
(2012) 06 CAL CK 0082
In the Calcutta High Court
Case No : Writ Petition No. 3657 (W) of 2012

Bisweswar Rakshit

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 06-06-2012

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 21
Limitation Act, 1963 — Section 3

Citation : (2012) 06 CAL CK 0082

Hon'ble Judges : Nadira Patherya, J

Bench : Single Bench

Advocate : Sourav Mitra and Mr. Satya Ranjan Kundu, for the Appellant; M.P. Gupta, for the Respondent

Judgement

I.P. Mukerji, J.

BACKGROUND

1. This is an application challenging an award made on 31st January, 2005 by a retired Judge of this Court. The learned Arbitrator was appointed by the Chief Justice of this Court on 6th December, 2001 to adjudicate the disputes between the parties arising out of their contract dated 20th January, 1995.

2. As many as 70 sittings were held. Pleadings were filed. Documents were disclosed and produced. There was examination and cross-examination of witnesses. Thereafter, the award was made and published. Union of India is aggrieved by this award.

3. The contract between the parties was that the Respondent was to construct two types of residential quarters. One type was described as Type I. Sixty four of them had to be constructed. The other was described as Type III.

4. Eight of them had to be constructed. The total amount payable under the contract was Rs. 1,81,33,584/-. Work was done to the extent that Rs.

1,77,84,140/- could be claimed. Such amount was claimed by the Respondent Contractor and paid by the Petitioner. The percentage of the total consideration or value of work which was not done was only 1.98%.

5. According to the contract the work was to be completed on 3rd November, 1996. It was completed about 11 months later on 7th October, 1997. The usual claims that are made in a works contract were made before the learned Arbitrator for about Rs. 25 lacs. The award is for Rs. 22.95 lacs.

6. The learned Senior Counsel for the Petitioner showed exceptional fairness, which is seldom seen in counsel nowadays, in restricting his challenge to the award, to those made in claim Nos. 2, 6, 8 and 9. The others were not challenged because he was satisfied and in all probability he satisfied his client that there was no point challenging them as they were legally sound and tenable. This kind of advocacy is very beneficial for our legal system because it shows the integrity of the counsel and also cuts down the time of the court to hear a matter. It also has a cost saving result.

Case of the Respondent:

7. The time period for completion of the work was twenty one months. The start date was to be reckoned as the fifteenth day from the date of formation of the contract. As the contract was entered into on 20th January, 1995, the start date was 4th February, 1995. It was to be completed on 3rd November, 1996. It was completed on 7th October, 1997.

8. The Respondent Contractor had offered a rebate on their bills provided they were paid within time. They were not so paid, due to the fault of the Petitioner. That is why they were entitled to payment of all the rebate given.

9. The Petitioner was in breach of their obligations under the contract, to supply working drawings and to make some decisions required to be made regarding execution of the work. 181 days were lost for non-availability of structural details for the roof slab of the type "I" building consisting of 64 quarters. Furthermore, the Petitioner took inordinate time up to 13th December, 1995 in finalizing the plan for steel windows with grill work. There was also substantial delay in finalizing the plan of the water supply line and for furnishing the details of the flooring.

10. Furthermore, a substantial amount of extra work, beyond the contract was done by the Respondent Contractor.

11. As a result of such breach on the part of the Petitioner the performance of the contract got substantially delayed. The Respondent Contractor was obliged to keep their men, materials and establishment on the site for a substantially longer period than required under the contract, thereby incurring significantly higher expenses to perform the contract. Hence, they were entitled to reimbursement of those expenses.

12. The Respondent claimant made their claims under 10 heads, the last being interest, in the following manner:

Claim No. 1 : (a) Claim for refund of conditional rebates wrongfully realised from running account bills ?

(b) Amount of conditional rebate wrongfully realised from the so-called final bill

Rs. 54,570.53

Rs. 74,743.84

Claim No. 2 Claim for refund of amount wrongfully deducted/withheld from the payment of so-called final bill....

Rs. 4,68,164.90

Claim No. 3 Claim for balance amount payable towards escalation as per clause 10CC of the Agreement....

Rs. 2,58,621.12

Claim No. 4 Claim for the payment for works executed which remained either unpaid or paid for less quantum than actual quantum?

