A.R. Khanna and Sons Vs D.T.C. and Others

Court: Delhi High Court

Date of Decision: Sept. 18, 2008

Acts Referred: Arbitration Act, 1940 â€" Section 30, 33

Citation: (2008) 4 ARBLR 153

Hon'ble Judges: Hima Kohli, J

Bench: Single Bench

Advocate: Raman Kapur and Honey Taenja, for the Appellant; Jyotinder Kumar, for the Respondent

Judgement

Hima Kohli, J.

I.A. No. 4917/1994 (by respondents objections u/s 30 & 33 of the Arbitration Act, 1940 and CS (OS) No. 2765/1993)

1. By way of the present order, this Court proposes to dispose of the objections filed by the respondent DTC to the award dated 30.11.1993,

passed by Sh.Swami Dial, Sole Arbitrator, Chief Engineer, CPWD (Retd.).

2. Briefly stated, the facts of the case are that an agreement was entered into between the petitioner contractor and the respondent DTC on

10.8.1983, for construction of Wazirpur Depot-II, Delhi at an estimated cost of Rs.11,51,333/- plus 93.90% above DSR 1977 i.e. at a total cost

of Rs.22,32,434.69paise. The stipulated date for the start of the work was 29.7.1983 and the stipulated date for completion of the contract was

28.1.1984. The time for completion was extended upto 30.9.1984 and the work was actually completed on 16.10.1984. Thereafter, as disputes

and differences arose between the parties at the time of submission of final bill, the petitioner contractor invoked the arbitration clause governing

the parties and raised certain claims. The respondent DTC appointed Dr.P.S. Rana as a sole Arbitrator to adjudicate the claims and counter claims

of the parties and complete the arbitration proceedings with a direction that the award should be a speaking award. As the petitioner contractor

raised an objection to the appointment of the aforesaid Arbitrator, he approached this Court by filing a petition for appointment of any other

Arbitrator, which was disposed of vide order dated 16.5.1989, and Sh. Swami Dial was appointed as a sole Arbitrator to adjudicate the disputes

between the parties with the direction that the said Arbitrator shall give a speaking award.

3. Counsels for the parties state that prior to the passing of the impugned award dated 30.11.1993, an interim award dated 12.12.1990 was also

passed by the sole Arbitrator where under it was directed that the respondent DTC shall pay a sum of Rs.79,337.75paise to the petitioner

contractor on account of the fact that the said amounts were accepted by the respondent DTC in the final bill prepared by them and admitted

before the Arbitrator. This was followed by passing of the impugned award dated 30.11.1993.

4. Counsel for the respondent DTC assails the findings given by the learned Arbitrator in respect of claims No. 1, 3 and 5. Under claim No. 1, the

petitioner contractor claimed a sum of Rs.14 lakhs on account of balance payment which was still recoverable by it from the respondent DTC.

Claim No. 3 was raised on account of increase in rates as damages for the work executed after the expiry of the stipulated date of completion of

work and claim No. 5 was on account of reimbursement of statutory hike under Clause 10 (c) of the contract.

5. Counsel for the respondent DTC submits that the learned Arbitrator erred in awarding an amount of Rs.3,62,470/- collectively against the

aforesaid claims raised by the petitioner contractor and that he failed to furnish any details thereof. He states that the learned Arbitrator did not

care to justify the increase beyond the stipulated date of completion from the agreed enhancement of 93.91% to 125% and that the learned

Arbitrator failed to take into consideration the actual measurements of work taken jointly and duly signed and accepted by the parties. He further

submits that the Local Commissioner appointed by the learned Arbitrator visited the site but did not take any measurement himself and that there

were many errors in the Local CommissionerÃ¯Â¿Â½s report which the respondent DTC had raised, but which were not considered by the learned

Arbitrator while passing the impugned award. It is lastly submitted that the learned Arbitrator misconducted the proceedings by directing payment

of statutory increase in labour and material under Clause 10(c) for the reason that for claiming an amount under Clause 10(c), the petitioner had to

present the records such as muster roll, paid vouchers etc.,and show them either to the respondent or the learned Arbitrator, which was not done.

6. Counsel for the petitioner contractor, however, supports the impugned award and states that it must be kept in mind that the impugned award

was given by an expert in the field being a Chief Engineer (CPWD) and that he was well conversant with the kind of disputes which were being

adjudicated by him. He relies on the judgments rendered in the cases of Delhi Development Authority Vs. Bhagat Construction Co. (P) Ltd. and

Another, and D.D.A. Vs. Bhagat Construction Co. Pvt. Ltd., to state that the Arbitrator need not disclose the mathematical calculations in the

award and if the award shows application of mind and a view taken by the learned Arbitrator, which is a plausible view, the same can be taken to

be correct. Counsel for the petitioner contractor states that the learned Arbitrator has given his decision on the basis of the evidence of the parties

and the decision is based on questions of facts, which this Court ought not to interfere with while exercising its powers under Sections 30 and 33 of

the Arbitration Act, 1940 (in short, `the ActÃ¯Â¿Â½).

