
(2005) 05 J&K CK 0015
In the Jammu And Kashmir High Court
Case No : CIMA No. 97-A of 2000

Bawa Ram and Company	Vs	APPELLANT
Union of India (UOI)		RESPONDENT

Date of Decision : 06-05-2005

Acts Referred:

Jammu and Kashmir Arbitration and Conciliation Act, 2002 — Section 20, 39

Citation : (2006) 3 ARBLR 318

Hon'ble Judges : S.N. Jha, C.J.; S.K. Gupta, J

Bench : Division Bench

Advocate : R.K. Gupta, for the Appellant; Gagan Basota, Addl. CGSC, for the Respondent

Judgement

S.N. Jha, C.J.—This appeal u/s 39 of the Jammu and Kashmir Arbitration Act, 2002 is directed against the judgment of a learned Single

Judge of this Court dated 17th August, 2000 in Arbitration Application No. 270/1991, rejecting the objections of the appellant to the award of the

arbitrator and making the award rule of the Court. The facts of the case, briefly, are as follows.

2. The appellant entered into an agreement for construction of quarters/married accommodation for JCOs/Hav./Ors and Key personnel at

Akhnoor. Dispute arose between the parties and the appellant filed a petition u/s 20 of the Arbitration Act registered as AA No. 360/1986 in this

Court for reference of the dispute to the arbitrator. By order dated 15th July, 1988, as modified by order dated 22nd December, 1988, the

competent authority, namely, Engineer-in-Chief, Army Headquarters was directed to appoint an arbitrator. Initially one Brigadier M.M.S. Parihar

was appointed as arbitrator but he did not conclude the proceeding and resigned.

Thereafter, on 7th February, 1991, the competent authority appointed Brigadier Y.W. Joshi as the sole arbitrator. The said arbitrator entered upon reference on 4th March, 1991 and vide letter of the date

directed the parties to file statement of case along with supporting documents by 15th April, 1991, after serving copy thereof on the other side.

The parties were further directed to submit their pleadings on receipt of the said statement by the other side by 13th May, 1991 after serving copy

thereof. Reply to the pleadings in defence was to be submitted by the parties by 22nd May, 1991. The parties were informed that the venue of

arbitration and date of hearing would be intimated after compliance with the above. Though not disclosed in the memo of appeal, it appears from

the award that on 17th May, 1991 another communication was sent by the arbitrator to the appellant to submit its statement by 30th May, 1991.

A telegram to this effect was also sent by him on 18th May, 1991. It may be stated here that the respondents through CWE HQ 135 Works

Engineers had submitted the statement of case on 24th April, 1991 in the meantime.

3. The case of the appellant is that it had requested the authorities to furnish certain documents for filing the statement of case but the same was not

made available with the result he could not file the statement.

4. On 1st June, 1991, the arbitrator informed the parties that hearing of the case would be taken up in the office of CWE HQ 135 Works

Engineers on 21st June, 1991 from 11 am and the hearing may continue next day, if required. The parties were requested to attend the hearing and

present their oral submissions. They were also requested to produce books, papers, accounts, bills, writings, documents etc. which may be in their

possession and which they intend to refer to or would be otherwise required during the hearing. The parties were further informed that in case

either party fails to attend the hearing, the arbitrator shall proceed with the reference ex-parte.

5. The case of the appellant is that the appellant and its representative reached the office of CWE HQ 135 Akhnoor at 10 am on 21st June, 1991

waited for the arbitrator throughout the day but he did not turn up. The representative of the appellant delivered a letter to CWE HQ 135 Akhnoor

-- representing the Union of India -- and also posted letter to the arbitrator. In

the letter the representative expressed unhappiness that reasonable opportunity to present the statement of claim was not given and a direction be issued to the respondent to make documents available. Having delivered the said letter, after the arbitrator failed to turn up, the appellant along with representative returned to Phillaur in Punjab in connection with some other work.

6. The arbitrator, it may be stated, as per record could not reach on account of flight delay (he had to come from Lucknow where he was posted).

He, however, held the proceeding on 22nd June, 1991 and on 1st July, 1991 gave the award sending copies thereof to the parties on the same day.

