

(1964) 03 CAL CK 0007
In the Calcutta High Court

B.K. Dhar (Private) Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 20-03-1964

Acts Referred:

Citation : AIR 1965 Cal 424 : (1965) 1 CALLT 401 : 68 CWN 927

Hon'ble Judges : Bose, C.J;G.K. Mitter, J

Bench : Division Bench

Advocate : P.P. Ginwala and A. Chaudhury, for the Appellant;Bhola Nath Sen, for the Respondent

Final Decision : Dismissed

Judgement

Bose, C.J.—This is an appeal from an order of A.N. Ray, J. dismissing an application for setting aside an Award. The appellant is a Company incorporated under the Indian Companies Act, 1913 and carries on inter alia the business of building and construction at 6, Hasting Street, Calcutta. The appellant entered into a contract in writing dated the 30th December 1954 with the President of India represented by the Acting Chief Engineer, Eastern Command for construction of a Canteen-cum-Rest Room for the Gun and Shell Factory at Cossipore for a lump sum of Rs.2,11,827/- in accordance with the terms, conditions and specifications set out in the documents constituting the contract. The work to be done under the contract consisted of dismantling of demolishing the existing structure and construction of Canteen-cum-Rest Room building complete with sanitary fittings, fixtures, etc. The time for completion of the entire work was twelve months from the date of handing over of the site and the contract also contained clauses for deviations of alterations in the work and also for suspension of execution of the work during its progress. There was also a clause providing for compensation for delay in completion of the work. This is numbered as clause (50) of the contract and provides that if the contractor fails to complete the work and clear the site on or before the date of completion, he shall without prejudice to any other right or remedy of Government on account of

such breach be liable to pay as compensation an amount equal to one per cent, of the contract sum for every week that the whole of the work remains uncompleted but the total amount of compensation shall not exceed ten per cent, of the contract sum and the amount found due on account of such compensation may be adjusted or set off against any sum payable to the Contractor under the contract. There is also a clause in the contract providing for cancellation for Contractor's default. This is clause 54. There is a clause for arbitration being clause 69. Pursuant to this contract the appellant received a Works Order dated 31st January 1955 and under it the date of completion of the work was stated to be 30th January, 1956. But it appears that it was discovered shortly after this Works Order was given, that the site chosen by the Military Engineering Service (described hereinafter as M.E.S.) for the Canteen-cum-Rest Room interfered with the drainage of other existing structures in the vicinity and/or with drains already constructed. As a result of this faulty designing and planning on the part of the M.E.S. the latter had to direct suspension of the work and such suspension was made on 11th April 1955. On 29th February 1956 the appellant ultimately received written instructions that the original site was to be shifted 6"-9" to the North and 5"-7 1/2" to the East and the actual site was thus made over to the appellant on the 29th February, 1956. Thereafter for certain other reasons the progress of the work under the contract had to be suspended from time to time, with the result that the completion of work was considerably delayed and the appellant was constrained to ask for increases of the rates and negotiation of fresh rates for execution of the work, but on 9th May, 1957 the M.E.S. cancelled the contract on the ground that the appellant had been guilty of default. Thereafter certain joint measurement was made in respect of the work executed by the appellant and for the unexecuted portion of the work of a contract was entered into with another Company known as Prakash Chandra (Private) Ltd. Thereafter the appellant required the respondent to appoint an Arbitrator in accordance with the terms of the contract and to refer the disputes between the appellant and the respondent for arbitration and on the 4th June, 1958 the Engineer-in-Chief, Army Head Quarters, New Delhi, appointed M.L. Rahaja, Superintending Engineer as sole Arbitrator. In the meantime the appellant had made an application to this Court for appointment of an Arbitrator inasmuch as there was delay in making the appointment, but as pending disposal of the application the Arbitrator had been appointed by the Engineer-in-Chief, Army Head Quarters, New Delhi, no order was made on this application. Thereafter the appellant filed a statement of case before the Arbitrator and the respondent filed a statement in defence in reply thereto. The respondent also filed a statement of case as claimant against the appellant and the appellant filed a counter statement in reply thereto. One of the items of claim put forward by the respondent was for a sum of Rs.21,182.70 nP., as compensation for delay from 3rd January, 1957 to 9th May, 1957 being the date of cancellation of the contract. With the proceedings were pending before the Arbitrator, the appellant made an application to this Court for revoking the authority of the arbitrator and for appointment of some other person in his place on the ground of apprehension

of bias of the Arbitrator but as the learned Judge before whom the application was made expressed the view that the appellant's apprehension of bias appeared to be somewhat premature, the appellant asked for leave to withdraw the said application and such leave was granted to the appellant and the Court did not make any order on the said application.

