

(1977) 11 PAT CK 0009

In the Patna High Court

Case No : Appeal From Original Order No. 73 of 1974

Bokaro Steel Limited

APPELLANT

Vs

B.D. Kedia and Company

RESPONDENT

Date of Decision : 01-11-1977

Acts Referred:

Arbitration Act, 1940 — Section 30
Contract Act, 1872 — Section 126

Citation : (1977) 25 BLJR 274

Hon'ble Judges : S. Sarwar Ali, J;B.P. Jha, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

B.P. Jha, J.—This is an appeal u/s 39(vi) of the Arbitration Act, 1940 (Act X of 1940) (hereinafter referred to as "the Act") against the judgment dated the 17th January, 1974, By this judgment, the Subordinate Judge, Second Court, Dnanbad, refused to set aside the award dated 18th November, 1972.

2. The claimants, M/s. B.D. Kedia & Co., entered into a contract with Bokaro Steel Limited for construction of 176 units of "C" type and 408 units of "E" type houses for a total amount of Rs. 38,81,333/-. Vide Agreement No. BSLCE/Agmt./6/6667 dated 28th March, 1967. Pursuant to the agreement, the claimants completed the work on 18th June, 1968 within time. After the preparation of the final bill, some difference arose between the claimants and Bokaro Steel Limited (hereinafter referred to as "appellant"). The claimants inspected the final bill and found the following discrepancy:

(a) Extra items worked were not taken into consideration.

(b)(i) Illegally shown recovery of 713.85 tonnes of cement and (ii) 86.64 tonnes of steel and (iii) Royalty charges for supply of quarry materials and bricks.

On 4th June, 1970, the claimants sent a letter to the objectors in which they objected to the preparation of the final bill.

3. On 14th September, 1970, the claimants gave notice to the objectors under the arbitration clause of the agreement, requesting the objectors to refer the matter to arbitration. On 26th October, 1970, the dispute between the parties was referred to the arbitration of two arbitrators, namely, Mr. B.G. Baljekar (nominee of the objectors) and Mr. B. Prasad (nominee of the claimants). Both parties filed their pleadings before the arbitrators. The arbitrators, after examining their pleadings, gave the award on 18th November, 1972. The award was received in the Court on 28th November, 1972. Thereafter, the objectors filed an objection u/s 30 of the Act challenging the validity of the award on the ground that the arbitrators have misconducted themselves. The claimants prayed that the Court might pronounce the judgment on the basis of the award.

4. After hearing the parties, the Court pronounced the judgment according to the award and refused to set aside the award. Hence, the objectors preferred an appeal u/s 39(vi) of the Act before this Court.

5. On these facts, learned Counsel for the appellant challenged the validity of the award on these grounds:

- (1) That there is an apparent mistake of law on the face of the award.
- (2) That the award is so indefinite as to be incapable of execution.
- (3) That the arbitrator erred in law in allowing the extra cost involved in the construction of the houses.
- (4) That there is no evidence to support the award.

6. It is a settled law that an award can be set aside if there is an apparent mistake of law on the face of the award. In this connection, learned Counsel for the appellant referred to paragraph No. 1 of the award dated 18th November, 1970 which runs as follows:

That M/s. Bokaro Steel Limited should pay to M/s. B.D. Kedia & Co. a sum of Rs. 42,903.00 (Rupees forty two thousand nine hundred and three only). This amount takes into consideration the total dues of the claimant's final bill, security deposit lying with the respondent as well as the recoveries to be affected by the respondent against the final bill.

7. In this connection, learned Counsel for the appellant contends that the words "security deposit" lying with the respondent mean the Bank guarantee which was executed by the claimants-respondent in favour of the appellant (Bokaro Steel Limited). I am unable to accept this argument. The words "security deposit" lying with the appellant may mean the amount which is in actual deposit with the appellant. In this connection, a reference has been made to the claim of the claimants in Annexure-B attached to the statement of facts filed before the arbitrators. The case of the claimants before the arbitrators was that the appellant was not entitled to withhold Rs. 35,756/- out of the refund security deposit. It is relevant to mention item No. 19 of Annexure-B which runs as

follows:

From our refund security a sum of Rs. 35,756/- was deducted against the Royalty charges for Bricks, sand, chips and boulder.

In reply to item No. 19 (quoted above), the appellant submitted the following reply which runs as follows:

In view of the facts and circumstances stated in paras 9 and 10, the respondent withheld provisionally Rs. 35,576/- from the 50% security deposit released to the claimant.