7. The appellant objected to the award being made rule of the Court on the ground that by denying it a reasonable opportunity of hearing in the arbitration proceeding, the arbitrator had misconducted himself and the proceeding and, therefore, the award was fit to be set-aside. The learned

Single Judge framed two issues for decision:

1. Whether the arbitrator has misconducted himself and the proceedings and if so with what effect?

2. Whether the award suffers any error apparent on the face of the record?

8. Upon consideration of the materials on record and hearing the parties, the learned Single Judge decided the issues in favour of the respondents

and against the appellant and, rejecting the objections, made the award rule of the Court. The appellant has come in appeal.

9. Shri R.K. Gupta appearing for the appellant submitted that it is the admitted position that the arbitration proceeding was not held on 21st June,

1991 on account of absence of the arbitrator and, therefore, the arbitrator should have fixed another date and intimated the appellant of the date

and held the proceeding on that date. As per the letter/notice dated 1st June, 1991, the proceeding was to be held on 21st June and the hearing

could continue next day if it was taken up on 21st June but remained inconclusive. As the hearing did not commence on 21st June, 1991, the

proceeding could not be held on 22nd June, 1991. Counsel submitted that it is also the admitted position that the appellant / representative was

present at the venue of the proceeding and a letter had been delivered in the office of CWE HQ 135 Works Engineers. The said letter was, in fact,

handed over to the arbitrator on 22nd June, 1991. The appellant being present on the date and venue fixed for hearing, the arbitrator was not

justified in taking up the proceeding on the next day behind its back and pass ex-parte award. Counsel submitted that though it is open to the

arbitrator to decide the course of proceedings, he cannot act arbitrarily and in violation of rules of natural justice. According to the counsel, if the

arbitrator wanted to proceed ex-parte in the matter, he should have fixed another date for ex-parte proceeding and informed the appellant that the

proceeding would be held ex-parte on that date. In support of the contentions counsel placed reliance on Prem Nath L. Harsaran Dass and

Another Vs. Om Parkash L. Ram Kishen Dass Aggarwal, ; Saxena and Co. Vs. Damodar Pershad Gupta, ; Ariyur Mohammed Habeebur

Rahman and Others Vs. Ansuri Varamma (died) and Another, and Lovely Benefit Chit Fund and Finance Pvt. Ltd. Vs. Shri Puran Dutt Sood and

Others,

10. It is relevant to mention here that the Union of India had lodged cross claim for a sum of Rs. 3,25,280 as wages paid to the labour employed

by the appellant, at par with the departmental labour under the provisions of the Contract Labour (Regulation and Abolition) Act, 1970. By the

impugned award while the arbitrator rejected the claim of the contractor appellant and gave 'nil' award in his favour, the cross claim put forward on

behalf of the Union of India was allowed and award for Rs.3,25,280 was given in its favour, against the appellant.

11. Assailing the latter part of the award allowing the respondent's claim of Rs.3,25,280, Shri R.K. Gupta submitted that the claim was made as

loss suffered by the respondent as penalty on behalf of the contractor. The fact is that no amount was paid by the respondent and as it did not

suffer any loss there was no question of lodging, muchless allowing, the claim. Secondly, he submitted that in terms of arbitration clause 70 of the

agreement IAFW 2249 the arbitrator was required to give a speaking award setting out reasons therefor, whereas in the instant case the award

was non-speaking without assigning reasons for allowing the respondent's claim. On this ground alone the latter part of the award is fit to be set

aside. In this connection counsel placed reliance on Gora Lal v. Union of India (2004)1 SCC 916.

On the submission of the counsel two questions arise for consideration:

1. Whether the award is fit to be set aside on the ground that it was passed ex-parte without giving opportunity of hearing to the appellant?
2. whether in any view the latter part of the award allowing the respondent's claim of Rs. 3,25,280 against the appellant is justified?

12. As far as the first question is concerned, we may observe at the outset that what has been stated by the appellant, as mentioned herein-above,

is not even half truth. The fact is that on 21st June, 1991 far from making prayer for fixing another date of hearing or airing the grievance that

documents had not been supplied to him by the authorities with the result he was unable to file statement of the case, the appellant questioned the

very bona fide of the arbitrator asking him to resign as the arbitrator. The letter has been quoted in extenso by the learned Single Judge in the

impugned judgment but it would be useful to quote it again for easy reference. The letter reads as under:

Ref. Your No. SPA/791/YWJ dated 1.6.91.