Rs. 4,03,806.28

(amended to Rs. 3,70,122.00)

Claim No. 5 Claim for works /extra works/ substituted items of works executed but paid at less rate than the due rate

Rs. 3,18,165.97

Claim No. 6 Claim for the infructuous expenditures incurred on off-site and on-site establishments retained for the work executed beyond the period of completion ?

Rs. 3,70,983.39

Claim No. 7 Claim for maintaining Watch and Ward staff after completion of works

Rs. 1,17,654.00

Claim No. 8 Claim for loss of hire charges of machinery, tools etc. for the job in the extended period of completion.

Rs. 3,00,000.00

Claim No. 9 Claim for loss of anticipatory profit?.

Rs. 1,05,332.52

The claimant has also in claim no. 10 claimed interest at the rate of 18% per annum for :-

(a) Blockage of payment from time to time ?.

Rs. 1,52,459.76

(b) Delay in payment of so-called final bill and security deposit ?..

Rs. 66,015.95

(c) Amount less paid withheld wrongfully deducted in the so-called final bill ?..

Rs. 1,91,122.56

(d) On Rs. 24,38,358.55 with effect from 16.1.99 till Realization .

DISCUSSION:

13. As I have already said the learned Counsel for the Petitioner in his arguments challenged only the awards made in claim Nos. 2,6,8 and 9.

14. Claim No. 2 was for Rs. 4,68,164.90. It was awarded in full. The argument of the learned Counsel for the Petitioner was that the subject matter of claim 2 was non arbitrable.

15. The claim related to amounts allegedly wrongfully deducted from the final bill of the Respondent contractor. At this moment it is very important to set out the relevant part of the agreement between the parties which is as follows:

Clause 25. "...The decision of Superintending Engineer regarding the quantum of reduction as well as justification thereof in respect of rates for substandard work which may be decided to be accepted will be final and would not be open to arbitration.

16. The learned Counsel for the Respondent-contractor contended that this point regarding Clause 25 was not taken before the learned Arbitrator.

17. I am unable to accept this contention. The learned arbitrator has recorded the following at inner page 42 of the award being page 63 of the petition:

He has also argued that the decision of the Superintending Engineer concerned of the Respondent regarding the quantum of reduction as well as justification thereof in respect of rates of sub-standard works which may be decided to be accepted will be final and would not be open to arbitration.

18. The deduction which was challenged was on account of work which was substandard according to the Petitioner. In my opinion, Clause 25 imposed a clear bar upon the learned arbitrator to consider a claim arising out of such deduction. When this point of arbitrability was pointed out to the learned arbitrator, with the deepest respect to him, he ought to have decided it.

19. The Hon''ble Supreme Court in the case of General Manager Northern

Railways and Another Vs. Sarvesh Chopra, has pronounced the following in paragraphs 10 and 16.

10. ...In Union of India v. Popular Builders and Steel Authority of India Ltd. v. J.C. Budharaja, Govt. and Mining Contractor, Ch. Ramalinga Reddy v. Superintending Engineer (para 18) and Alopi Parshad and Sons Ltd. v. Union of India SCR at p. 804 this Court has unequivocally expressed that an award by an arbitrator over a claim which was not arbitrable as per the terms of the contract entered into between the parties would be liable to be set aside. In Prabartak Commercial Corpn. Ltd. v. Chief Administrator, Dandakaranya Project a claim covered by "excepted matter" was referred to the arbitrator in spite of such reference having been objected to and the arbitrator gave an award. This Court held that the arbitrator had no jurisdiction in the matter and that the reference of the dispute to the arbitrator was invalid and the entire proceedings before the arbitrator including the awards made by him were null and void."

"16. ...If the arbitrator allows a claim covered by an excepted matter, the award would not be legal merely because the claim was referred by the court to arbitration. The award would be liable to be set aside on the ground of error apparent on the face of the award or as vitiated by legal misconduct of the arbitrator. Russell on Arbitration (21st Edn. 1997) states vide para 1 -027 (at p.15):

arbitrability - The issue of arbitrability can arise at three stages in an arbitration; first, on an application to stay the arbitration, when the opposing party claims that the Tribunal lacks the authority to determine a dispute because it is not arbitrable, second, in the course of the arbitral proceedings on the hearing of an objection that the Tribunal lacks substantive jurisdiction and third, on an application to challenge the award or to oppose its enforcement. The New York Convention, for example, refers to non arbitrability as a ground for a court refusing to recognize and enforce an award."