On verification of the relevant quarry registers submitted by the claimant, the final amount shown for recovery on the above amounts in the final bill is Rs. 17,287/49 for the royalty charges for bricks and Rs. 6,212/52 towards development charges for sand, metal, stone chips and boulders. And as such it is prayed to the Arbitrators, the claim be rejected.

8. On a perusal of these paragraphs, it is clear that the arbitrators referred to the above mentioned security deposit which was lying with the appellant (Bokaro Steel Limited). It is the admitted position that the appellant kept back 21/2 per cent of the refund security deposit which was not paid to the claimants. The claimants requested the appellant to pay the full 21/2 per cent, of the security deposit to them. The appellant paid only Rs. 53,873/52 Paise and withheld a sum of Rs. 35,756/- from the aforesaid security deposit. On a perusal of the claims and counter-claims of both the parties, to me, it appears that the security deposit mentioned in the award refers to the security deposit in respect of 21/2 per cent which was not paid to the claimants by the appellant-objector. If it is so, the arbitrators considered as to whether the security deposit which remained with the appellant should be paid to the claimants or not. This view of mine is being supported by the wordings of the arbitrators in the award. The arbitrators stated in their award that "this amount takes into consideration the total dues of the claimant's final bill, security deposit lying with the respondent as well as the recoveries to be affected by the respondent against the final bill." The words "claimant's final bill, security deposit lying with the respondent" are preceded by the words "total dues". It is in this context also I hold that the security deposit, as mentioned in the award, refers to the total dues of the claimants towards 21/2 per cent lying as security deposit with the appellant. The claim of the claimants was that the appellant erred in withholding payment of Rs. 35,756/- out of the security deposit. In other words, the claimants were claiming Rs. 35,756/- as dues from the appellant. In this context, the words "security deposit" mean 21/2 per cent out of the total dues which were kept back by the appellant.

9. In my opinion, the words "security deposit" referred to in the award do not mean the Bank guarantee. The Bank guarantee has been defined in Section 126 of the Indian Contract Act (Act X of 1872). While executing the work, the claimants furnished a Bank guarantee of Rs. 1,00,000/- for the due performance of the contract. The Bank was the surety and the claimants were the principal

debtors and appellant-objector was the creditors. The Bank guarantee was executed to perform the execution of the work given to the claimants by the appellant-objector. The admitted position is that the work was executed by the claimants. If the claimants would have defaulted in execution of the work, then certainly the appellant-objectors could have filed the suit, for realising the amount mentioned in the Bank guarantee. In the present case, the claim of the claimants is that they performed the contract to the satisfaction of the appellant-objectors within time, and, as such, the claimants were discharged from the liability of payment of the amount mentioned in the Bank guarantee. In other words, it is pleaded by the claimants that as the claimants have performed the promise, the appellant-objector is not entitled to realise the amount mentioned in the Bank guarantee. In my opinion, there is sufficient force in the case of the claimants. Learned Counsel for the appellant contends that the words "security deposit" refer to the Bank guarantee which was executed by the claimants in favour of the Bokaro Steel Limited. In my opinion, the words "security deposit" do not mean the Bank guarantee. It is also not the case of any party that the Bank guarantee was also referred to the arbitrators. In this circumstance, I hold that the words "security deposit" do not mean the Bank guarantee. If it is so, there is no apparent mistake of law on the face of the award. Apart from these facts, the arbitrators were quite competent to know the difference between the Bank guarantee and the security deposit as one of them, namely, B.G. Baljekar was the project Manager of the Hindustan Steel Construction Works Ltd. and B. Prasad was the retired Chief Engineer of P.W.D., Bihar.

10. In my opinion, the award is not so indefinite as not being incapable of execution. The award clearly directs M/s. Bokaro Steel Limited to pay to M/s. B.D. Kedia & Co. a sum of Rs. 42,903/-. In my opinion, the award is certain and it is not so indefinite as to be incapable of execution against M/s. Bokaro Steel Limited, and as such, on this ground the award cannot be remitted back to the arbitrators.

11. So far as the third point is concerned, it is not clear from the award that the arbitrators granted Rs. 42,903/- towards extra cost. It is admitted in paragraph No. 2 of the objection of the appellant-objector that all the disputes and differences between the parties were referred to arbitration by the claimants (plaintiff) which runs as follows:

That the aforesaid contract work was duly executed by the plaintiff, but certain disputes and differences arose between the plaintiff and the defendant regarding payment of claims recoveries to be effected etc, and the disputes were referred to arbitration by the plaintiff by letter dated 26.10.1970.