7. Insofar as the objections raised by the counsel for the respondent DTC in respect of claims No. 1, 3 and 5 are concerned, counsel for the

petitioner states that the learned Arbitrator made his award with regard to the measurements only after visiting the site and even the Local

Commissioner appointed by him was a retired Chief Engineer, NDMC and thus an expert in the field. He further submits that measurements were

partly recorded in the Measurement Book by the respondent DTC at the relevant time when the work was still going on.

8. A perusal of the impugned award shows that after referring to the brief facts of the case, the learned Arbitrator rendered an award wherein he

took notice of the objections of the respondent to the effect that there was no discrepancy in the record of measurements in the Measurement

Book and whatsoever was due and payable to the petitioner contractor, had been paid by the respondent DTC under the interim award.

Thereafter, it was observed that efforts were made to reconcile the measurements and a Local Commissioner was appointed who submitted his

report. It was also observed that the representatives of the respondent DTC did not co-operate fully with the Local Commissioner and opposed

his appointment. Later on, they raised objections to his findings. As a result, the learned Arbitrator visited the site personally with the parties. It is

noted in the award that the Arbitrator visited the site of the work and inspected the various points on the spot by holding an inspection on

10.4.1993. The learned Arbitrator thereafter arrived at certain conclusions after considering the various disputed measurements and rendered the

award in respect of claims No. 1, 3 and 5.

9. As regards the claim for payment of Rs. 14 lakhs on account of balance payment under claim No. 1, the award shows that the learned

Arbitrator sifted through the claims prepared by the claimants and identified five sub heads on the basis of the claims. He assessed the claims put

forward by the petitioner contractor and finally awarded Rs.3,62,470/- against the claim made for Rs.14 lakhs. The contention of the counsel for

the petitioner contractor to the effect that the Arbitrator was not to disclose the basis of the mental process for arriving at a figure and when called

upon to give a reasoned award, is still not required to give a detailed award like Judges do, is well founded. It is reiterated that as long the

Arbitrator has indicated his trend of mind and indicated the basis on which he has arrived at such figure, the same is sufficient for the purposes of

giving a reasoned award. The said trend of mind can be deciphered from a perusal of the award. (Refer: Kochhar Construction Works Vs. Delhi

Development Authority and Another, . It is also settled law that giving a collective award by clubbing different claims, cannot be a ground for

assailing an award. Refer:Firm Madanlal Roshanlal Mahajan v. Hukumchand Mills Ltd. Indore AIR 1967 1030. Hence the objections taken by the

respondent DTC in that regard are rejected being devoid of merit.

10. Insofar as payment of amounts @ 125% above the scheduled rate of the respondent DTC is concerned, the learned Arbitrator while dealing

with claim No. 3 took note of the submissions of the petitioner contractor that the said amount was claimed for the value of the work done beyond

the date of completion, but observed that the petitioner contractor was not able to fully justify the said claim and thus the said claim was only partly

accepted, as included in claim No. 1. Claim No. 1 included subhead (d), whereunder the petitioner contractor claimed that payment should be

made for the work actually executed beyond the reasonable deviation limit and that the said work should be paid at a reasonable market rate or on

actual basis. In view of the above, the petitioner contractor claimed that the value of the work done after the completion date was for more than

Rs. 9 lakhs and hence an extra amount of Rs. 2,79,900/- was claimed. However, as noted above, the learned Arbitrator collectively awarded a

sum of Rs.3,62,470/- against claims No. 1, 3 and 5 to the petitioner contractor. In other words, as against claims No. 1 and 3 for a sum of Rs.14

lakhs and Rs.2,79,900/- respectively, the petitioner contractor was paid only a sum of Rs.3,62,470/- in respect of claims No. 1, 3 and 5. There is

no reason to interfere in the impugned award insofar as the aforesaid claims are concerned, as there appears no error apparent on the face of the

award for the purposes of interference.