From your letter under reference we apprehend the following:

(a) Your honour are likely to be biased in the matter and on such do not expect justice from your lordship being the departmental officer, on the

believable grounds that you are taking personal interest in conducting the hearing without having received the statt, of claims, pleadings in defence

without having further given us the opportunity to do the needful.

In the above circumstances your honour is requested to resign from the post of an arbitrator and your proceeding reference to exparte is not

agreed to, being a threatening attitude at your end.

Moreover, in case you do not wish to resign, we will be submitting before your hon'ble court under protest.

13. Hollowness of the appellant's case stands exposed by a bare reading of the aforesaid letter. The appellant wants us to believe that its

representative reached the venue of the proceeding on the date fixed i.e. 21st June, 1991 and waited for the whole day for the arbitrator to arrive,

but as the arbitrator failed to arrive he submitted the letter in token of his presence, as if had the arbitrator reached the venue and taken up the

hearing, it would have participated in the proceeding. There is no whisper in the letter about the appellant's inability to file the statement of case on

the professed ground that documents were not in its possession -- a ground which is usually taken -- and on that ground it wanted another date of

hearing to be fixed so that he could participate in the hearing on that date. As a matter of fact, we are at a loss to appreciate how the appellant

would have participated in the hearing as he had not filed his statement of claim along with supporting materials. The plea in the circumstances that

the appellant was present at the venue of the proceeding on the date fixed so that it could participate in the hearing appears to be a ploy to get rid

of the award. It is relevant to mention here that the aforesaid letter was passed on to the arbitrator by Lt. Col. H.S. Samyal, along with his letter

dated 22nd June, 1991 informing the arbitrator that a 'messenger' of the proprietor of the appellant had submitted the letter on 21st June, 1991. It

is in accord with the contents of the letter as there is no mention in the letter that either the proprietor or its authorized agent was in attendance in

the office for the purpose of participating in the hearing. As a matter of fact, on a plain reading of the letter it is abundantly clear that the appellant

merely wanted to avoid arbitration by the arbitrator and, therefore, there was no question of his being present to participate in the hearing.

14. We do not find any substance in the submission of the counsel that 22nd June, 1991 was not the date fixed for hearing. The letter dated 1st

June, 1991 stated as under:

I hereby give you notice that the above case will be taken up for hearing in the office of HQ CWE 135 Works Engrs on 21 June 91 starting from

1100 hours. The hearing may be continued next day if required. You are requested to attend and present your oral submissions and arguments.

The words ""may be"" and ""if required"" on which emphasis was placed by the counsel for the appellant only indicate that in case the hearing would

not conclude on 21st, it may be continued on the next day, it does not at all mean that the proceeding could not be taken up on 22nd June, 1991.

On a plain reading, our understanding of the letter is that the parties were informed to come ready for hearing on 21st June, 1991 as well as 22nd

June, 1991. No doubt, on 22nd June, 1991 the hearing could take place only if it had remained inconclusive on 21st June, 1991 but it does not

mean that if hearing did not take place on 21st June, 1991 the proceeding could not be taken up on 22nd June, 1991. It is to be kept in mind that

the arbitrator was a Lucknow based official and that apparently is reason why he had fixed two consecutive days of hearing which if we may say, it

is a normal practice in arbitration proceedings. All said and done, we would have appreciated the stand of the appellant provided its proprietor

and/or authorized representative had come to participate in the hearing. If the only object of visit of the said 'messenger' was to submit the letter

challenging the very competence of the arbitrator, it is doubtful if the messenger intended to stay at the venue so as to represent the appellant at the

time of hearing on the next day i.e. 22nd June, 1991.

15. Coming to the main question as to whether the arbitrator was justified in proceeding ex-parte, it is settled law -- and not disputed by the

appellant's counsel -- that there is no fixed format of arbitration proceeding. The arbitrator is competent to decide his own procedure and the

course of proceedings, of course, guided by the rules of fair play and procedure and natural justice. The correctness of the course adopted by the

arbitrator in the instant case is to be considered in the backdrop of facts and circumstances as mentioned hereinabove. Before answering the

question, in fairness to the appellant, we must notice the decisions cited by the counsel.

