

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **OMP No. 27/2005**

Date of Decision: 1st July, 2010

DELHI DEVELOPMENT AUTHORITY Petitioner
Through: Ms. Ansuiya Salwan, Advocate

VERSUS

M/S. CONSTRUCTION & DESIGN SERVICES Respondent
Through: Nemo.

% **CORAM:**
HON'BLE MS. JUSTICE ARUNA SURESH

- (1) Whether reporters of local paper may be allowed to see the judgment?
- (2) To be referred to the reporter or not? Yes
- (3) Whether the judgment should be reported in the Digest? Yes

J U D G M E N T

ARUNA SURESH, J.

1. This objection petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'Act') has been filed by the Petitioner DDA challenging the validity and legality of the Award dated 12.08.2004 published by the sole arbitrator Mr.P.K. Bahri, J. in favour of the Respondent (claimant).

2. Petitioner had entered into a contract with M/s. Construction and Design Services under U.P. Water Supply Sewerage Act, 1975 for construction of a Sewage Pumping Station at Kundli Gharoli, Delhi vide Award letter No. F9(1)/ED-9/95-96/DDA/A/C's/1022 dated 28.09.1995. The work was to be completed within 15 months from the date of the start of the work i.e. 8.10.1995. However, Respondent could not complete the work granted to it under the said contract even after lapse of 42 months.
3. Respondent vide its letter No.779/Work-214 dated 30.09.1997 informed DDA that it was not possible for it to execute the work due to some internal problems and financial constraints within the Respondent department. The work therefore was completely stopped by the Respondent claimant on 6.4.1999. Various notices were served upon the Respondent to complete the work, but to no effect. Petitioner had to get the balance work executed through another contractor at the risk and cost of the Respondent after rescinding the contract vide letter No.F9(1) ED-9/95/DDA/A/C/6008 dated 17.9.1999.
4. Since dispute arose between the parties, Respondent filed a petition under Section 11 of the Act on 16.8.2000 seeking appointment of an arbitrator.

5. Vide order dated 19.12.2001 this court appointed P.K. Bahri, J. former Judge of this Court as the Sole Arbitrator to adjudicate upon the dispute between the parties. Since objection was raised by counsel for the Petitioner that the arbitration clause mentioned in paras 25 and 25-A of the contract has been scored out, a clarification was sought if the arbitrator could be competent to go in to the factum of said controversy if there is arbitration agreement between the parties. It was ordered that the arbitrator would be competent to go into the controversy, if there was an arbitration agreement between the parties.
6. The arbitrator entered into reference and after considering the claim and counter claim of the parties, published his Award on 12th August, 2004 whereby he directed the petitioner (objector) to pay a sum of Rs.5,20,303/- to the claimant with cost of Rs.50,000/-. It was further ordered that in case the said payment is not made within two months from the date of the award, claimant would be entitled to recover interest @ 12% per annum from the date of award till realization. However, it rejected the claim of interest for pre-reference and pendent lite period.
7. Respondent despite service of notice did not appear in court to contest the objection petition except once on 7th October, 2005

through Mr. R.K. Joshi Advocate. Hence, Respondent remained ex-parte throughout the proceedings.

8. Petitioner has challenged the impugned award on following grounds:-

(a) That there was no arbitration agreement between the parties and therefore, the arbitrator had no right to proceed with arbitration and pass the impugned award.

(b) That arbitrator has made his award contrary to the conditions of the agreement and dealing with the dispute not falling within the terms of submission to arbitration and beyond the scope of agreement between the parties.

(c) That the arbitrator committed error on the face of the award in respect of claim No.8 of the claimant while awarding him cost of Rs.50,000/- and he did not give any reason for awarding the cost.

(d) That arbitrator went wrong in rejecting the counter claim No.1 being contrary to his own findings in para 49 of the award that the contract came almost to standstill with the claimant raising its claim and in stopping the work till its claims were settled and therefore Respondent was right in rescinding the contract

and that the contract ended when the claimant stopped executing the remaining work.

(e) That the arbitrator did not give any reasons for rejecting the counter claim No. 2 and 3.

9. In the prayer clause Petitioner has only sought award regarding claim No.8, counter claim no.1,2 and 3 to be set aside.

10. Claims under challenge are :-

(i) Claim No.8 – Cost of Arbitration – Rs.5 lacs;

(ii) Counter Claim No. 1 – Rs.25,40,958.71 is claimed as the loss suffered on account of balance work being got done from M/s. G.C. Enterprises and M/s. R.P. Gupta for Rs.55,46,098/-.

(iii) Counter Claim No.2 – Interest @ 24% per annum on the amount claimed in counter claim No.1 for pre-reference, pendent lite and future period till payment.

(iv) Counter Claim No. 3- cost of the proceedings.

11. The arbitrator rejected counter claim No.1 and also counter claim No. 2 and 3, observing that claimant was right in closing the contract and DDA was not entitled to recover any extra amount as penalty / liquidated damages from the claimant for delayed performance of the

contract and incurred by it by getting the remaining work executed through another agency.

