

(2010) 06 CAL CK 0094

In the Calcutta High Court

Case No : G.A. No. 2495 of 2003 and A.C. No. 15 of 2003

Alstom Projects India Limited

APPELLANT

Vs

Galaxy Engineering Contractors

RESPONDENT

Date of Decision : 18-06-2010

Acts Referred:

Contract Act, 1872 — Section 73

Citation : (2010) 06 CAL CK 0094

Hon'ble Judges : Sanjib Banerjee, J

Bench : Single Bench

Advocate : Moloy Kumar Ghosh, Mitusree Boral and Tapan Kumar Dey, for the Appellant; Dipak Basu Samapti Chatterjee, Chaitali Mukhopadhyay, Adhiti Banerjee and Nandita Das, for the Respondent

Judgement

Sanjib Banerjee, J.—The petitioner seeks to have the principal part of an award set aside on the ground that it is perverse and that the arbitrator has misconducted himself and the proceedings in awarding an amount despite recording that there was no evidence to substantiate the extent of loss suffered by the respondent.

2. Under a purchase order of October 12, 1989 the respondent was required to take up the job of fabrication, erection and commissioning of two electrostatic precipitators for the Madhya Pradesh Electricity Board in Korba. It was the respondent-claimant's case before the arbitrator that despite such contractor having completed all work, the commissioning could not be done on account of default on the part of the petitioner herein. The claimant complained in its statement of claim that it had suffered loss and damage on account of such inordinate delay and sought an amount of Rs. 51 lakh on the ground that the petitioner herein could not arrange for the commissioning to be completed despite the claimant being ready and willing to do the same by December, 1992. The contractor said that it had to wait till the middle of 1994 to complete the commissioning work and its men and material were uselessly detained at site

when they could have been gainfully engaged elsewhere. The arbitrator considered such claim under issue No. 3. The arbitrator recorded the basis of the claim and concluded, on the basis of the material before him, that the head of claim was justified since the job that remained outstanding was negligible and was equivalent to five per cent of the work assigned to the contractor. The arbitrator found that by July, 1992 the contractor had indicated that it would finish the entirety of the work by December, 1992, but no effective steps were taken for shutting down the plant to enable the new precipitators to be commissioned. The award records that the contractor had to wait at the Korba site needlessly and that it was the petitioner herein who was responsible for the delay.

3. The arbitrator noticed the claim for the 17 months' delay made by the contractor at Rs. 3 lakh per month and the petitioner's contention that the contractor was not entitled to such amount and the contractor should have taken appropriate steps for mitigation of damages.

4. After nearly four pages of discussion on such aspect, the arbitrator held as follows:

I am of the view that the claimant has suffered damages. The claimant has claimed it in particulars specified in the Statement of Claim to justify the damages of Rs. 51 lakhs that it has suffered loss on being detained at Korba site cannot be doubted. Its claim of Rs. 3,00,000/- per month as the profit per month which it could have earned if it could do similar job is the claimant's over estimate no doubt. But I am of the view that whether such contract could have been available to the claimant during the period the same value was not a certainty. So, it would not be proper to award the claimant damages for Rs. 51 lakhs as claimed by it. However, on considering the case from all its aspects and regard being had to the fact that the claimant was a very efficient and competent contractor and even after the completion of this job the respondent offered it another contract which the claimant, however, did not undertake, the claim of compensation made in this arbitration proceeding is genuine as the claimant suffered loss for being detained for 17 months. However, in the light of the facts and circumstances of the case I award the claimant Rs. 25,00,000/- as damages." (Page 12 of the award)

5. The petitioner argues that the present challenge to such aspect of the award is not on the basis of any mistake of fact or reasonableness of the reason in support thereof or of inadequate evidence. The petitioner says that the assessment of the quantum of damages is based on no evidence at all and is, as such, perverse. The petitioner concedes that in a matter of such nature there is an element of guesswork or the application of a thumb rule, but once the arbitrator recorded that there was no certainty as to whether the contractor could have obtained alternative work of such value during the period, it was not open to the arbitrator to conjure up another figure without any material in support thereof.

6. The petitioner says that the Supreme Court has accepted a percentage of the profit to be a measure of damages on account of loss of profit but the arbitrator in the present case did not attempt to ascertain either the rate of profit or the quantum thereof for the period that the contractor was needlessly detained.

7. The petitioner relies on a judgment reported at A.T. Brij Paul Singh and Others Vs. State of Gujarat, where, at paragraph 10 of the report, the Court accepted that an amount equivalent to 15 per cent of the value of the balance work which was not permitted to be executed "would not be an unreasonable measure of damages for loss of profit." The Court observed, at paragraph 11, that if a party to a contract was guilty of breach by rescission of the contract, the other party would be entitled to damages on account of loss of profit. The Court noticed that in respect of a similar work, 15 per cent of the value of the remaining work was reckoned to be an adequate measure of damages for loss of profit in respect of the unexecuted work. The petitioner here says that the arbitrator should have adopted such thumb rule in the present case.

8. In another judgment reported at Mohd. Salamatullah and Others Vs. Government of Andhra Pradesh, that the petitioner has brought, the Court questioned the propriety of the High Court reducing damages from 15 per cent of the contract price to 10 per cent on an appeal. The Court observed that if the trial court had arrived at the figure by indulging in a bit of guesswork, "it was at least a better guess than the second one." The legal principle recognised in such decision is that there was no material for the appellate court to have reduced the amount notwithstanding the fact that the trial court had not fully justified the quantum of damages that it awarded.

9. The petitioner has relied on a Single Bench decision of this Court reported at Gambhirmull Mahabirprasad Vs. The Indian Bank Ltd. and Another, where it was observed that in cases admitting of proof of damages the amount must be established with reasonable certainty; but that would not imply that absolute certainty was required since the loss sustained is sometimes "incapable of proof with the certainty of mathematical demonstration or is to some extent contingent and incapable of precise measurement."