16. In *Prem Nath v. Om Parkash* (supra), the Punjab High Court observed that it is a well-known proposition of law that although an arbitrator is

allowed considerable latitude in the procedure adopted by him at the hearing, it is essential that he should afford the parties a reasonable

opportunity of being heard and of presenting their case. If he makes an award without complying with this essential requirement he does so at the

peril of his award being declared invalid and inoperative in the eye of law. The observations, though general in nature, were made in the facts of the

case. The Court found that though the arbitrator had informed the parties that the case would be taken up on another date intimation of which

would be sent to them in due course but he proceeded to make an ex parte award in the absence of the parties and without affording them an

opportunity of being heard.

17. In *M/s Saxena & Co. v. D. P. Gupta* (supra) the facts were that the arbitrator had given notice to the parties of the date of hearing. The

defendant requested him three-four times to adjourn the case to a further date

as it was not possible for him to produce his witness on that date or to file affidavit of the witness which was important in the circumstances of the case. The arbitrator refused to adjourn the case and passed an ex-parte award. In these facts the Punjab High Court held that there had been failure of compliance with the principles of natural justice. The arbitrator should have given opportunity to the defendants to produce their witness and affidavit.

18. In *A.M. Habeebur Rahman v. A. Varamma* (supra), the points involved were completely different. While discussing them the Andhra Pradesh

High Court referred to certain observations of the Calcutta High Court in *Juggilal Kamlatpat Vs. General Fibre Dealers Ltd.*, to the effect that the

procedural rule application to arbitration proceedings is more tolerant than the rule followed in Courts of law. In the aforesaid case, it may be

pointed out, the Calcutta High Court also gave some illustrations of the cases when the arbitrator can proceed ex-parte. It was observed that if a

party to an arbitration agreement fails to appear in one of the sittings, the arbitrator cannot or, at least, ought not to, proceed ex parte against him at

that sitting. Where the non-appearance was accidental or casual, the arbitrator ought ordinarily to proceed in the ordinary way, fixing another date

of hearing and awaiting the future behaviour of the defaulting party. Having said so, the learned Judges added the following caveat:

If it appears from the circumstances of the case that a particular party is determined not to appear before the arbitrators in any event, as when he

has openly repudiated either the reference itself or the particular arbitrators and has shown no desire to recant, the arbitrators are not required to

issue a notice of an intention to proceed ex parte against such a recalcitrant person and may proceed ex parte and make a valid award without

issuing a notice. ...

19. In *M/s Lovely Benefit Chit Fund & Finance Pvt. Ltd. v. Puran Dutt* (supra), the Delhi High Court after observing that an arbitrator ought not to

proceed ex parte against a party if he has failed to appear at one of the sittings but should fix another date for hearing and give notice to the

defaulting party of his intention to proceed ex parte on a specified date, time and place and if after notice the defaulting party does not take part in

the proceedings, the arbitrator may proceed in his absence, held as under:

When an ex parte award has been made the principle to be applied is that the award will not be upheld unless it is apparent that the failure to give

notice of intention to proceed ex parte has not caused any prejudice to the party against whom the ex parte award was made.

20. From the above decisions it appears that though there is no constraint on the arbitrator to proceed ex-parte against defaulting party, he ought

not proceed ex parte on the very first date, and if he intends to proceed ex parte, he may fix another date for the purpose giving intimation to the

defaulting party of such date and proposed ex parte proceeding. However, where the arbitrator is satisfied that the absence is not on account of

inability of the party to appear on the date / dates fixed but on account of some recalcitrance on his part, he is not bound to adjourn the hearing to

any other date. In such situation question may arise as to whether having invited an ex parte award, is it open to the defaulting party to make a

grievance of the conduct of the proceeding and / or the ex parte award?

21. In the instant case, as seen above, the appellant had questioned the very authority of the arbitrator doubting his bona fide to make arbitration

on the ground that he was a departmental officer, something which cannot be countenanced in law. As a matter of fact, he asked him to resign from

arbitration taking umbrage at the notice dated 1st June, 1991 that 'in case of absence the hearing would be taken ex parte' as a threat. We are

inclined to think in the circumstances that the appellant did not want to participate in the proceedings. It is not a case where due to one reason or

the other the party is unable to participate in the hearing. That being so, we do not think the arbitrator misconducted himself in proceeding ex parte

and giving an ex parte award against the appellant.

