2024:DHC:2166-DB

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on:19.03.2024

\+ **FAO (COMM) 115/2023**

DHARAMVIR & COMPANY .....Appellant

Versus

DELHI DEVELOPMENT AUTHORITY & ANR. .... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr. G.L.Verma, Adv.

For the Respondent : Ms. Aakanksha Kaul & Mr. Aman Sahai, Advs. for DDA.

Mr. Yoginder Handoo, Mr. Raghvendra Upadhyay & Mr. Vaibhav Tripathi, Advs. for NDMC.

CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU
HON'BLE MS. JUSTICE TARA VITASTA GANJU

JUDGMENT

VIBHU BAKHRU, J

1. The appellant has filed the present appeal under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 (hereafter the *A&C Act*) impugning an order dated 21.03.2023 (hereafter the *impugned order*) passed by the learned Commercial Court in OMP(COMM) No.13/2020 captioned *M/s Dharamvir & Company v. Delhi Development Authority & Anr.*

2. The appellant had filed the said petition under Section 34 of the A&C Act impugning an arbitral award dated 15.06.2020 (hereafter the *impugned award*).

3. The impugned award was rendered in context of the disputes that had arisen between the parties in connection with a contract between the appellant and the respondent, Delhi Development Authority (hereafter *DDA*), for repair of quarters in Pocket-A-5, Paschim Vihar (hereafter *Works*). The DDA had invited bids for execution of the Works. The admitted cost for completing the Works was ₹27,65,097/-. The appellant submitted its tender offering to execute the Works for a sum of ₹42,65,793/-. The parties thereafter negotiated the contract price at ₹40,57,083/-. The appellant's tender for negotiated amount was accepted on 15.12.2012. The execution of the Works was to commence on 25.12.2012 and was required to be completed within a period of six months, that is, on or before 25.06.2013.

4. The Works were finally completed on 22.07.2014. The appellant claimed that the delay of 458 days in completing the Works was attributable to the DDA and the appellant was liable to be compensated for the same. In addition, the appellant also claimed that the DDA had wrongly withheld a sum of ₹7,000/- from the amount payable by DDA.

5. The appellant being aggrieved by the non-payment of the amount by the DDA, invoked the arbitration agreement under Clause

25 of the contract between the parties by sending several notices to the DDA seeking appointment of the arbitrator. However, the DDA neither replied to the letters nor took any steps for the appointment of the arbitrator. Therefore, the appellant filed an application, under Section 11 of the A&C Act, being Arb. P. 500/2017, before this Court for the appointment of an arbitrator to adjudicate the disputes between the parties. This Court by an order dated 11.10.2017 directed the Delhi International Arbitration Centre (hereafter *DIAC*) to nominate an arbitrator to adjudicate the dispute between the parties. Pursuant to the said order the DIAC appointed a sole arbitrator (hereafter the *First Arbitrator*) in April, 2018.

6. The appellant filed a Statement of Claim before the Arbitral Tribunal raising four claims: (i) Claim No.1 for a sum of ₹20,22,082/- being the amount of the final bill; (ii) Claim No.2 for a sum of ₹7,000/- on account of amount wrongly withheld; (iii) Claim No.3 for an amount ₹10,61,592/- on account of interest at the rate of 15% per annum from the date of completion of the Works (that is, 22.07.2014 till 31.01.2017); and, (iv) Claim No.4 for a sum of ₹2,00,000/- towards cost of litigation.

7. The term of the First Arbitrator was expired on 23.04.2019 and the appellant filed an application [being OMP (Misc.) (COMM) No.160/2019] under Section 29A of the A&C Act. This Court passed an order dated 20.12.2019 in the said application directing DIAC to appoint a substitute arbitrator in place of the First Arbitrator and also

extended the time for completion of the arbitration proceedings by a period of nine months. The said application was disposed in terms of the said order.

8. In compliance of the order dated 20.12.2019, the Chairperson, DIAC appointed a sole arbitrator in place of the First Arbitrator. The letter of appointment dated 08.01.2020 was received by the sole Arbitrator (the Arbitral Tribunal) on 13.01.2020.

9. The Arbitral Tribunal delivered the impugned award accepting the Claim No.2 (the amount wrongly withheld) and awarded an amount of ₹7,000/- along with interest at the rate of 12% per annum. However, the remaining claims of the appellant were rejected.