12. Ms. Ansuiya Salwan, counsel for the petitioner has not raised any serious objection to the non existence of the arbitration clause in the contract and in a way has accepted the findings of the arbitrator on the question if there is any arbitration clause in the contract. It is pertinent that even before the arbitrator, petitioner had taken half hearted plea and also did not urge that there was no arbitration agreement inter se the parties and that the arbitration clause was struck off before it was signed by the parties. Observations of arbitrator are :-

“15. The respondent had half heartedly taken a plea, which was not even argued before me, that in original contract before it was signed, the arbitration clause was struck off. Thus it is pleaded that there is no arbitration agreement under which any arbitrator could be appointed.

16. A photo-copy of the contract has been produced on the record. It shows that every page has been signed by both parties and where ever corrections by hand have been made, they are initiated by the parties. Surprisingly the clause 25 which was scored off with a cross and marked ‘DI’ has not been got signed from the claimant, although it is initiated by the respondent’s representative.”

13. It is also noted that even in the instant objection petition, though objector has disputed the existence of arbitration clause in the

agreement in para 4 (a) of the objection petition but, did not seek setting aside of the award on the ground that arbitrator had no jurisdiction to enter into reference. I find no reason to disagree with the findings of the arbitrator regarding the existence of arbitration clause in the contract.

14. Not everyone takes defeat in their stride. So whenever an arbitral award goes against one of the parties to the dispute he seeks ways of setting it aside. Award can be set aside only on the grounds mentioned in Section 34 of the Act. Recourse to a party against arbitral award under Section 34 of the Act can be made by an application for setting aside such award in accordance with sub Section 2 and sub Section (3) of Section 34 of the Act. Sub-Section 3 is not relevant in the present case as it relates to issue of limitation for filing an objection petition under the Section. So far as is relevant in the present case, Sub Section 2 (a) of Section 34 of the Act reads:-

“(2) An arbitral award may be set aside by the Court only if-

(a) the party making the application furnishes proof that-

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part;

15. Thus, salient features of Section 34 of the Act are :-

- (i) It prohibits any recourse against arbitral award other than the one provided for in sub section (1) of Section 34.
- (ii) It limits the grounds on which the award can be assailed in sub-section (2) of Section 34.
- (iii) It promises a fairly short period of time in sub-section (3) of Section 34 within which the application for setting aside may

be made.

(iv) It provides for remission of award to the arbitral tribunal to cure defects therein.

16. A plain reading of the above would show that an arbitral award can be questioned only on any ground or more mentioned in the above provisions. Now it is to be seen if challenge to the award made in the petition needs any interference in the impugned award.

17. It is urged that Petitioner served various notices under Section 3 (a) (b), (c) of the Agreement, but Respondent did not complete the work awarded to him and abandoned the same.

18. Ms. Ansuiya Salwan has submitted that claimant himself admitted that there was delay in executing the contract and he sought extension of time and the Petitioner had issued a show cause notice for taking action against it for delay in the execution of work to which the claimant had protested. She has further submitted that petitioner extended the period for completion of work but claimant invoked arbitration clause and the petitioner had to get the work completed by appointing other agency after rescinding the contract on 17th September, 1999 in terms of the contract at the risk and cost of the Respondent of the value of Rs. 55,46,098/- whereas Respondent only claimed Rs. 25,40,958.71 in its counter claim No.1.

19. She has argued that the arbitrator himself considered the validity of the rescission of the contract and held that contract ended when the Respondent stopped executing the remaining work and the Petitioner was right in rescinding the contract. After holding the validity of the rescission of the contract, the arbitrator should have awarded counter Claim No.1 to the petitioner.

20. In para 49 of the award, the arbitrator considered the validity of the rescission of the contract and concluded:-

“49. In view of the facts already discussed, the contract came almost to standstill with the claimant raising its claims and it stopped the work till its claims were settled. The respondent was thus right in rescinding the contract. The respondent could not have waited for the claimant to restart the work and complete of balance work as project was prestigious one being monitored by the Apex Court. The claimant was not unjustified in raising its claims, so I come to the conclusion that the contract ended when the claimant stopped executing the remaining work. I will now deal with the claims and counter claims of the parties.....”