22. On behalf of the respondents reliance was placed on Lachman D. Chablani Vs. The Union of India (UOI), and P.S. Oberoi Vs. The Orissa

Forest Corporation Ltd., In the former case it was held that refusal to adjourn the case because of party absenting deliberately and without

sufficient cause and holding ex parte proceeding cannot be construed as a misconduct on the part of the arbitrator. In the latter case, it was held

that there is no statutory rule that if an arbitrator proceeds ex parte without giving notice of his intention to proceed in that manner, the award made

by him must be set aside. In the absence of any such statutory provision, the

question of notice is a rule of prudence and convenience. The true test is, has the complainant who takes exception to the validity of the award, been in fact prejudiced by the omission of the arbitrator to serve the special notice on him? If it is established that notwithstanding such warning, he would not have appeared before the arbitrator, he has really no grievance and cannot invite the court to set aside the award on account of the alleged defect in procedure. If there was no intention of a party to appear in spite of notice, there would be no prejudice if an ex parte award was passed against such a recalcitrant party.

23. In the facts and circumstances of the case and in view of the legal position as indicated hereinabove, we, agreeing with the learned Single Judge, reject the submissions of the appellant's counsel that the arbitrator had misconducted himself in proceeding ex parte, vitiating the award, making it liable to be set-aside.

24. As regards the second limb of the appellant's grievance against the award, we find the submission of the appellant's counsel to be well founded.

The claim put forward by the Chief Engineer, Udhampur on behalf of the Union of India was in respect of payment of wages to the contract labour

employed by the appellant at par with the departmental labour. Where the principal employer is saddled with the liability of employment of contract

labour in violation of the provisions of the Act it may lodge a claim in that regarding but for establishing the claim for recovery of the amount

through suit or other proceedings, including arbitration, it has to be proved that payment was made and thereby the principal employer suffered

loss. In the instant case there is no material to show that payment was made by the respondents. As a matter of fact, from the submissions made by

counsel, it appears that the matter relating to payment of wages remained pending after the contractor approached this Court and obtained interim

order in another proceeding. The matter, thereafter, became subject of the arbitration proceeding and the so called payment never took place. If

that is so, we do not think the respondent was entitled to any reimbursement by the contractor. Rejecting the contention in this regard the learned

Single Judge observed that whether payment was made is a question of fact and cannot be gone into. In the absence of positive material on the

point, while closing the hearing, we called upon the respondent's counsel to file

affidavit affirmed by a competent person preferably the Garrison Engineer but no such affidavit has been filed.

25. Even if another view of the matter could be taken, the relevant part of the award is liable to be set aside as being non-speaking contrary to the terms of the arbitration agreement. It is well settled that award of arbitrator need not be speaking but where the arbitration agreement contemplates that the dispute shall be resolved through arbitration by a speaking/reasoned award, on the ground of absence of reasons the award may be set-aside. In the instant case the relevant part of the arbitration clause 70 of IAFW 2249 runs as under:

The Arbitrator shall...

... ..

... and shall indicate his findings, along with the sums awarded, separately on each individual item of the dispute.

In M/s Gora Lal v. Union of India 2004 (1) Supreme 916, wherein the interpretation of the same very arbitration clause was involved, an attempt

was made on behalf of the successful party, the contractor, to defend the non-speaking award pointing out difference between the expression

'finding'

and 'reason'. It was submitted that the finding denotes conclusion and not reason and since the arbitrator had already given 'findings' in his award,

the same was not liable to be set-aside. Rejecting the submission, the Supreme Court observed as under:

... Applying the above test to clause 70, we are of the view that the arbitrator was required to give reasons in support of his findings on the items of

dispute along with the sums awarded ... In such a situation as in the present case, there having been no finding recorded on each item as required

by the arbitration clause, the High Court was justified in setting aside the award...

26. In these premises, part of the award of the arbitrator, upheld by the learned Single Judge, allowing the cross-claim of the respondent for

Rs.3,25,280 is set aside.

27. In the result, the appeal is allowed in part to the extent mentioned above. The cost will be borne by the parties themselves.