

(1999) 02 CAL CK 0016
In the Calcutta High Court

Case No : Ordinary Original Civil Jurisdiction G.A. No. 2920 of 1996 A.C. No. 45 of 1996

Bidhan Chandra Krishin Viswa Vidyalaya APPELLANT

Vs

The Association Design Planning Group Private Ltd. and RESPONDENT
Another

Date of Decision : 04-02-1999

Acts Referred:

Arbitration Act, 1940 — Section 30, 33

Citation : (2000) 1 CALLT 495

Hon'ble Judges : Amitava Lala, J

Bench : Single Bench

Judgement

The Court :

1. This is an application under sections 30 and 33 of the Arbitration Act, 1940 challenging the validity of the award dated 25th March, 1996.

2. I have perused the award and I find the award is non-speaking award giving a financial benefit for a sum of Rs. 77.00.000/- in favour of the claimant/respondent herein together with interest pendente lite at the rate of 696 per annum on the said awarded amount from the date of entering into reference till the date of making the award and cost assessed at Rs. 50,000/-. The award also speaks about Interest at the rate of 8% per annum from the date of the award until payment is made by the respondent/petitioner herein to the claimant/respondent herein or the date of the decree whichever is earlier. In addition thereto nil award is given in favour of the respondent/petitioner herein. .

3. By challenging the award Mr. Gopal Chakraborty, learned senior counsel appearing with Mr. AJay Dutta, learned Advocate raised various points which are specified hereunder :

(a) The Arbitrator has acted without jurisdiction;

(b) The subsequent claim as added by the Arbitrator is not arising out of an

existing dispute;

(c) Lump sum non-speaking award given by the Arbitrator when question of jurisdiction exists, therefore such award has to be set aside;

(d) The Arbitrator misconducted the proceeding;

(e) Changing of rates of work as prescribed by the Arbitrator is not permissible;

(f) Principle of natural Justice has been violated by the Arbitrator;

(g) No communication has been made by the Arbitrator by serving copy of the award alongwith the notice which Is an example of misconduct:

(h) There is a clear case of non-application of mind;

(i) Claim is barred by law of limitation.

4. On the other hand, Mr. H.M- Dutt, learned senior counsel appearing with Mr. Asim Banerjee. learned counsel summarally contended that :

(a) If the Arbitrator is in excess of Jurisdiction award can be set aside but tf within the jurisdiction cannot be set aside;

(b) Issues in the 9th sitting are old Issues but new claim was lodged in 32nd sitting on which further issues were settled at the time of cross-examination in 41st sitting, therefore the same is an accepted position;

(c) Since the project was completed in course of arbitration proceedings and the entire claim was Incorporated therein before the Arbitrator as a final claim" on account of final bill the same cannot be treated as an additional claim;

(d) When the claim was lodged, witness was examined, an opportunity of cross-examination was given, therefore there is no question of violation of principle of natural Justice.

5. Although several points and counter points are agitated by the parties herein but I find basically the dispute is whether the Arbitrator has exceeded his Jurisdiction by incorporating further claim of Rs. 80,04,103.76 p. over and above the original claim of Rs. 3,65,844.07p. ignoring the scope and ambit of the reference or not.

6. Therefore, to come to a right conclusion a cursory look into the scope of reference is required. In this context, I have come to know that by an order dated 6th March, 1991, in disposing an application being Matter No. 3120 of 1990 (Associated Design Planning Group (P) Ltd. v. Bldhan Chandra Krishi Viswa Vidyalyaya), the Arbitrator was appointed as sole Arbitrator by the court to adjudicate the disputes between the parties In terms of the agreement.

7. It appears therefrom that cause of action for the purpose of referring the dispute accrued sometimes in 1995 when the two fold objections were raised by the petitioner being respondent therein on account of Jurisdiction as well as

limitation. The court answered affirmatively in favour of the respondent/petitioner therein by holding that this court has Jurisdiction in referring the dispute since cause of action partially arose within the Jurisdiction and claim is not barred by limitation because of the reason that the petitioner being respondent therein categorically refused to conquer the appointment of the sole-Arbitrator and was communicated by the letter dated 29th October, 1990 which was within the prescribed period of limitation.

8. Therefore, the cause of action for the purpose of invocation of the Arbitration clause arose sometime in 1985 and the sole Arbitrator was appointed for the purpose of adjudicating such disputes in between the parties.