20. Therefore, following that judgment I say with the deepest respect that this claim ought not to have been awarded by the learned arbitrator. Accordingly this head of award is set aside.

21. Claim No. 6 was for reimbursement of expenses on and off site made by the Respondent contractor beyond the time period for completion of the contract. The claim made was for Rs. 3,70,983.30/-The Learned Arbitrator scrutinized the deposition made by the witness for the Respondent Contractor and came to the conclusion that extension of time was granted by the Petitioner without any party giving up their right to claim damages.

22. Thereafter, the learned arbitrator remarked that as he had decided issue No. 2 in favour of the Respondent Contractor, this claim also had to be decided in their favour. I read such remark as signifying that the reasons given in deciding issue No. 2 are to be incorporated in the decision in claim No. 6. So far, so good. Immediately thereafter, the learned arbitrator came to a finding that "Justice will

be made", if the claimed amount was reduced by 10%. This particular conclusion reached by the learned arbitrator has become the subject matter of attack by the Petitioner. His attack is on assessment and quantification of damage. No argument has been made that the conclusion that damages were payable was erroneous. Even otherwise in my judgment such cannot be contended because the learned arbitrator has given quite adequate reasons by relying on the deposition of the witness for the Respondent contractor and his reasons in dealing with issue No. 2 to justify the claim.

23. But quantification of damages is yet another issue. It has to be done u/s 73 of the Indian Contract Act 1872. They have to be proved, as contended by Mr. Bose, learned senior advocate for the Petitioner citing Draupadi Devi and Others Vs. Union of India (UOI) and Others, . Mr. Shibdas Banerjee, learned senior advocate appearing of the Respondents cited Gambhirmull Mahabirprasad Vs. The Indian Bank Ltd. and Another, and submitted placing paragraph 66 of that judgment that the learned arbitrator could resort to guess work in computing damages.

24. I am unable to accept this argument. I read paragraph 79 of Draupadi Devi and Others Vs. Union of India (UOI) and Others,

79. Although, in the written submissions filed before the High Court as well as in the appeal before this Court, submissions have been made with regard to the alternative relief, no arguments were addressed before us on this issue when the oral submissions were made by the counsel on both sides. Despite looking for it, we are unable to locate anything on record which expressly suggests that this claim had been expressly given up by the Plaintiff during the trial. We are unable to find out the basis on which the Division Bench arrived at this conclusion. This fact, however, does not carry the case of the Plaintiff any further. The burden of establishing that the Plaintiff had sustained damages and the measure of damages was squarely on the Plaintiff. The Plaintiff has singularly failed to discharge this onus both by lack of pleadings and lack of evidence. In the circumstances, this alternative relief claimed by the Plaintiff must fail.

25. I also read paragraph 66 of Gambhirmull Mahabirprasad Vs. The Indian Bank Ltd. and Another, .

66. The fact that damages are difficult to estimate and cannot be assessed with certainty or precision does not relieve the wrong-doer of the necessity of paying damages for his breach of duty, and is no ground for awarding only nominal damages. A distinction must be drawn, however, between cases where the difficulties are due to uncertainty as to the causation of damage, where questions of remoteness arise, and cases where they are due to the fact that assessment of damages cannot be made with any mathematical accuracy. Lack of relevant evidence may make it impossible to assess damages at all, as where the extent of the loss is dependent upon too many contingencies, and in such cases, where the liability is established, nominal damages only may be awarded. Where it is

established, however, that damage has been incurred for which a Defendant should be held liable the Plaintiff may be accorded the benefit of every reasonable presumption as to the loss suffered. Thus the Court or a jury doing the best that can be done with insufficient material, may have to form conclusions on matters on which there is no evidence, and to make allowance for contingencies even to the extent of making a pure guess; this is of common occurrence in claims made, for example, in respect of pain and suffering, loss of expectation of life, and the loss of a chance of winning a prize; Halsbury's Laws of England, 3rd Edition, Vol. 11, page 226, Article 394.

