

IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT : Arbitration Act, 1940.

CS(OS)2094A/1997 and CS(OS)2561A/1998

Date of decision: 11.09.2008

M/S Bumbrah Electric Co. .

Plaintiff
Through: Mr. Vivekanand, Advocate

Versus

Delhi Development Authority

Defendants
Through: Mr. D.S. Mahendru, Advocate

RAJIV SAHAI ENDLAW, J (ORAL)

CS(OS)2094A/1997 and CS(OS)2561A/1998

1. CS(OS)2094A/1997 was filed by the petitioner/claimant u/s 14 of the Arbitration Act, 1940. However, the Arbitrator independently filed the award and which was registered as CS(OS) 2561A/1998 and objections were filed by the petitioner/claimant thereto. The Arbitrator has vide the award dated 18.9.1997 dismissed all the claims of the petitioner/claimant on the finding on the preliminary issue raised at the instance of the respondent, DDA. The preliminary objection raised by the respondent and as recorded in the award is: The claims of the claimant are barred by limitation.

2. The Arbitrator found that the date of the completion of work was 24.10.1991, the final measurement was recorded by the respondent on 1.11.1991 and the same was accepted by the petitioner/claimant on 20.5.1992 without any dispute and the final payment was made to the petitioner/claimant on 20.10.1992. The Arbitrator held that as per clause 25 of the agreement, the petitioner/claimant was to invoke the arbitration within three months from the date of the final payment on 20.10.1992 i.e., by 27.1.1993. Arbitrator further found that the petitioner/claimant had for the first time applied for arbitration vide letter dated 25.1.1993 delivered in the office of the Engineer Member of the respondent on 12.2.1993. It was held that the arbitration clause was thus invoked on 12.2.1993, beyond 90 days prescribed in clause 25 of the agreement. The Arbitrator further held that as per clause 25 of the agreement, the petitioner is deemed to have waived his claims against the respondent and the claim is barred and the respondent was held to have stood discharged in respect of all liabilities in respect of the claims.

3. The submissions of the counsel for the petitioner are two fold. Firstly, it is argued that the legal reasoning given by the Arbitrator is contrary to section 28 of the Indian Contract Act, 1972, which was amended w.e.f. 1.8.1997 i.e. prior to the pronouncement of the award. Secondly, it is contended that the Arbitrator has misconducted himself in ignoring a vital document, being letter dated 28.12.1992 of the petitioner invoking the arbitration and which was filed before the Arbitrator as Ex. C-47. It is contended that as per the said letter, even if the reasoning of the arbitrator with respect to clause 25 of the agreement is accepted, the petitioner has invoked the arbitration within the period of 90 days.

4. The counsel for the respondent has on the contrary argued that the amendment to section 28 of the Contract Act shall not apply in the present case owing to the cause of action having accrued prior to the amendment of Section 28 of the Contract Act. It is further contended that the Arbitrator is not required to deal with each and every document and once it is found that the Arbitrator has given reasons, whether the same are correct or not, the Court ought not to exercise appellate jurisdiction and that no case for setting aside of the award is made out.

5. Clause 25 of the agreement is as under: Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs drawings and instruction herein before mentioned and as to the quality on workmanship or materials used on the work or as to any other questions claim, right matter or thing whatsoever, in any way and arising out of or relating to the contract designs drawings, specifications, estimates, instructions orders or these conditions or otherwise concerning the works or the execution or for failure to execute the same whether arising during the progress of the work or after the completion or abandonment there of shall be referred to the sole arbitration of the person appointed by the Engineer Member Delhi Development Authority at the time of dispute. It will be no objection to any such appointment that the arbitrator so appointed is a Delhi Development Authority employee that he had to deal with the matters to which the contract relates and that in the course of his duties as Delhi Development Authority employees he had expressed view on all or any of the matters in dispute of difference. The arbitrator to whom the matter is originally referred being transferred or vacating office or being unable to act for any reason, such Engineer Member Delhi Development Authority as aforesaid at the time of such transfer, vacation of office or inability to act shall appoint another person to act as arbitrator in accordance with the terms of the cone contract. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor it is also a term of this contract that no person other than a person appointed by such Engineer Member, Delhi Development Authority as aforesaid should act as arbitrator and, if for any reason that it is no possible, the matter is not to be referred to arbitration at all. In all cases where the amount of the claim in dispute is Rs. 50,000/- (Rupees Fifty thousand) and above, the arbitrator will give reason for the award. Subject as aforesaid the provisions of the Arbitration Act, 1940 or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this Clause. It is a term the contract that the party invoking arbitration shall specify the dispute or disputes to be referred to arbitration under this clause together with the

amount or amounts claimed in respect of each such dispute. It is also a term of the contract that if the contractor (s) does/do not make demand for arbitration in respect of any claim (s) in writing within 90 days of receive of the intimation from the Engineer-in-charge that the Bill is ready for payment, claim (s) of the contractor (s) will be deemed to have been waived and absolutely barred and the Delhi Development Authority shall be discharged and released of all liability under the contract in respect of those claims.