THE CONTROVERSY

10. As noted above, the appellant's principal claim (Claim No.1) was for a sum of ₹20,22,082/- in respect of a bill (Final Bill) that remained unpaid. The appellant had raised the said bill for the Works done as per market rates derived by it and not as per the rates agreed between the parties. According to the appellant, the Contract had been delayed and therefore, the appellant was entitled to be paid for the work done on the basis of market rates derived from Delhi Schedule of Rates-2007 published by Central Public Works Department. The Arbitral Tribunal rejected the said claim (Claim No.1) on the ground that the appellant had failed to establish that it had suffered any loss due to breach of contract. The Arbitral Tribunal observed that the Statement of Claim did not disclose any cause of action in respect of

the claim of ₹20,22,082/- and therefore, the appellant was not entitled to the same.

11. As noted above, the appellant's challenge to the impugned award was rejected by the impugned order dated 21.03.2023 passed by the learned Commercial Court. The learned counsel for the appellant has confined the challenge to the impugned award as well as the impugned order in the present appeal on the ground that the findings of the Arbitral Tribunal were contrary to the order dated 07.04.2019 passed by the First Arbitrator. According to the appellant, the First Arbitrator had in unambiguous terms rejected the DDA's contention that the appellant had no cause of action. Mr. Verma, the learned counsel for the appellant contends that the impugned order thus runs contrary to the earlier finding of the First Arbitrator, who was substituted pursuant to the order dated 20.12.2019 passed by this Court in OMP (Misc.) (COMM) No.160/2019.

12. Mr. Verma, referred to Section 29A (6) of the A&C Act and contended that the arbitral proceedings were required to be continued by the substituted arbitrator from the stage already reached and on the basis of evidence and material on record. Therefore, it was not open for the substituted sole arbitrator (Arbitral Tribunal) to take a contrary view. He fairly stated that he was conscious of the limited scope of challenge under Sections 34 and 37 of the A&C Act and therefore was not pursuing any other ground except that the impugned award fell foul of Section 29A (6) of the A&C Act.

13. Ms. Aakanksha Kaul, learned counsel appearing for the respondent countered the aforesaid submissions. She submitted that the order dated 07.04.2019 is a procedural order passed by the First Arbitrator and did not determine any issue. She also submitted that the relevant part of the said order, which is relied upon by the learned counsel for the appellant, in a sense records submissions advanced on behalf of the appellant and not the findings of the First Arbitrator. She submitted that there were no findings recorded in the said order, which are binding on the parties.

14. She submitted that although the Arbitral Tribunal had found that the delay in completion of the works was attributable to the DDA, the appellant's claims were rejected on the ground that it had failed to establish any loss. She submitted that the said conclusion was not amenable to challenge under Section 34 of the A&C Act.

REASONS & CONCLUSION

15. At the outset, it would be necessary to examine the import of the order dated 07.04.2019 passed by the First Arbitrator. This is because the challenge in this appeal is founded on the basis that the findings recorded in the said order were binding on the sole arbitrator (Arbitral Tribunal) appointed in place of the First Arbitrator.

16. A plain reading of the order dated 07.04.2019 indicates that the same records the arbitral proceedings held on the said date. The DDA had filed an application under Section 13(2) read with Section 12(3) of

the A&C Act challenging the First Arbitrator. In the said context, the first Arbitrator issued directions for completion of pleadings in respect of the said order. In addition to the aforesaid application, there were two other applications filed by the respondent styled as applications under Section 151 of the Code of Civil Procedure, 1908 (hereafter the *CPC*). The First Arbitrator issued directions in regard to the said applications also.

17. It is noticed that the hearing held on 07.04.2019 was the nineteenth arbitral hearing held before the First Arbitrator. It is essential to examine the prior orders passed by the first Arbitrator for the purpose of comprehending the context in which the order dated 07.04.2019, was passed. It is relevant to note that the DDA had filed an application under Section 16 of the A&C Act contending that the Final Bill was prepared on 12.09.2014 and the same was recorded in the measurement book. Thus, no further payment was due against any other final bill set up by the appellant. The questions whether the bill dated 12.09.2014 was the Final Bill and whether the appellant had accepted a sum of ₹5,03,781/- towards full and final payment of the same were contentious and therefore could not be decided within the framework of Section 16 of the A&C Act. Accordingly, the DDA's application was rejected.