10. The petitioner submits that though the three judgments referred to above would indicate that the assessment of the quantum of damages is not always capable of being made with mathematical precision, but it would not do to merely quote a figure without any basis. In support of such argument, the petitioner relies on a Single Bench decision of this Court reported West Bengal Industrial Infra-Structure Development Corporation Vs. Star Engineering Co., for the proposition that the total absence of evidence in support of a finding in an award would render it susceptible. In that case, the arbitrator mentioned a particular figure "in full and final settlement of all the disputes and claims and counter-claims of the parties." The Court noticed that in that case it was an admitted fact that no counter-claim had been referred to arbitration and the arbitrator adjudicated on an imaginary counter-claim. The Court held that it was

a gross mistake that had arisen "from culpable negligence amounting to legal misconduct on the part of the arbitrator."

11. In the next case cited by the petitioner, reported at Gujarat Water Supply and Sewerage Board Vs. Unique Erectors (Gujarat) (P) Ltd. and Another, it was a non-speaking award that fell for consideration. The Court held that an award could be set aside in such circumstances "only if it is apparent from the award that there is no evidence to support the conclusion or if the award is based upon any legal proposition which is erroneous." (Paragraph 9)

12. The last judgment referred to by the petitioner is reported at Rajasthan State Mines and Minerals Limited Vs. Eastern Engineering Enterprises and Another, where the circumstances in which an award under the 1940 Act can be set aside have been summarised at paragraph 44 of the report. The petitioner relies on sub-paragraph (j) and the enunciation of the law therein that the arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks just and reasonable; the arbitrator is a tribunal selected by the parties to decide the disputes according to law. The petitioner asserts that the law of the land requires an objective assessment of the quantum of damages though there may be an element of subjectivity about the process. The petitioner contends that instead of the sum of Rs. 25 lakh, the arbitrator may as well have awarded Rs. 25/- or Rs. 25,000/- or even Rs. 2.5 lakh. The respondent says that there is nothing in the award or, at least, no reference to any evidence in support of the figure of Rs. 25 lakh in preference to other possible figures of, say, Rs. 25/- or Rs. 25,000/- or Rs. 2.5 lakh.

13. The petitioner does not contest the arbitrator's finding that the petitioner was guilty of breach of contract. Section 73 of the Contract Act provides that a party who suffers on account of breach of contract by the other is entitled to receive compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. Compensation, however, cannot be granted for any remote or indirect loss or damage sustained by reason of the breach. It is not necessary that a party guilty of breach of contract has to be foisted with an award of damages in every case. Equally, the party suffering the breach is not required to prove actual loss or damage, or the exact quantum thereof, to be entitled to compensation.

14. The relevant passage from the award quoted above would reveal that the arbitrator felt that the contractor's estimate of the quantum of loss suffered was an over-statement. But the arbitrator found, as a matter of fact, that the contractor had suffered loss and damage. The basis for the contractor claiming damages at the rate of Rs. 3 lakh per month for the 17 months that it had to overstay at the site was indicated in the statement of claim. A break-up in support of such monthly figure was furnished by the contractor. The arbitrator merely expressed a view that the contractor had over-estimated the extent of loss suffered; the arbitrator did not opine that there was no basis to the claim.

15. That there is an element of guesswork and subjectivity in assessing damages is but natural. The decisions that the petitioner has fairly carried to Court to bear on such aspect justify an element of subjectivity in the matter of assessment of damages. Neither the 1940 Act nor the arbitration agreement required the arbitrator to give any reasons in support of his award on such score. The fact that the arbitrator has indicated his mind in rejecting the full complement of the contractor's claim under such head would not imply that the basis for the monetary calculation put forth by the contractor was altogether rejected. There is a distinction between a claim being found to be without basis and a claim being found to have been overstated. There was material before the arbitrator, in the particulars furnished by the claimant, as to how the quantum of damages should be assessed. It cannot be said that there was no basis presented before the arbitrator to make a reasonable assessment of the quantum of damages.

16. In any event, and in the absence of any material to demonstrate as to why such amount is in excess and to what extent, the court in proceedings in present nature would tend to err on the arbitrator's side.

17. The assessment of damages was within the authority of the arbitrator and since it cannot be objectively demonstrated that the figure arrived at by the arbitrator is palpably erroneous, the court would be inclined to uphold the arbitrator's view rather than detract from it. Even though the specific reason as to what impelled the arbitrator to arrive at the figure of Rs. 25 lakh has not been made clear, on a reading of the entirety of the award and the value of the contract, the quantum assessed by the arbitrator on account of damages does not appear to be outlandish.

18. The challenge to the award on the limited aspect fails. No other ground has been urged. GA No. 2495 of 2003 is dismissed without any order as to costs.

19. Since the petition for setting aside the award stands dismissed, there is no impediment to a judgment being passed in terms of the award. The arbitrator awarded a total principal amount of Rs. 17,77,000/- with interest thereon at 10 per cent per annum from the date of commencement of the arbitral proceedings on February 21, 1996 till the date of the award on April 9, 2003. The arbitrator awarded costs of Rs. 3 lakh to the claimant. The award further provided that upon the failure of the respondent to the reference to make payment of the total amount awarded within three months from the date of the award, the total amount awarded would carry interest at 10 per cent per annum till payment or till the date of the decree. There will be a decree in terms of the award with the total amount awarded carrying interest at 10 per cent per annum from the date of the award till payment. AC No. 15 of 2003 is disposed of.

20. Urgent certified photocopies of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

21. The petitioner prays for a stay of operation of the order which is declined.