2. The hearing before the Arbitrator commenced on the 12th May, 1960 and continued till 18th May, 1960 and on or about the 1st June, 1960 the Arbitrator made and published his Award. On the 22nd December, 1961 the Award was filed in this Court and notice of filing of the Award was served on the appellant on the 17th January, 1962. By the said Award the Arbitrator rejected the appellant's claim and he made an Award against the appellant in favour of the respondent for the sum of Rs.24,281/-.

3. On the 15th February, 1962 the appellant took out notice of motion for an application out of which this appeal arises for setting aside the Award and in the petition the grounds made for setting aside the Award are: firstly, that the Award is erroneous in law on the face of it inasmuch as the Arbitrator has purported to allow the respondent's claim for alleged compensation for delay and secondly, the Arbitrator misconducted himself and/or the proceedings in the said Arbitration and/or was biased and/or prejudiced against the appellant and was acting in concert and collusion with the Officers of the respondent. The particulars of such misconduct are set out in paragraph 35 of the petition. the main allegations of such misconduct relate to exclusion of important and relevant evidence by the Arbitrator, conspiracy by the Arbitrator with the Officers of the respondent for depriving the appellant of its legitimate claim and the bias of the Arbitrator.

4. In the affidavit-in-opposition which was filed on behalf of the respondent and which was affirmed by Subodh Ranjan Guha, Garrison Engineer at Fort William, it was stated that the compensation for delay charged or claimed from the appellant was in terms and conditions of the contract and was payable by the appellant. It is also stated in the affidavit that the appellant never recorded any objection or protest in writing to the conduct of the Arbitrator or to the alleged irregularity in the procedure adopted by him, nor did the appellant make any application for appropriate step to remedy its grievances until after the Award was given against it, and on the contrary the appellant consented to extensions of time given to the Arbitrator for making the Award. So, no objection having been taken until after the Award was filed in Court and notice thereof was served on the appellant, the latter was estopped from challenging the validity of the Award on the ground of the alleged misconduct or bias of the Arbitrator.

5. In the affidavit-in-reply which has been filed on behalf of the appellant it is stated that Subodh Ranjan Guha who affirmed the affidavit-in-opposition did not attend the Arbitration proceedings and has no personal knowledge of the events that took place at any stage of the proceedings and so not having any knowledge of the facts and circumstances of the case, he was not competent to affirm the

affidavit-in-opposition or to challenge the facts stated in the petition. It is further stated in the affidavit-in-reply that during the Arbitration proceedings no question arose and no occasion arose for the appellant to make any record of objection or formal protest in writing but the fact remains that the appellant was constantly objecting and protesting against the manner in which the Arbitrator conducted the proceedings and was at all times suggesting alternative courses - as courses that ought to be followed but the appellant's contentions were overruled by the Arbitrator. Moreover, some of the incidents took place after the last sitting of the Arbitration and it was the cumulative results of all the incidents that established and misconduct alleged and showed that the Arbitrator was biased against the appellant.

6. at the hearing of this appeal the learned counsel appearing for the appellant has challenged the Award on the ground that there is an error of law apparent on the face of the Award inasmuch as the Arbitrator has awarded in favour of the respondent the claim for compensation for delay in terms of clause 50 of the contract, although no such claim is maintainable in law under the said clause in view of the fact that the entire contract had been put an end to and cancelled by the respondent on 9th May, 1957. Now the principle which is firmly established is that where a question of law necessarily arises on the face of the Award or upon some paper accompanying or forming part of the Award, that will constitute a ground for the Award being set aside, unless the error is immaterial to the decision (*Hodgkinson v. Fernie* (1) (1857) 3 CB (NS 189)).