21. Before coming to a conclusion on the validity of the rescission of the contract, the arbitrator considered, analyzed all the facts, circumstances and evidence on record which led to delay and rescission of the contract in detail under the heading “*Which Party is responsible for the delay in execution of the contract?*”

22. The arbitrator also considered various relevant clauses, specifications and conditions of the contract. Observations of the arbitrator are well founded. This court cannot re-assess or re-appreciate the evidence of the parties produced before the arbitrator to find out if the arbitrator did not properly analyse the evidence of the aggrieved party as an Appellate Court. The Award published by the arbitrator attained finality and this court cannot consider the objections as if it is sitting in appeal against the award.
23. Learned counsel for the petitioner has referred to '*Union of India vs. V. Pundarikakshudu and Sons & Anr., (2003) 8 SCC 168*', to emphasize that the arbitrator misconducted himself in rejecting the counter claim No.1 of the petitioner. She has specifically referred to para 17 of the judgment, which reads:-

“17. It is not in dispute that the claims and counter-claims of the parties centred around determination by the arbitrator as to whether the appellant or the first respondent had committed a breach of contract. The power of the appellant to terminate the contract and to put forth the claim for extra expenditure involved to complete the incomplete items of work left out by the first respondent revolved around the issue as to whether it was a defaulter or not. The appellant could terminate the contract and get the work completed through another agency entitling it to lay the said claim, but its justifiability therefor indisputably would depend upon the interpretation of clause 54 of the contract. The said clause empowers the

appellant to cancel the contract, only if the contractor "fails to complete the works, work order and items of work, with individual dates for completion, and clear the site on or before the date of completion". Thus, the "failure" must be on the part of the contractors and not by reason of acts of omissions and commissions of the appellant herein."

24. This judgment is of no assistance to the petitioner as no proposition of law has been laid down in the aforesaid paragraph. Rather, it refers to interpretation of Clause 54 of the contract in question in the said case. It does not lay down any guidelines which can be followed in this case.

25. The arbitrator observed in para 46 of the award as under:-

" 46. The accumulation of such continuously pouring waste water from the drain of the village obviously hampered and hindered the claimant in maintaining any good progress in the execution of the work. It is in these circumstances that respondent in agreement with the claimant kept on setting up different subsequent target dates for achieving completion of the project. The respondent did not levy any compensation against the claimant blaming him for causing any delay in the progress of the work till the matter came to standstill. It is only when the claimant put up its claims and required respondent to settle such claims and also sought for remission of rates in the execution of the remaining work that the respondent woke up and proceeded to impose the compensation alleging delay in execution of the contract by the claimant and thereafter

proceeded to rescind the contract. It may be that the claimant was, also at some stage of the work, slow in maintaining the progress in the work. Thus both the parties were in a way responsible for causing delay in execution of the contract. The stipulated time in the contract for completion of the work was set at large as the work continued even after expiry of the period so stipulated in the contract with the consent of the both the parties.”

26. The arbitrator also observed that parties were mutually fixing certain targets. Thus for the completion of the project when the progress in the work was not being maintained, the Respondent did not take any serious view of the acute problem being faced by the claimant with regard to waste water of the village drain continuously pouring at the site which was the major cause hindering the progress in the work. Therefore the arbitrator did not accept the plea of the Respondent that claimant was to be blamed for not achieving the projected targets set up for completion of the work and such targets being communicated to the Apex Court in the proceedings pending before the said court.
27. In view of the findings given by the arbitrator as to which party was responsible for delay in execution of the contract, finding that claimant was right in closing the contract, he rejected the counter claim No.1 of the petitioner.

28. The findings of the arbitrator on counter claim No.1, to my mind are not covered under any of the grounds as laid down in Section 34 of the Act. Hence, I find no reason to interfere in the findings of the arbitrator while rejecting the counter claim No.1.
29. Counter claim No.2 and 3 of the petitioner relate to interest and cost of the proceedings. Since counter claim of the petitioner was rejected and no amount was awarded to him and after taking into consideration the communication sent by the Petitioner to the claimant indicating its intention to impose penalty, the arbitrator rightly rejected these two claims. The arbitrator observed that since claimant was right in closing the contract, the Petitioner was not entitled to recover any penalty/ liquidated damages from the claimant for delayed performance of the contract.
30. Petitioner has also objected to award of cost of Rs.50,000/- to the claimant Respondent. Under Section 31 of the Act, arbitrator has to fix the cost of the arbitration and has to specify the party entitled to costs, the party who shall pay the costs, the amount of costs or, method of determining the amount and the manner in which the costs is to be paid. Costs include the fees and expenses of the arbitrator and the witnesses, legal fees and expenses, any administration fees of the institution supervising the arbitration and any other expenses

incurred in connection with the arbitral proceedings and the arbitral award.

31. Claimant had claimed Rs. 5 lacs as cost. Considering the claims made by the claimant, the arbitrator was very reasonable in his approach while awarding cost of Rs.50,000/- only, since he found that Petitioner was liable to pay amount of Rs. 5,20,303/-, as it could not be said that claims were farfetched. Under the circumstances, I do not find any reason to interfere in the discretion of the arbitrator in awarding cost of arbitration as it is not contrary to the award. Reference is made to '*J.E. Engineers (P) Ltd vs. National Building Construction Corporation Ltd., MANU/DE/1766/2008*'.
32. In view of the discussion as above, I find no merit in the objection petition, the same is accordingly dismissed.

**ARUNA SURESH
(JUDGE)**

JULY 01, 2010

vk