to complete the work at the quoted rate.

20. The arbitrator having found that the non-fulfilment of the contractual obligations on the part of respondent No.1 had caused the delay, granted a 15 per cent increase for the work done making it a sum of `2,16,448.00. The arbitrator noted that as part of claim No.1(c), increase in labour wages had been granted as per clause 10(c). This was on account of the increase in labour rates and an award had been made for a sum of `1,28,552.00. Thus, the award under this claim was made over and above the amount awarded under claim No.1(c) which was predicated on clause 10(c).

21. This award has been set aside by the learned single Judge on the ground that it was a condition of the contract, being condition No.1 of the specifications and conditions of the contract, which reads as under:

"1. The contractor must get acquainted with the proposed site for the works and study specifications and conditions carefully before tendering. The work shall be executed as per programme approved by the Engineer-in-Charge. If part of site is not available for any person (reason) or there is some unavoidable delay in supply of materials stipulated by the Department, the programme of construction shall be modified accordingly and the contractor shall have no claim for any extras or compensation on this account."

22. The aforesaid condition refers to the non-availability of the site or unavoidable delay in supply of material which would result in the programme of construction being modified accordingly. This was taken as a prohibition for avoiding escalation from delay in supply of material. The learned single Judge found that the clause would imply that both parties were expecting delays in certain respects and had provided for that situation and thus allowing compensation for the delay would amount to paying twice for such rights.

23. Learned counsel for the appellant submitted that condition No.1 referred to aforesaid only contemplated non-supply of material due to unavoidable reasons. The finding of the arbitrator was to the contrary. Respondent No.1 had led no evidence to show there were reasons which were unavoidable and the arbitrator had, thus, awarded a part of the claim. The amount awarded under claim 1(c) was for statutory increase in labour and wages as per terms of the contract and has nothing to do with the late supply of material.

24. Learned counsel also emphasized that the judicial view in this behalf is in his favour by referring to the judgement of the Supreme Court in Hyderabad Municipal Corporation v. M. Krishnaswami Mudaliar & Anr. AIR 1985 SC 607 where the contractor was required to spread over work for two years instead of one year and no intimation was sent for extra payment and contractor had claimed 20% increase in the price of the work done. It was held that the contractor could be granted extra payment at increased rates. He also referred to the judgement of the Supreme Court in P.M. Paul v. Union of India AIR 1989 SC 1034 where the award was set aside on ground of mis-conduct by the Court on account of the arbitrator allowing escalation in contract amount for delay in completion of the contract. A 20 per cent escalation was allowed by the arbitrator which was upheld by the Supreme Court and it was observed that it could not be said that if the work was not completed within stipulated time, the party has got a right only for extension of time and not for difference in prices.

25. The submission of the learned counsel for respondent No.1 was based only on condition 1 of the contract and it was claimed before us that this aspect was ignored by the arbitrator.

26. We are unable to accept the reasoning of the learned single Judge in this behalf. A defaulting party must pay for the consequential sufferance to the opposite party. The reason for the delay has been laid at the door of respondent No.1. The fault was of respondent No.1. The delay was quite substantial, increasing the time period of contract from original nine (9) months to thirty-six (36) months. The appellant led evidence to show the increased cost of material during this period of time by showing the awarded rates to other contractors by respondent No.1. In fact, increase in labour cost from revision of the labour rates has already been granted as per claim No.1(c).

27. In our considered view, condition 1 would have no application in the present case because respondent No.1 failed to establish the sub-stratum of that condition, i.e. any unavoidable reason. This is not even apparently a defence originally raised by the respondent No.1. The arbitrator having weighed these aspects, the learned single Judge ought not to have acted as a court of appeal. We find the reasoning of the learned single Judge unsustainable and set aside the interference with the award of the arbitrator.

Counter Claim No.1(iii): Deduction of TDS by respondent No.1

28. The last aspect is the counter claim No.1(iii) on account of deduction of TDS of ₹78,915.00. The learned arbitrator found that respondent No.1 had not submitted any documents to establish as to how this figure was arrived at. The pre-final bill had showed that no income tax was recovered and no evidence was led to show that income tax so deducted was deposited with the Income Tax Department. Thus, the claim was rejected. The learned single Judge found that Section 194 (c) of the Income Tax Act, 1961 puts an obligation on respondent No.1 to deduct TDS at the time of credit of the sum to the account of the contractor or at the time of payment thereof. The award has, thus, been held by the learned single Judge to be in derogation of the mandate of the said provision of the Income Tax Act.

29. Learned counsel for the appellant/contractor submitted that respondent No.1 was required to deposit the TDS amount with the Income Tax Department in the name of the appellant but the fact remains that no amount was deposited towards such tax ever and thus, respondent No.1 was not entitled to withhold this amount.

30. The written submissions filed by learned counsel for respondent No.1 show that such amount was not deposited by the DDA as it is stated that the DDA would deposit the TDS on the amounts given under the bills.

31. We are of the considered view that the amount not having been deposited by the DDA, such amount could have been deducted only at the time of payment, the DDA was not entitled to the counter claim.

32. The result of the aforesaid is that the impugned judgement of the learned single Judge dated 27.3.1998 is set aside and the award of the arbitrator dated 29.4.1993 is made rule of the Court without any modification.

33. The appeal is accordingly allowed leaving the parties to bear their own costs.

34. Decree sheet be drawn up accordingly.

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