R.S. Rana Vs Delhi Development Authority and Another

Court: Delhi High Court

Date of Decision: March 9, 1993

Citation: (1993) 2 ARBLR 165 : (1993) 51 DLT 528

Hon'ble Judges: Dalveer Bhandari, J

Bench: Single Bench

Advocate: Anusuya Salwan and N.K. Handa, for the Appellant;

Judgement

Dalveer Bhandari, J.

(1) The petitioner was awarded the balance work of construction of parking and widening of existing roads phase II at Asian Games Village

Complex vide agreement NO. 10/PE/AGD & DDA/81-82.

(2) The disputes between the contractor/petitioner and the D.D.A./respondent were referred to Mr. Banarasi Das, for adjudication. The arbitrator

gave the award on 20th June, 1991. The award and the proceedings were filed by the arbitrator. The abjections to the award were filed on behalf

of the respondent and immediately thereafter issues were framed and parties in pursuance of the Court''s directions filed the evidence by way of

affidavit .

(3) On 18/02/1993, when the matter was listed for final disposal ,the petitioner appeared in person and submitted that he does not want to press

his objections to the award and wants to withdraw his objections. Accordingly, the permission was granted to the petitioner to withdraw his

objections.

(4) Now, the Court is required to deal with the objections to the award filed by the respondent/D.D.A.

(5) The learned Counsel for the respondent submitted that the claim No .7 is contrary to the provisions of the agreement entered into between the

parties and deserves to be set aside. The claim was for increase in labour wages under Clause 10-C of the agreement It was submitted by the

learned Counsel appearing for the respondent that the claimant was not entitled for increase in labour wages as delay in the execution of contract

was attributed to the contractor by the Chief Project Engineer. Under Clause 10-C of the agreement ,the decision of the Engineer is final. Clause

10-C of the agreement reads as under :

IF during the progress of the works, the price of any material incorporated in the works (not being a material supplied from the Engineer-in-

charge"s stores in accordance with Clause 10 hereof)and/or wages of labour increase as a direct result of the coming into force of any fresh law.

or statutory rule or order (but not due to any changes in sales taxes.) and such increase exceed ten per cent of the price and/or wages prevailing at

the time of receipt of the tender for the work, and contractor thereupon necessarily and properly pays in respect of the material (incorporated in

the work) such increased price and/or in respect of labour engaged on the execution of the work such increased wages, then the amount of the

contract shall accordingly be varied provided always that any increase so payable is not. in the opinion of the Engineer (whose decision shall be

final and binding) attributable to delay tn the execution of the contract within the control of the contractor. ...

BARE reading of the said clause clearly reveals that the opinion of the Engineer regarding determination of delay in execution of the contract shall

be final and binding and the arbitrator was not justified in sitting in appeal on the decision of the arbitrator,

(6) The petitioner who appeared in person has filed reply to the objections filed by the respondent against the award. In the reply, it has been

submitted that the arbitrator had committed no error in making the award and the same be made rule of the Court. The petitioner submitted that the

arbitrator was justified in decreeing his claim in respect of claim No .7. The respondent on the other hand has mentioned that because of Clause

10-C of the agreement, the petitioner was not entitled to the decree of his claim No. 7. The Project Engineer in his letter dated 6/04/1984 has

attributed delay in execution of the contract to the petitioner. According to Clause 10-C of the agreement, the decision of the Engineer is final and

binding. Furthermore, when delay has been attributed to the contractor; then according to the said Clause 10-C, the petitioner is not entitled to any

increase in wages of labour. The learned Counsel for the respondent in support of her arguments, placed reliance on M/s. Bharat Furnishing Co.

v.Delhi Development Authority and Another, 1991 4 D.L. 335. In this judgment the Court observed:

THE principal question is whether the arbitrator could sit over the finding of the Engineer concerned, ignore and override it and, despite it, make

the award. I feel that this be could not do. By doing so, he not only sat over the finding of the Senior Project Engineer which was ""final"" and thus

exceeded the jurisdiction of the arbitrator ,but also reduced to meaninglessness the expression: ""Except where otherwise provided in the contract

as contained in Clause 25 of the Contract.

(7) I have heard the petitioner and the learned Counsel appearing for the respondent. The arbitrator has clearly misconducted himself in decreeing

claim No. 7 of the petitioner. The award to that extent is liable to beset aside.

The learned Counsel for the respondent submitted that finding of the learned arbitrator with regard to claim Nos. 9 and 11 are also contrary to the

provisions of the contract entered into between the parties and the arbitrator has clearly misconducted himself in decreeing the claim Nos. 9 and 11

of the petitioner.

THE learned arbitrator has held that since the respondent has committed continuous breaches in handing over the site and supply of drawings, the

delay was attributable to the respondents.