11. Counsel for the respondent DTC has also challenged the findings of the learned Arbitrator in respect of claim No. 4, which pertains to the

claim made by the petitioner contractor for refund of Rs.4,034.50paise, on account of excess recovery effected by the respondent DTC against

water charges. Counsel for the respondent DTC states that the petitioner contractor was provided water by the respondent against 1% charges

and that excess recoveries had already been made from the petitioner for Rs.4,992.83paise and that the award of Rs.4,034.50paise against the

said claim was wrong. Counsel for the petitioner contractor denies the same and states that on the contrary, his clients had made their own

arrangements for water at the site both for construction and labour and that the respondent DTC had supplied water only after 26.3.1984, as

negotiated, for the work of cement plaster and for second and third coats of WMB and therefore, a claim of Rs.9,000/- was made against water

charges. He submits that after payment of the 11th running bill, the respondent DTC liquidated Rs.4,965.50paise from the final bill thus leaving

Rs.4,034.50paise payable to the petitioner. A perusal of the award shows that the learned Arbitrator has returned a finding on the basis of the

material placed on record confirming the fact that the claimants had made their own arrangements for water and hence he awarded the balance

amount of Rs.4,034.50paise. The aforesaid decision is based on the appreciation of the evidence and purely, a question of fact which, as is settled

law, this Court ought not to interfere with. Re-appreciation of evidence is not within the scope of the interference by this Court Refer: Municipal

Corporation of Delhi Vs. Jagan Nath Ashok Kumar and Another, . The Arbitrator is the final arbiter of the facts and the law and merely because

this Court may arrive at a different conclusion than the one arrived at by the learned Arbitrator is not a ground for interfering with the award. In the

present case, even that is not the case as this Court does not find any error apparent on the face of the award in respect of findings returned against

claim No. 4.

12. The next claim assailed by the counsel for the respondent DTC is in respect of claim No. 8 under which the petitioner contractor claimed

interest @ 24% p.a. on the awarded sum from the date of the claim, till the date of payment. As against the aforesaid claim, the learned Arbitrator

granted interest @ 15% p.a. for the awarded amount payable from 16.5.1989 (the date on which the sole Arbitrator was appointed by the Court)

to 30.11.1993 (the date of passing of the impugned award).

13. Counsel for the respondent submits that the interest awarded by the learned Arbitrator is erroneous as no amount whatsoever was due and

payable to the petitioner and hence there was no question of paying any interest by the respondent. There appears no error on the face of the

award on the issue of interest. It was well within the power of the learned Arbitrator to award interest in respect of amounts found due and payable

by the respondent DTC to the petitioner contractor which he did. As against the interest claimed by the petitioner contractor @ 24%, the learned

Arbitrator granted interest @ 15%. This Court does not find any reason to interfere with the rate of interest awarded by the Arbitrator.

14. Lastly, counsel for the respondent DTC states that the learned Arbitrator erred in overlooking the counter claim raised for a sum of

Rs.1,15,130/- on account of deficiency and defects in the work done by the petitioner contractor. He submits that the Arbitrator wrongly and

without any reasons disallowed the said amount which was levied in accordance with the Clause 14 of the contract.

15. It may be noted that in the impugned award, the learned Arbitrator made a specific mention of the fact that the respondent DTC had not raised

any counter claim against the petitioner contractor but he proceeded to take note of the final bill passed by the respondent DTC during the

pendency of the arbitral proceedings, for an amount of Rs.11,996.62paise as also the recovery statement attached to the bill. The recoveries made

by the respondent DTC have been enumerated by the Arbitrator at page 8 of the award, totaling to Rs.4,08,455.30paise. The learned Arbitrator

held that out of all recoveries made against the petitioner contractor, only four recoveries were not in order which included the recovery made

under Clause 14, for compensation.

16. In the aforesaid context, the observations made by the learned Arbitrator at page 5 of the award are relevant. He has observed that based on

the findings/results regarding deficiency in the road metal recovered from two trial pits which were dug, the respondent DTC applied the same

yardstick to the entire work done in the contract. The aforesaid process of working out the deduction and deficiency was held by the Arbitrator to

be a highly controversial method of working and not fair to the other party. Holding so, the claim raised by the respondent DTC by invoking

Clause 14 of the contract, was shot down as unjustified. There appears no error apparent on the record in respect of the aforesaid finding which in

any case, is a finding of fact and as observed above, this Court should restrain itself from interfering with the findings of fact which fall within the

domain of the learned Arbitrator. Hence, the objections raised on behalf of the respondent DTC with regard to the rejection of the deduction made

by the respondent DTC in its final bill are found devoid of merits.

17. For the foregoing reasons, the objections filed by the respondent DTC are rejected. The impugned award dated 30.11.1993, passed by

Sh.Swami Dial is made rule of the Court. The suit is disposed of. Decree sheet be drawn up accordingly. The parties are left to bear their own

costs.