18. At the fourteenth hearing held on 10.03.2019, the First Arbitrator examined the pleadings of the parties and framed eight issues. Thereafter, the matter was put up for cross-examination of the

appellant's witness and the next date of hearing was scheduled on 17.03.2019 for cross examination of the appellant's witness (CW-1). On 17.03.2019, an application was filed on behalf of the DDA stating that the claims raised by the appellant were liable to be rejected under Order VII Rule 11 of the CPC. It was also contended that the Statement of Claims did not disclose any cause of action. The same was also raised as a preliminary objection in the Statement of Defence filed on behalf of the DDA. It is material to note that one of the issues framed by the Arbitral Tribunal (Issue No.3) was "Whether the Statement of Claim do not disclose any cause of action? OPR". The onus to prove the said issue rested on the DDA. The order dated 17.03.2019 indicates that the First Arbitrator had referred to the said issue and held that the said issue could not be treated as a preliminary issue at that stage. The First Arbitrator, accordingly, directed the parties to lead their respective evidence in regard to the said issue along with other issues. However, the First Arbitrator amended its earlier order insofar as the onus to prove the said issue rested with the respondent. The First Arbitrator now noted that the onus would rest on both the parties – "OPR/OPC".

19. The witness (CW-1) was partly examined on 17.03.2019. However, the cross-examination of CW-1 remained inconclusive and the further cross-examination was deferred. The proceedings were resumed on 25.03.2019 (the sixteenth hearing). On that date, CW-1 was partly cross-examined and the matter was deferred for further cross-examination on 03.04.2019.

20. On the next date of hearing, that is, 03.04.2019, the DDA moved three applications. The first two applications were styled as applications under Section 151 of the CPC and the third application was filed under Section 13(2) read with Section 12(3) of the A&C Act for challenging the jurisdiction of the First Arbitrator. The First Arbitrator issued directions for completion of pleadings in the said applications. The cross-examination of CW-1 remained inconclusive and therefore, the matter was re-listed for the said purpose on 05.04.2019.

21. The order dated 05.04.2019 (eighteenth hearing) records that on the said date, the learned counsel appearing for the DDA insisted that before continuing with the cross-examination of the witnesses, the application under Section 13(2) read with Section 12(3) of the A&C Act be decided. Accordingly, the First Arbitrator re-listed the proceedings for 07.04.2019.

22. Thus, it is clear from the above that as on 07.04.2019, the arbitral proceedings were at the stage of cross-examination of the appellant's witness (CW-1) and the application filed by the DDA challenging the jurisdiction of the first Arbitrator [under Section 13(2) read with Section 12(3) of the A&C Act] was required to be considered by the Arbitral Tribunal. Additionally, there were two other applications styled as applications under Section 151 of the CPC, which are not relevant as far as the controversy is concerned. The DDA's application under Section 13(2) of the A&C Act was

premised on several grounds including that the First Arbitrator had suggested answers during the cross-examination of the appellant's witness (CW-1); the First Arbitrator had taken *suo motu* cognizance of the delay in filing Statement of Defence; and not considered DDA's contention that the Statement of Defence does not mention any cause of action. It is in this respect that the First Arbitrator made the following observations:

> "Respondent has raised the question over not raising cause of action in the claim. This too is totally false and respondent is applying its own perceived notions to cast aspersions on the fareness of Ld. tribunal. Cause of action or dispute arises when one party raises the claim and opposite party denies the claim. This essential attribute is very much present in this case because claimant had raised the final bill by notice on 06.06.2015 which was never replied by respondent on merit. Therefore, cause of action is evident. Further, respondent never intimated the claimant following events in execution of work:
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> i. Respondent never intimated the claimant about completion of work.
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> ii. Respondent never intimated the claimant that the final bill is ready which is mandatory under Clause 25 of the Agreement.
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> iii. Respondent never called the claimant for joint inspection of the work.
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> iv. Respondent never treated the illegal withheld amount of Rs.7000/- from the final bill by way of RIS and DIS.
>
> v. Respondent finalize the bill on its own and send the cheque after seven months of finalization by post. No clarification for 7 months delay.
>
> vi. Respondent has tampered with the record and even cut the measurement book which was shown conclusively during the course of hearing.

vii. Claimant had clearly proved on reference to original record during the proceedings that he had recorded 'under protest' in first running bill and in second running bill also he had recorded 'under protest' and also recorded "bill and measurement kam dee gayee hey". This was conclusively proved on production of original measurement book.

viii. That delay in execution of the work has already been admitted by the respondent in its own record i.e. 'hindrance register'.

ix. It is not in dispute that claimant had executed the work beyond contractual period for which he is entitled to get his claim as per legal proposition coming from decided case.

x. Cause of action is manifest in sum and substance.