Learned Counsel for the respondent submitted that the arbitrator has completely ignored the notice inviting tenders, which forms a part of the

agreement .In Clause 2 (a) it was clearly stated that the site was to be made available in stages. Clause 2(a) of the agreement reads as under :

THE site for the work will be made available in stages or the site for the work will be made available in parts.

The learned Counsel for the respondent pointed out another condition of the contract which reads as under:

IF a part of the site is not available for any 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 that account.

(8) The learned Counsel for the respondent submitted that because of incorporation of Clause 2-A, the site was to be made available to the

petitioner in stages. Therefore, the petitioner was not justified in claiming any compensation on that account. Moreover, during negotiations the

petitioner had withdrawn his condition that the site should be made available in fall and ,Therefore, had accepted that the site may be made

available to him in stages .The learned Counsel for the re respondent has drawn attention of this Court to the decided English case namely, British

Guiana Credit CorporationDasilva, (1965) 1 W.L.R. 248 in Building Contracts by D. Keating 4th Edn.The relevant portion of the judgment is

reproduced hereunder :

WHERE negotiations are in progress between the parties ''intending to enter into the contract, the whole of those negotiations must be looked at

to determine when if at all, the contract comes into being...once the contract comes into being, however, subsequent negotiations by either party

seeking for e.g. to obtain better terms will not affect the existence with previously concluded contract

The judgment was cited to strengthen her arguments that the petitioner had withdrawn the condition of availability of full site at the time of

negotiations and at that time contract came into being as his negotiations formed a part of the contract. Subsequent negotiations/grievance of the

petitioner demanding 25% and 30% over the tendered rates due to non-availability of the full site is not justified.

(9) The learned Counsel for the respondent has placed reliance on Supreme Court judgment delivered in Associated Engineering Co. v.

Government of Andhra Pradesh, AIR 1991 (2) 180. In this judgment, the Supreme Court has mentioned that the function of the arbitrator is to

arbitrate in terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled outside the

bounds of the contract, he has acted without jurisdiction.

(10) In the instant case, in accordance with the terms of the contract, the site was to be given to the petitioner in stages and further more, during

negotiations ,the petitioner agreed to receive the site in stages Therefore it was not open to the petitioner to have agitated this issue again with the

arbitrator and the arbitrator was not justified in awarding any damages on this Court to the petitioner.

(11) The learned Counsel for the respondent has also placed reliance on another judgment of the Supreme Court delivered in Continental

Construction Co. Ltd. Vs. State of Madhya Pradesh, , for strengthening her submission. The objection of the respondent seems to be justified

because the arbitrator has ignored the terms of the contract. The site was to be made available in stages. However, the respondent has failed to

explain undue and long delay in supplying the requisite drawings and giving directions/decisions in time to the petitioner. The delay in supplying the

drawings and giving directions/decisions in time is clearly attributable to the respondent and the arbitrator was justified in awarding damages to the

petitioner. The arbitrator has decided claims No. 9 and 11 together and given Rs. 81.736.00 as damages against claims 9 and II. The amount has

not been bifurcated between the delay in giving the entire site and delay in supplying requisite drawings and other directions/decisions in time to the

petitioner. The arbitrator has also not given any reason how he has arrived at the figure of Rs. 81,736.00

(12) Learned Counsel for the respondent has submitted that the arbitrator ought to have given reasons for awarding damages against claims 9and

11. The learned Counsel for the respondent has placed reliance on the Supreme Court judgment delivered in Raipur Development Authority Vs.

M/s. Chokhamal Contractors etc. etc., .

(13) In view of the law laid down in these cases, the arbitrator ought to have given reasons for decreeing the award pertaining to claims No. 9

and11. The error is apparent on the face of the record. The award to the extent of claims No. 9 and 11 is set aside. The award is remitted to the

arbitrator for giving reasons as to how he has arrived at this amount. He is further directed to give bifurcation of the damages with regard to delay

in providing entire site and delay in giving requisite drawings and directions/decisions in time.

(14) Claim No. 10 pertains to interest. The law is now well settled. The arbitrator is empowered to grant pendants lite and future interest,

however, in view of my decision with regard to other claims, it would be appropriate for the arbitrator to reconsider his finding with respect to the

claim No .10 and accordingly the arbitrator''s finding in respect of claim No. 10 are also set aside and he is directed to consider the claim of

interest in view of Court''s finding regarding other issues. Counter Claim No. 1

(15) The arbitrator has disallowed reductions under Serial Nos. 1 to 7made by the respondent in the rates due to sub-standard work done by the

claimant and filed its counter claim No. 1 to this effect. According to the respondent the arbitrator erroneously disallowed counter claim of the

respondent. Clause 25(B) of the agreement reads as under :

THE decision of the Chief Project Engineer regarding the quantum of reduction as well as justification thereon in respect of rates for sub-standard

work which may be decided to be accepted will be final and would be open for arbitration.