6. Section 28 of the Indian Contract Act, prior to its amendment w.e.f. 01.08.1997 was as under : Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent. After amendment, it stands as under: 28. Agreements in restraint of legal proceedings, void.[Every agreement (a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or (b) which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability, under or in respect of any contact on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to that extent.]

7. The Apex Court in National Insurance Co Ltd v Sujir Ganesh Nayak and Co AIR 1997 SC 2049 with reference to the unammended Section 28 held that an agreement which seeks to curtail the period of limitation would be void but an agreement which provides for the forfeiture or waiver of the right itself if no action is commenced within the time stipulated in the agreement would not fall within the mischief of Section 28.

8. The record reveals that the counsel for the petitioner/claimant had before the Arbitrator cited case law with respect to unamended section 28 and also brought to the notice of the Arbitrator the amendment to section 28 of the Act. However, the award is conspicuously quiet on the said aspects and does not deal with the said contentions of the petitioner/claimant. The claim of the petitioner/claimant being more than of Rupees 50,000/-, the Arbitrator under the agreement was required to give a reasoned award. The Arbitrator was thus required to give reasons for not accepting the contentions aforesaid of the petitioner/claimant. It is significant that the preliminary issue raised, as noted in the award also was of the claim being barred by time and not of the claim having been waived. The Arbitrator has failed to give any reasons whether in the facts of the case, the claim was barred by limitation or stood waived, which the apex courts also in National Insurance Co Ltd (supra) noted had a fine distinction. The amendment to section 28 does away with the distinction made by apex court in National Insurance Co Ltd (supra). The arbitrator has also not dealt with Munilal Vs. Oriental Fire and General Insurance Co. 1996, Raj. Law Reporter (SC) 9 cited by the counsel for petitioner/claimant before the Arbitrator where the apex court appears to have taken a view different from National Insurance Co Ltd (supra). The Arbitrator has also not adjudicated the effect, if any of amendment of section 28. Section 28 was amended to do away with the flaw which according to the legislature had crept into the unamended section 28 due to interpretation

thereof. Would such an amendment apply to pending cases or not, will be an important question arising for adjudication.

9. Counsel for the petitioner has before this court also relied upon Hindustan Construction Corporation Vs. Delhi Development Authority, 77(1999) Delhi Law Times 165, where in a similar situation the ground for setting aside of the award u/s. 30 and 33 of the Act was held to have been made out. The same was the position in M/s. Naresh Kumar Gupta Vs. The Vice Chairman/Engineer Member, DDA and Ors. 2003 II AD (Delhi) 628 and Union of India Vs. Simplex Concrete Pipes India (P) Ltd. 2004 III AD(Delhi)305. The counsel for the respondent has on the contrary placed reliance on Shri Ram Singh Vs. Delhi Development Authority, 1996(1) Arb. L.R.163, where a Single Judge of this court has set aside the award for the reason of the same allowing a claim contrary to the Clause 25 of the Agreement. However, I find that there is no discussion in this judgment about section 28 of the Contract Act and thus in my view, is not to be construed as laying down any law.

10. The award being contrary to the agreement requiring the arbitrator to give reasons, is liable to be set aside on this ground alone and there is error apparent on the face of the record.

11. I find merit in the second submission of the petitioner also of the award being liable to be set aside the reason of the Arbitrator having ignored the document dated 28.12.1992. The said document was very much in consideration as borne out from the proceedings before the Arbitrator. However, the Arbitrator has again chosen to remain quiet and not adjudicated as to why, if the said document is to be accepted, there is compliance of clause 25. The reliance by the counsel for the petitioner on K.P. Poulouse Vs. State of Kerala, AIR 1975 Supreme Court 1259, in this regard is apposite where the Apex Court has held that ignoring the document falls within the definition of misconduct within the meaning of section 30 of the Act. The same view was taken in Satya Narayan Brothers (P) Ltd. Vs. Tamil Nadu Water Supply and Drainage Board, 2004(5)SCC 314.

12. The objections of the petitioner/claimant are, therefore, allowed. The matter is quite old. The respondent is directed to appoint Arbitrator within four weeks from today. Considering the age of the matter, the Arbitrator to decide the disputes within six months of entering reference. The arbitration record may be returned to the respondent for forwarding to the new Arbitrator.

Sd./-
RAJIV SAHAI ENDLAW,J

September 11, 2008