7. The further question which emerges from this is whether the question of law decided by the Arbitrator was specifically referred to him for his decision or was only one which necessarily arose in applying ascertained facts to the terms of the contract. As has been pointed out in the case of *F.R. Absalom Ltd. v. Great Western (London) Garden Village Society Ltd.* (2) (1933 AC 592), it is essential to keep the case where disputes are referred to an arbitrator in the decision of which a question of law becomes material, distinct from the case in which a specific question of law has been referred to him for decision. The authorities make a clear distinction between these two case and they decide that in the former case the Court can interfere if and when any error of law appears on the face of the Award, but in the later case no such interference is possible upon the ground that it so appears that the decision upon the question of law is an erroneous one. In other words, where a question of law has not been specifically referred to an arbitrator but is material in the decision of matters which have been referred to him and he makes a mistake apparent on the face of the award, an award can be set aside on the ground that it contains an error of law apparent on the face of the Award, but when the submission is on a specific question of law and is such that it can be fairly construed to show that the parties intended to give up their rights to resort to the Courts and in lieu thereof to submit that question to the decision of Tribunal of their own, such decision cannot be questioned.

8. In the statement of claim which was filed on behalf of the respondent, item No. 1 of the claim relates to the amount of final bill of Rs.24,747.27 nP. and in course of elucidation of this claim it is stated in paragraph 4 inter alia as follows: -

Due to continuous default by respondents in proceeding with the work in spite of notices calling upon them to do so and having repudiated their liabilities under the contract, the contract was ultimately cancelled for default under condition 54 (amended) of I.F.A.W. - 229 vide claimant's letter No. 980003/42218/E8 dated 9th May, 1957 (Ext. A). The claimant is therefore entitled to claim compensation for delay for the period from 3rd January, 1957 to 9th May, 1957 (date of cancellation) in terms and condition 50 (amended) of I.F.A.W. - 2249.

9. Then in paragraph 10 of item 1 under heading "Deduct" clause (D) is as follows: -

Compensation for delay (from 3rd January, 1957 to 9th May 1957) date of cancellation, that is, for 181/2 weeks but subject to maximum compensation of ten per cent of the contract sum (see paragraph 3 and 4 above) - Rs.21,182.70 nP.

10. In the counter statement which was filed in answer to this claim of the respondent clause (J) of paragraph 4 of such counter statement runs as follows: -

Save as aforesaid the respondent denies that the contract was ultimately cancelled for default under condition 54 as alleged and/or that the claimant is entitled to claim compensation for delay for the period between January 3, 1957 and 9th May, 1957 as alleged.

11. So this being the nature of the claim for compensation submitted to the Arbitrator, the crucial question that arises is whether there is a reference in which a specific question of law was referred to the decision of the Arbitrator as the sole Tribunal or is it a reference in which the question of construction arises as being material in the decision of the matter which has been referred to Arbitration. Although there is reference to clause 50 of the contract under which the compensation for delay is claimed and there is also reference to clause 54 of the contract as the clause under which the cancellation was effected, there is nothing to show that any specific question of law relating to the interpretation of these two clauses or the question that recourse could not be had to clause 50 of the contract if the entire contract had been cancelled under clause 54 of the contract, was specifically submitted to the Arbitrator for his decision. The position therefore appears to be that the question before the Arbitrator was whether by virtue of clause 50 of the contract the respondent was entitled to claim compensation for delay in the facts and circumstances of the case, up to the date of cancellation of the contract, that is, 9th May 1957. The question that was submitted to the Arbitrator was general in nature and it cannot be said that any specific question of law was submitted to the Arbitrator, with the result that his decision could not be interfered with merely on the ground of its being wrong. There is no reason to think that the parties had any specific question of law in