9. It is an admitted position that an Arbitrator cannot be appointed unless and until referable disputes exists in between the parties. Therefore, as and when the Arbitrator was appointed, the same appointment was obviously made on the basis of the existing disputes in between the parties in terms of the agreement. The court cannot appoint an Arbitrator in respect of the disputes yet to born even if it is arising out of the agreement. Agreement has its enormous scope and ambit but the Arbitrator has to go by the scope of reference in respect of the existing dispute by or between the parties out of such agreement. Therefore, unless and until authority is given to an Arbitrator, an Arbitrator cannot assume his jurisdiction in respect of the future disputes born, if any, in respect of the final bill out of the same contract in between the parties in the course of the arbitration proceedings. Court will at first decide, being called upon, a question of referability. In such case and if situation arises may send such dispute even to the same Arbitrator for the purpose of adjudication by way of extending the scope. The Arbitrator, suo motu, has no power to extend the scope and ambit of the Jurisdiction of his reference. As and when the order was passed appointing an Arbitrator as far back as on 6th March, 1991 In respect of existing dispute with regard to non-payment of any amount then subsisting, even by the liberal construction as to the scope and ambit of reference as to whether the Arbitrator has power to adjudicate the disputes in between the parties in terms of the arbitration agreement does not necessarily mean all time any disputes during the tenure of the Arbitrator even existing at the material point of time or will exist in the future occasion will be decided by such Arbitrator. Hence the element of misconduct of the Arbitrator in exceeding Jurisdiction is present.

10. In support of the contentions pointwise as above Mr. Chakraborty has relied upon several Judgments at the time of opening the case and even in reply. Since all such judgments are well-known in respect of principles of setting aside or not setting aside the award for some reason or other now becoming academic unless referable to the fact situation.

11. However, referred judgments are incorporated hereunder : Sudarsan Trading Co. Vs. Government of Kerala and Another, , S. Harcharan Singh Vs. Union of India, , Associated Engineering Co. Vs. Government of Andhra Pradesh and another, , Hindustan Construction Co. Ltd. Vs. State of Jammu and Kashmir, 53

CWN 873 (Madhuradas Gouerdhandassv. Khusiram Benarshilaf), Nandram Hanutram Vs. Raghunath and sons Ltd., , Union of India (UOI) Vs. G.S. Atwal and Co. (Asansole), . Kiran Singh and Others Vs. Chaman Paswan and Others, Tamil Nadu Electricity Board Vs. M/s. Bridge Tunnel Constructions and others, , Tarapore and Co. Vs. State of M.P., , State of U.P. Vs. M/s. Ram Nath International Const. Pvt. Ltd., , M/s. Prabartak Commercial Corporation Ltd. Vs. The Chief Administrator Dandakaranya Project and another, , Union of India (UOI) Vs. D. Bose and Others, Dandasi Sahu Vs. State of Orissa, and In reply The Union of India (UOI) Vs. Shri Om Prakash, , Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority, (1961) 3 WLR 1405 (Benjamin Leonard Macfoy v. United Africa Co. Ltd.) and Jabbalpore Electric Supply Co. Ltd. Vs. The Madhya Pradesh Electricity Board and Others, .

12. In effect, Mr. Chakraborty wanted to establish the contentions of the petitioner and observations of different courts with the support of those judgments, leaving aside very few in dealing with separately in case of any negative assessment others are not necessary to deal with separately since this court has no conflict of opinion with regard to established principles.

13. On the other hand, Mr. H.M. Dutt, learned senior counsel cited only four decisions out of which he also relied upon the self-same decision being Sudarsan Trading Co. Vs. Government of Kerala and Another, Sudarsan Trading Co. Vs. Government of Kerala and Another, , The Hindustan Construction Co. Ltd. Vs. Governor of Orissa and others, , Punjab State Electricity Board and others Vs. Ludhiana Steels Private Ltd., and also Prasun Roy Vs. Calcutta Metropolitan Development Authority and Another, . Even going through such judgments as cited by the respondent/award holder it is apparent that the respondent mainly wanted to distinguish the factum of the situation that Arbitrator has not exceeded the Jurisdiction but travelled within the Jurisdiction and for the same there is no scope of judicial review. Interestingly the respondent also made a defence of acquiescence since the issues in respect of new claim were settled at the time of cross-examination before the Arbitrator for the purpose of his perusal and consideration. By not taking steps thereto before the Arbitrator objecting such incorporation of new claim now cannot agitate at the stage as being prevented by the law of acquiescence.

14. Therefore, in order to appreciate the position and since the award is non-speaking award, this court has no other alternative but to go through the records which have been produced before this court along with the award to come to an appropriate conclusion.

15. Since question of acquiescence has to be put before any other question I have no other alternative but to peruse the records time for the purpose of ascertaining the scope of the submission of the petitioner in respect thereof as to whether the same has been properly objected by the petitioner being respondent therein or not.

