HIGH COURT OF DELHI *(D.B.)*

Ms Ms Sukumar Chand Jain
V/S
Rail Vihar Sehkari Avas Samiti Ltd

Date of Decision: 18 December 2009

Citation: 2009 LawSuit(Del) 297

Hon'ble Judges: VIKRAMAJIT SEN, SUNIL GAUR

Case Type: F A O (OS)

Case No: 612 OF 2009

Subject: Arbitration, Civil

Acts Referred:
Evidence Act, 1872 Sec 114
Arbitration and Conciliation Act, 1996 Sec 34

Final Decision: Appeal dismissed

Advocates: Sandeep Sharma

Reference Cases:
Cases Referred in (+): **2**

Judgement Text:-

SUNIL GAUR, J

[1] The Respondent-Society invited tender for the execution of the "Development of Housing Site (laying of sewerage system) at Sadaullabad, Loni, District Ghaziabad

(U.P.). Appellant-Firm of Engineers and Contractor (said to be engaged in doing construction work) was awarded the work of laying of sewerage system as aforesaid in December, 1996. The stipulated date for completion of the aforesaid work was 3rd July, 1997. It is the precise case of the Appellant that during the abovesaid contractual period, no substantial work could be executed and in this regard, correspondence was exchanged between the parties and in the meanwhile, the cost of construction increased tremendously. Appellant claims that the construction of the septic tank was stopped by the Secretary of the Respondent-Society. Since dispute between the parties in this matter arose, statement of claim was made by the Appellant before the Arbitrator, which was contested by the Respondent and the Arbitral Proceedings resulted into an Award of 5th December, 2009.

[2] Appellant had preferred objections under Section 34 of the Arbitration & Conciliation Act, 1996 against this Award, which have been dismissed in limini by the learned Single Judge vide impugned order of November 09, 2009.

[3] Sole Arbitrator has awarded a sum of Rs.3,46,624/- with pendentelite interest at the rate of 18% per annum in favour of the Claimant/Appellant. The objection of the Appellant to the aforesaid award of 5th October, 2009 pertained to Claim No.1, 4 and 6. Claim No.1 relates to payment for the work done by Appellant/Contractor. Out of the ten running bills, payment for the 9th running bill has been granted to the Appellant as this bill was verified by the Respondent. For the remaining running bills, payment to the Appellant has been declined by the Arbitrator as well as by the learned Single Judge because the remaining running bills were not verified by the Respondent. In fact, the main reason for declining the payment of the remaining nine running bills to the Appellant was that the measurement book to support these bills was not produced before the Arbitrator. Learned Single Judge in the impugned order has rightly relied upon Section 114 of the Evidence Act to draw an adverse inference against the Appellant for not producing the measurement book before the Arbitrator. In this appeal, learned counsel for the Appellant has not been able to justify the non-production of the measurement book. What has been emphasized by the learned counsel for the Appellant is that even the remaining running bills were verified by the Respondent. This aspect pertains to the merits of the claim. Although, we are not required to go into this aspect, but it needs to be noted that because Counsel for the Respondent could not give the clarification to the Arbitrator regarding the 9th running bill, therefore, the payment of this bill has been awarded to the Appellant.

[4] Claim No.4 related to interest for delayed payments. It has been noticed by the

learned Single Judge in the impugned order that non-filing of the measurement book was the reason for the delay in making the payment. For this, the Appellant is to be blamed. Appellant has been rightly denied the interest on the delayed payment by the Arbitrator and the learned Single Judge has correctly not found any merit in the objection against denial of Claim No.4 by the Arbitrator.

[5] Claim No.6 relates to infructuous expenditure, i.e., on account of labour of the Appellant remaining idle. This claim has been disallowed by the Arbitrator, as it was found that the letters relied upon by the Appellant in respect of this claim were of no help and the bills in question did show that the work was being done and in that situation, Appellant/claimant was compensated on account of loss of profit.

[6] The challenge to an Award under Section 34 of the Arbitration & Conciliation Act, 1996 can be on limited grounds, as provided in Section 34 itself.

[7] In Fiza Developers and Inter-Trade Pvt. Ltd. Vs. AMCI (I) Pvt. Ltd. & Anr., 2009 1 SCALE 371, Apex Court has reiterated the scope of Section 34 of Arbitration and Conciliation Act, 1996, in these words:-

> "The grounds for setting aside the award are specific. Therefore necessarily a Petitioner who files an application will have to plead the facts necessary to make out the ingredients of any of the grounds mentioned in sub-section (2) and prove the same. Therefore, the only question that arises in an application under section 34 of the Act is whether the award requires to be set aside on any of the specified grounds in sub-section (2) thereof. Sub Section (2) also clearly places the burden of proof on the person who makes the application."

[8] It is neither stated in the appeal nor it was pointed out by counsel for the Appellant during the course of the arguments as to under which sub-section of Section 34, the case of the Appellant falls.

> In fact, the Award in question is neither patently illegal nor is against the public policy and is not covered by any of the grounds of challenge as provided under Section 34 of the Arbitration & Conciliation Act, 1996. The learned Single Judge has correctly, in our opinion, not acted as a Court of Appeal and we find that the reliance placed by the learned counsel for the Appellant upon Oil & Natural Gas Corporation Ltd. vs. Saw Pipes Ltd.,2003 5

SCC 575 is misplaced.

[9] In the light of the aforesaid, impugned order cannot be faulted with. Learned Single Judge was justified in dismissing the objections of the Appellant but the costs imposed while doing so, appears to be on the higher side. We think it appropriate to reduce the costs from Rs.50,000/- to Rs.20,000/- and modify the directions issued by the learned Single Judge in this regard. Appellant is granted two weeks time to deposit the reduced costs of Rs.20,000/- with the Registrar General of this Court, who shall ensure that it is sent to the Prime Minister Relief Fund.

[10] With aforesaid modification, this appeal is dismissed in limini.