The arbitrator could not have adjudicated upon this aspect of the matter because the decision of the Chief Project Engineer was final and could not

have been adjudicated by the arbitrator, and has to be set aside.

(16) Reliance was placed by the respondent on para 11 of the judgment in M/s. Bindra Buildings v. Delhi Development Authority, Air 1985Del

370.Levy of Compensation under Clause 2 :

(17) According to the learned Counsel for the respondent the finding of the arbitrator regarding Clause 2 is also clearly in excess of the jurisdiction

because the law of compensation made by Senior Project Engineer under Clause 2 would be final and is not open to adjudication by the arbitrator.

Clause 2 of the agreement clearly stipulates that in case of any delay on the part of the contractor to comply with the time schedule, he would be

liable to pay compensation to the respondent and the decision of the Senior Project Engineer would be final.

(18) Reading Clauses 2 and 25 together, the position that emerges is that the question of determination of compensation/penalty for delay

incompletion of the work rests only with the Superintending Engineer and any adjudication is outside the scope of the Arbitration Clause. Reliance

was placed by the learned Counsel on the leading judgment of the Supreme Court in Vishwanath Sood v. Union of India, Air 1989 (1) Sc 357.

(19) I have heard the petitioner and learned Counsel for the respondent. The assumption of jurisdiction to adjudicate and review the findings of the

Superintending Engineer is an error apparent on the face of the record .The award to that extent is set aside and remitted for reconsideration.

(20) The learned Counsel for the respondent has also referred to the authoritative treatise on arbitration by Russell and particularly invited attention

to page 441 of the 19th Edn. The relevant portion of page 441 reads as under :-

IT is necessary here to distinguish between cases in which a question of law is specifically referred and cases in which a question of law merely

arises (though necessarily) in the course of a reference. The question is whether what is referred to the arbitrator is, ""The general question, whether

involving fact of law"" or ""Only some specific question of law in express terms as the separate question submitted ""or in other works whether there

is ""A reference in which the questions of construction arises as being material in the decision of the matter which has been referred to arbitration"" of

A reference in which a specific question of law was referred to the decision of the arbitrator as the sole Tribunal. Only in the latter case will an

apparent error in law be left unquestioned.

(21) Learned Counsel for the respondent submitted that in the instant case ,no specific question of law was referred and Therefore, the decision of

the arbitrator was not final. The arbitrator''s assumption of jurisdiction over the findings of the Senior Project Engineer was, Therefore, in excess of

the jurisdiction of the award is bad in law.

(22) Learned Counsel for the respondent submits that the arbitrator has disallowed Rs. 17,817.00 towards the security deposit after 5 years of the

date of completion when the security was no longer required towards the satisfactory execution/completion of the work.

(23) In view of the Clauses 3(a), (b) and (c) the finding of the arbitrator regarding para 10 of the award is an error apparent on the face of the

award. The arbitrator could not have travelled beyond the terms of the agreement and in doing so he has gone beyond the terms of the contract.

(24) Mrs. Salwan, learned Counsel for the respondent has submitted that the arbitrator has committed an error with regard to claim No. 10-A in

disallowing Rs 1327.16 to the respondent as less amount credited by the bank on F.D.Rs. According to the petitioner, the plea of the D.D.A. that

their bankers have given a less credit of Rs. 1327.16 is not justified. This question relates to the decision of the arbitration in the facts of the case

which cannot be looked into unless the error is apparent on the face of the award .In this view of the matter, the award to the extent of Rs.

1327.16 is made the rule of the Court.

(25) The award to the extent of counter claim No. 1 is set aside because the arbitrator has given no reasons while awarding Rs.100.00to the

respondent to be paid by the claimant. Against this counterclaim, no reasons whatsoever have been given for awarding this amount. Therefore, the

award to this extent is bad, because the error is apparent on the face of the award.

(26) I have heard the petitioner and the Counsel for the respondent. In the facts and circumstances of this case, the award with respect to

claimsNos. 7, 9 to 1). and additional claims No. 1 to 3 and counter-claim No. 1 are set aside and the award with respect to the remaining clauses

is made rule of the Court.

(27) The award regarding claim Nos. 7, 9 to 11, additional claims 1to 3 and counter claim No. 1, are remitted back to the arbitrator for his

decision in accordance with law.

(28) Before parting with this case, this Court would like to place on record extremely able assistance provided by Mrs. Anusuiya Salwan, learned

Counsel for the respondent/DDA. The petition is accordingly disposed of and the parties are directed to bear their own costs.