It is clear above mentioned undisputed fact that there was a cause of action and respondent is trying to dilute and divert the core issue by questioning the fairness of tribunal on this ground."

23. The said observations were made to justify the conduct of proceedings and to reject the DDA's claim that there were justifiable grounds to doubt the independence and impartiality of the First Arbitrator under Section 13(2) read with Section 12(3) of the A&C Act. It is important to note that by a prior order, the First Arbitrator had rejected the DDA's contention to frame the issue regarding cause of action (Issue No.3) as a preliminary issue. The First Arbitrator had held that the said issue was required to be decided after considering the evidence led by the parties. Thus, the observations made in the order dated 07.04.2019 were merely to justify that the decision to not try Issue No.3 as the preliminary issue did not give rise to any doubt as to the independence and impartiality of the First Arbitrator. The appellant's contention that the said order dated 07.04.2019 precluded

any challenge on the merits of the claims raised by the appellant is wholly erroneous. The question whether on the basis of the pleadings and evidence, the appellant's claim for a sum of ₹20,22,082/- was established remained a contentious issue to be decided. No facet of the said dispute was foreclosed by the order dated 07.04.2019.

24. We are unable to accept that the order dated 07.04.2019 can be treated as an interim award which finally decided any dispute. It is important to understand the impugned award and the reasons that persuaded the Arbitral Tribunal to reject the appellant's claim for ₹20,22,082/-. The same clearly indicate that the impugned award does not militate against the order dated 07.04.2019. The First Arbitrator had observed in the said order that the delay in execution of the work was attributable to the DDA and thus, undoubtedly the appellant had a cause of action for claiming compensation or loss suffered by it on that count. The Arbitral Tribunal also found in favour of the appellant in this regard. However, the Arbitral Tribunal found that the appellant had failed to plead and establish the loss suffered by it. Therefore, the Arbitral Tribunal rejected the appellant's claim in this regard. The relevant extract of the impugned award is set out below:

> "76. Arbitration is a creation of the contract between the parties. The Claimant was required to plead and prove that time was the essence of the contract. That the Claimant suffered losses due to delay caused on account of the Respondent. The Claimant was also required to plead and prove that he took all necessary steps to mitigate the losses for which the claim has been filed. The Claimant was required to

plead and prove if there was any escalation clause in the contract.

77. The Claimant has not pleaded that he actually suffered any losses on account of prolongation of the contract. He has merely relied on the judgement in the case of ***All India Radio Vs M/s Unibros & Anr, OMP. No.331/2010*** to submit that when a contract is performed during a prolonged period, instead of the originally contracted period, loss of profit does take place to the contractor.

78. The Claimant has pleaded that in the instant case breach of contract is clearly on the part of the Respondent, but he has not pleaded that he actually suffered any losses due to the breach of contract. He has not pleaded counts on which he suffered the losses. He has not pleaded that he took any steps to mitigate the losses.

79. The Claimant has merely claimed higher rates because the Respondent awarded the contract for the remaining 12 quarters at higher rates to another agency. The higher rates claimed by the Claimant are based on DSR 2014. Admittedly as per the Letter of Award **Ex.RW-1/X-3** Claimant was to paid on the basis of DSR 2007. Major part of the work was completed in 2013 or early 2014. The first R.A. Bill raised for a gross sum of ₹16,26,798/- was paid vide cheque dated 29.11.2013 for a net amount of ₹13,24,201/- The second R.A. Bill was raised for a gross sum of 11,18,323/-. A net amount of ₹9,84,125/- was paid to the Claimant vide cheque dated 28.03.2014. Apparently by that time DSR 2014 had not come into existence. The Claimant has not given any reasons for claiming for the entire work done by him at rates of DSR 2014."

25. We are not persuaded to accept that there are any grounds to interfere with the impugned award within the scope of Section 34 of the A&C Act. In our view, the learned Commercial Court rightly

rejected the appellant's petition under Section 34 of the A&C Act to set aside the impugned award.

26. The appeal is unmerited and, accordingly, dismissed.

VIBHU BAKHRU, J

TARA VITASTA GANJU, J

MARCH 19, 2024
'gsr'