26. If one has to give a proper meaning to the Calcutta decision by placing it side by side with the above judgment of the Supreme Court, damages should be established to a substantial extent. If upon establishing of such damages by the claimant, some head of damage has to be worked out and for which there is insufficient evidence to make an exact computation then and then only should a learned judge or an arbitrator resort to guess work. In my considered opinion the learned arbitrator ought to have assessed the damages, which I say with the greatest humility may have escaped his attention.

27. Similar was the argument to challenge the award for claim No. 8. Such claim was also in the nature of damages claiming loss of hire charges for machinery tools etc. The claim was for Rs. 3,00,000/-. On the same principle the learned arbitrator had awarded 90% of the claim by deducting 10% from it. While attacking this award the learned Counsel for the Petitioner also cited Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., . He submitted that an award which was contrary to law could not be passed. In this case the provision of law was the Indian Contract Act, 1872.

28. For the same reason that I have given in my judgment with regard to the award for claim No. 6, I am of the opinion with the deepest respect to the learned Arbitrator that this award was not made correctly.

29. The award for claim No. 9 is for Rs. 1,05,332.52/- which is the full amount claimed. This award was made on a claim for loss of anticipated profit. The learned arbitrator while awarding the whole amount claimed relied upon his reasons while dealing with issue No. 9.

30. The learned arbitrator made the following observation;

The element of profit was adopted as 15% and eventually any reduction in the volume of work should deprive the claimants to earn profit at the rate of 15% on the reduction in the value of work. There is a Clause 13 in the Agreement which provides that any reduction in the volume of work, if desired, after acceptance of tender can be done taking shelter under Clause 13 of the Agreement. There is a provision under the said Clause 13 which provides that the Engineer - in - charge shall give notice for reduction in the volume of work to the contractor and the contractor shall have the right of claim to any payment of compensation whatsoever on account of any profit or advantage which might have derived from

the execution of the work in full, but which he did not derive in consequence of the full amount of the work not having been carried out. It reveals from the deposition of the said claimants" witness Mr. A. Roy in answer to Q. 105 that he made evaluation of the rates quoted for the tender and also attended the negotiation meeting with then Chief Engineer of the Respondent for finalization of acceptance of tender. Not iota of indication was given by the Respondent even during the course of negotiation about the reduction in the volume of work at post acceptance stage."

"Having gone through the decisions referred to and relied on by Mr. B. Mukhopadhyay, learned Counsel for the claimant, reported in A.T. Brij Paul Singh and Others Vs. State of Gujarat, I think that 15% of the value of balance work pertaining to works contract would not be an unreasonable measure of damage for loss of profit. The Hon"ble Supreme Court also held that the contractor is entitled to claim damages for loss of profit which he expected to earn by undertaking the works contract."

31. Mr. Bose, learned senior advocate for the Petitioner has made very substantial argument as regards this head of award. He argued that according to the contract the Petitioner could be reduced to the maximum by 25 %. In this case the reduction was only 1.98%. Therefore, considering the total value of the contract this head of damages could not have been suffered by the Respondent contractor. Hence, award of the entire sum claimed was so unreasonable that the court should interfere with the award. Mr. Banerjee for the Respondent contractor however said that there was substantial justification in the reasons given by the learned arbitrator while deciding issue No. 9.

32. I am unable to accept that contention. Considering that the reduction was only 1.98 per cent and the claim was on account of loss of profit for that reduction, this damage, could not have been suffered by the Respondent contractor.

33. This is quite apparent on the face of the records.

34. Therefore, considering the discussion made above, the award for claim No. 2 is set aside.

35. Since claims 6,8 and 9 are damages and the infirmity in the award is with regard to their quantification I think that claims 6,8 & 9 should be remitted back to the learned arbitrator for reconsideration. The learned arbitrator will make the reconsideration afresh, according to the terms of his original reference and will be paid the same fees. He is requested to make and publish the supplemental award within three months of service upon him of a copy of this order. The rest of the award is upheld. I am of the view that these three claims are severable from the rest of the award.

36. Therefore, this application is partly allowed on the above terms. The Respondent contractor may proceed to execute the rest of the award in

accordance with law. In the facts and circumstances I pass no order as to costs.

37. Urgent certified photocopy of this judgment and order, if applied for, to be provided upon complying with all formalities.