mind at all which they submitted to the decision of the Arbitrator as the sole Tribunal. What was wanted was a practical decision on the disputed issues. In the circumstances, it will appear that this Court is not precluded from interfering with the Award provided it is manifest from the Award itself that there is an error of law which is apparent on the face of the Award. Now a reference to the Award dated 1st June, 1960 shows that no reason has been given by the Arbitrator in allowing the first item of the claim to the extent of Rs.23,978.91 nP. The only indication which is to be found is that some amount has also been awarded under this item of claim on account of compensation of delay. As is well known there was no obligation upon the Arbitrator to set out any reasons for allowing this item of claim and he has not done so. Therefore, there is nothing to indicate that any question that resort cannot be had to clause 50 for awarding this claim for compensation for delay, because the entire contract had been cancelled under clause 54 of the contract was ever raised before the Arbitrator or he has decided any such question. It was argued by the learned counsel appearing for the appellant that inasmuch as the Arbitrator has made a reference to item 1 of the claim, the result thereof is that the statement of claim becomes incorporated with the Award and is therefore to be treated as part of the Award and as such the error is to be regarded as an error apparent on the face of the Award. Reliance is placed on a decision of the English Court reported in 1936 (2). All England Law Reports, 191 (Hitchins & Anr. v. British Coal Refining Processes Ltd.) (3). This case is clearly distinguishable from the case before us. In Hitchins" case an agreement was entered into between certain consulting Engineers and a Company carrying on coal refining business and a dispute arose as to whether the contract had been rightfully terminated by the Company. This dispute was referred to arbitration. The Company pleaded that the consulting Engineers should have attended every day at the site of the plant and they have been guilty of negligence in respect of certain matters set out in the counter claim. The Arbitrator found that the termination of the agreement was unjustified and he also found the negligence on the part of the consulting Engineers in respect of the matters set out in the counter claim, and awarded the Engineers damages after setting off an unspecified amount for damages for negligence. The Company thereupon moved to set aside the award on the ground of error of law apparent on the fact of it. At the hearing of the application for setting aside the award the Company contended that the whole of the pleadings in the arbitration were admissible. The contention of the other side was that the Court could not look at any document except the award itself. It was held that inasmuch as the Arbitrator in his award referred to certain paragraphs in the counter claim, such paragraphs ought, in considering whether there was an error on the face of the award, to be regarded as forming part of the award. Now it is to be noticed that in this case the Arbitrator had found that the applicants were guilty of negligence "as mentioned" in certain paragraphs of the counter claim and so it was held that such paragraphs of the pleading should be regarded as having been incorporated in the award itself and as having formed part of the award. The question whether a document has to be incorporated in the award must be question of fact in each

case. When the Arbitrator in the case before us was alluding to item 1 of the claim of the respondent, he was doing so only for the purpose of earmarking the particular claim and even assuming that this reference to item 1 of the claim makes the entire claim as set out in the statement of claim a part of the award, there is nothing to show upon a reference to the facts set out in relation to item 1 of the claim as appearing in the statement of claim that there is any error of law which can be said to be apparent on the face of the document so as to satisfy the condition that there is an error on the face of the award. For the reasons given above I find it difficult to hold that there is any error of law apparent on the face of the award which will justify the Court in interfering with it and setting aside. Moreover I do not see why the appellant is not liable to pay the compensation under clause 50 which had become payable in terms of clause 50 before the contract was rescinded.

12. The respondent could not be deprived of the claim for compensation money which had accrued in their favour before the contract was cancelled. So no error of law appears to have been committed by the Arbitrator.