16. In the premises, I found that on being pressed for additional claim by the claimant/respondent herein, the petitioner wanted to add certain additional Issues as to the question of entitlement of the award in respect of or in connection with the additional claim and specifically in 94th sitting lodged a protest in the following manner :

"before going into the material allegations I would submit that the claimant never made any claim to the respondent-University demanding the illegal amount of Rs. 1,14,95,900.17 p. or Rs. 80,03,103/- as claimed in the Additional Statement of Claims. I would respectfully submit that there is not an iota of evidence that any dispute arose over the additional claims between the parties and so, the additional claims of Rs. 80,03,103/- cannot be considered in this proceedings as because there is no dispute existing on the said amount between the parties at any point of time. So, the alleged additional claims are not "arbitrable dispute" and thereafter without waiving such contention made several submissions,"

17. In this context, scope and ambit of the judgment reported in *Prasun Roy Vs. Calcutta Metropolitan Development Authority and Another*, is playing a very vital role. The, observation of the Supreme Court in *Prasun Roy Vs. Calcutta Metropolitan Development Authority and Another*, is that where though a party is aware from the beginning that by reason of some disability the matter is legally incapable of being submitted to arbitration, participates in arbitration proceedings without protest and fully avails of the entire arbitration proceedings and then seeing that the award is going against him comes forward challenging the validity of the arbitration proceedings as without Jurisdiction on the ground of a known disability, the same cannot be allowed. Therefore, the cardinal principle of consideration is whether protest was lodged before the Arbitrator or on protest was lodged before the Arbitrator. I find that the protest was lodged before the Arbitrator. Therefore, it is duly incumbent upon the Arbitrator to give answer to such protest being a preliminary point attracting the jurisdiction. But I found, even thereafter, the submissions were heard and heard again which ultimately resulted to a non-speaking award without giving a reason or making a whisper as to the question of lodging of protest with regard to such valuable question of additional claim being unfounded at the time of reference of the matter pursuant to the order of the court on which he was appointed. The observation of the Supreme Court in AIR 1998 SC 1355 is also similarly placed. There the court found that at no stage before the Arbitrator an objection raised by the authority that the Arbitrator had no authority to go into the dispute which tantamounts to a consent before the Arbitrator. Similarly in *The Hindustan Construction Co. Ltd. Vs. Governor of Orissa and others*, as cited by the respondent the objection as to the jurisdiction was first raised before the appeal court. Therefore, in all the cited decisions on behalf of the respondent as above are restricted only in respect of the cases where no objection was put forward before the Arbitrator unlike the present case wherefrom it is evident that such objection was put but in spite of having such objection the Arbitrator remains silent and ultimately without giving

a finding passed a non-speaking award which, according to me, resulted the award had from the face of it.

18. Had it been the position that Arbitrator only made an explanation with regard to such protest as to question of Jurisdiction and give a reason and thereafter came to an ultimate finding in merit making such part as non-speaking, the position would have been altogether different meaning thereby the Arbitrator has given reason in respect of the question of Jurisdiction but not in respect of the claim. Definitely the Arbitrator cannot be forced to give reason but where the dispute is with regard to jurisdiction and reason is unfounded thereon court has no other alternative but to draw an adverse inference that the Arbitrator acted without Jurisdiction.

19. It is true that it is not open to the Court to probe the mental process of the arbitrator and speculate where no reasons are given by the Arbitrator as to what impelled the Arbitrator to arrive at his conclusion and that is in respect of Arbitrator's power within the periphery of the reference being made out of the agreement but where the Arbitrator exceeded the Jurisdiction and passed a lump sum non-speaking award without assigning any reason thereto the same has to be set aside. Jurisdiction of the Arbitrator herein is fixed by the court on the basis of the cause of action the then prevailing but not with regard to subject matter which was subsequent to the appointment arose in between the parties. Moreover the statement from the respondent is that no dispute arose till such time when such huge amount was brought under the domain of the Arbitrator. Therefore, court will obviously become curious to know what was the occasion to lead the Arbitrator to adjudicate the question of 80 lakhs and 1 crore of an additional claim when the reference was made only about meagre claim of Rs. 3 lakhs and odd.

20. Since tills question being a *prima facie* attractive question to this court and court feels that the respondent failed to cross the handle by the conduct of the Arbitrator there is no necessity to go into any other question or questions.

21. Therefore the award is set aside taking Into consideration that in between remittance and setting aside the award, the second one is much more acceptable to this court on the given situation.

22. As a consequential effect of setting aside the award, I appoint Mr. Justice Ganendra Narayan Ray, a retired Judge of the Hon"ble Supreme Court of India to act as an Arbitrator In respect of the disputes in between the parties as regards the claim and additional claim, if any.

23. The Arbitrator will, however, enter upon the reference within a period of 2 weeks from the date of communication of the order and make and publish the award within a period of 4 months thereafter. For the purpose of expeditious adjudication the Arbitrator will have summery power. If necessary Arbitrator will be entitled to take into account the documentary and oral evidences already adduced by the parties before the outgoing Arbitrator.

24. The Arbitrator will be entitled for remuneration of 300 G.Ms, per sitting which will be shared equally by the parties.

25. Arbitrator will be entitled to engage one stenographer and one clerk and fix their remunerations accordingly. Remunerations of such persons, so fixed by the learned Arbitrator, will also be shared equally by the parties.

26. The petitioner, having carriage of proceedings, will be entitled to collect all the necessary papers and documents from the registry of this court and procedure before the incoming Arbitrator immediately after entering upon reference.

Outgoing Arbitrator, incoming Arbitrator and all parties are to act on a signed copy minute of the operative part of the order.

27. Order according by