13. The other question which is sought to be raised is that the Arbitrator was biased against the appellant and he had conspired with the officers of the respondent in depriving the appellant of its legitimate claim and that he also misconducted himself and/or the proceedings in the said arbitration. Now the Arbitrator must be a person who stands indifferent between the parties and has no interest direct or remote in the subject-matter to the controversy or in the parties. If an Arbitrator has a personal interest, in the subject matter of the Award, and that is known to one of the parties, he is not a proper person to act as Arbitrator. He should in no sense consider himself to be the advocate of the cause of the party appointing him and he should refrain from identifying himself with the interest of such party, but known interest does not disqualify a person from acting as Arbitrator. If the parties with full knowledge of the facts select their Arbitrator who is not an impartial person, the Court will not release them from the bargain upon which they agreed and if a party in order to secure a contract has submitted to the jurisdiction of a Tribunal which has an interest of its own in the decision, the Court will not on that account release them from their own bargain, however improvident it may consider it so long as the Court is satisfied that he knew or should have known what kind of bargain he was entering into. This is the statement of law which appears in Russell's book on Arbitration and is supported by the decision in *Eckersley v. Mersey Dock* (4) (1894) 2 QB 667. In the present case it is alleged that it is clear from the conduct of the Arbitrator that he was actually biased against the appellant. If that is the true position, then there can be no doubt that the Award has to be set aside on that ground. It is also true that if the Arbitrator has also been guilty of the misconduct alleged in paragraph 35 of the petition, that is, he entered into conspiracy with the officers of the respondent to deprive the appellant of its legitimate claim or that he has excluded the relevant evidence, certainly that would be a ground for setting aside the Award. But the answer of the respondent

to this contention of the appellant is that the appellant acquiesced in the irregularity of the procedure and he never raised any protest against the alleged misconduct of the Arbitrator in course of the arbitration proceedings and thereby had waived his right to challenge the Award on such ground. Although in the affidavit-in-reply the appellant has put forward the case that during the arbitration proceedings it had been persistently objecting to the irregularity in procedure adopted by the Arbitrator, no attention was paid to such objection by the Arbitrator. There is no mention of any protest or objection in the petition which has been filed for setting aside the Award. It is only after the respondent has in the affidavit-in-opposition made the specific case of this waiver and acquiescence that the appellant has in the affidavit-in-reply tried to met that case by setting up the story of oral protest in course of the arbitration proceedings but there is not a single letter nor is there any other document which shows that any such protest was ever made. From the materials on record it appears that the appellant having a clear knowledge of the circumstances on which he might have founded an objection to the Arbitrator's proceedings to make his award, did submit to the arbitration going on and he allowed the Arbitrator to deal with the case as it stood before him taking its chance of the decision being more or less favourable to it. A party will not be permitted in law to lie by any participate in the arbitration proceedings and if it suits his purpose, then attack on the ground of irregularity. As pointed out by Russell -

The strongest line of conduct and the strongest form of protest for a party to adopt or make is to retire from the proceedings, but such a course, when a party is brought before or tied to a particular Tribunal, is obviously extremely dangerous, because he may ultimately find, when he has moved to set aside the Award made against him, that the irregularity of which he complained is not sufficient to upset the Award. "The obvious course therefore is for a party complaining of irregularity to protest against the irregularity and to continue to conduct his case in the proceedings before the Arbitrator under such protest: The other alternative is to submit to the irregularity and forego any rights he may have to object to the Award on that ground when it is made, for he cannot lie by and then object to the Award if it is against him." (Russell - 17th Ed. - p. 174).

14. As already pointed out there is no satisfactory evidence before us that the appellant in fact made any protest or raised any objection with regard to the irregularity of procedure complained of or against the alleged misconduct. It is true that the appellant had made an application to this Court on the ground of apprehension of bias of the Arbitrator and the application was withdrawn after the learned Judge had made the observation that the application was premature, but one would expect that if it was found at a later stage of the arbitration proceeding that the Arbitrator's conduct evinced a bias against the appellant or that he was misconducting himself or the proceedings, some record would be made of objection or protest on the part of the appellant either in some correspondence or in the records of the proceedings before the Arbitrator. The plea of the appellant that it was not until the arbitration proceeding was

concluded and the Award was made and published., that the appellant could be certain about the bias of the Arbitrator is not acceptable, and is an afterthought.

15. The attention of the Court has been drawn to the cases reported in (5) AIR 91956) Cal 11 (6) Alex Miller (Merchants) Ltd. Vs. A.C. Runo Aktiebolag, , (7) Arbn. Jupiter General Insce. Co. Ltd. Vs. Corporation of Calcutta (with Award), , (8) 50 IA 324 and (9) Union of India (UOI) Vs. N.P. Singh, but it is not necessary to deal with these cases at any length.

16. In my view this appeal must fail and it is accordingly dismissed.

17. In the circumstances of the case, each party will bear its own costs.

Mitter, J.

18. I agree.