12. On a perusal of paragraph No. 2, all the disputes and differences in respect of the payment of claims and recoveries were referred to the arbitrators for arbitration by the letter dated 26th October, 1970. Pursuant to the arbitration agreement clause in the agreement No. BSL/CE/Agt. 6/66-67, dated 28th March, 1967, Sri B.G. Baljekar and Sri B. Prasad were appointed arbitrators by the

appellant and the claimants. They put their claims and counter-claims in respect of the payment of final bill, security deposit and recoveries to be effected. The case of the claimants was that the appellant, Bokaro Steel Limited, was not entitled to recover (1) 713.85 tonnes of cement, (2) 86.64 tonnes of steel and (3) royalty charges for supply of quarry materials and bricks. The claimants also claimed that the Bokaro Steel Limited was not entitled to withhold a sum of Rs. 35,756/- out of the security deposit which was lying with the Bokaro Steel Limited. The claimants also claimed extra costs. The Bokaro Steel Limited also filed reply to the claims of the claimants. In this circumstance, it cannot be said that the arbitrators directed the Bokaro Steel Limited to pay Rs. 42,903/- only on account of the extra cost incurred by the claimants. It is a settled law that in order to set aside an award, the mistake of law must be apparent on the face of the award. In view of the fact that there is no mistake of law on the face of the award, it cannot be set aside in law. I overrule this objection also on the ground that this point was not taken by the appellant in the objection petition filed before the Court below.

13. In my opinion, there is a fallacy in the argument that there is no evidence to support the award. The arbitrators had before them the statements of facts filed by both the parties. The statements of facts filed by the claimants show the claims made by the claimants in respect of the execution of work done in pursuance of the contract. There was no difficulty in passing the award on the basis of the statement of facts given by the parties. This point was also not raised in the objection petition of the Bokaro Steel Limited. It is a settled law that ordinarily the award of an arbitrator should be accepted when it is referred to by both the parties. Once the award is made, it is final between the parties and it could be set aside only on the ground of mistake of law apparent on the face of the record or on the ground that the matter was not referred to the arbitrators. In my opinion, there were sufficient materials before the arbitrators to come to the conclusion as to what amount could be paid to the claimants. Hence reject this contention. In this connection, learned Counsel for the appellant contended that the final bill was not before the arbitrators and, as such, the arbitrators could not have passed any award. I am unable to accept this contention for the simple reason that the arbitrators were required to arbitrate in respect of the difference in the final bill. The difference in the final bill was mentioned in the statements of facts made by the claimants and the Bokaro Steel Limited. If it is so, there was no difficulty for the arbitrators to decide what amount was due to the claimants. Hence, I reject the contention of the learned Counsel of the appellant that there was no evidence on which the arbitrators passed the award.

14. The objectors objected to the award on the grounds mentioned in paragraphs 7 and 10 of the objection petition which run as follows:

7. That your petitioner submits that the final position in term of the award stood like this that the plaintiff was to receive a sum of Rs. 42.903/- from the

defendant and on the other hand the defendant was entitled to receive the Bank Guarantee worth Rs. 1,00,000/- deposited by the plaintiff with the defendant, and thus actually the defendant was to get a sum of Rs. 57,097/- from the plaintiff in terms of the award on adjustment as aforesaid.

X X X X 10. That your petitioner submits that in the circumstances set forth above the defendant was entitled to an award for Rs. 57,097.00 in its favour without prejudice to its rights against the Banker under the Bank guarantee to that extent and the arbitrators have by making the defendant to pay to the plaintiff a sum of Rs. 42,903.00 and leaving the defendant to go through various complications to realise the security deposit lying with him, have misconduted themselves and have committed an error which is apparent on the face of the record, which your petitioner submits vitiates the whole award.

15. The allegation in these paragraphs was that the arbitrators had misconduted themselves for the simple reason that the arbitrators failed to pass an award for Rs. 57,097/- in favour of the Bokaro Steel Limited. The allegation of the appellant was that it was entitled to receive Rs. 1,00,000/- mentioned in the Bank guarantee. If Rs. 42,903/- is deducted from Rs. 1,00,000/-, then the appellant was entitled to get a sum of Rs. 57,097/-. In my opinion, the objector cannot dictate the arbitrators to give the award as it desired. In my opinion, the admitted position is that the Bank guarantee was never referred to the arbitrators as it is not borne out from the statements of fact of both the parties which were submitted before the arbitrators. Hence I hold that the arbitrators have not misconduted themselves while giving the award.

16. The point of law raised in this appeal may be summarised thus:

Prima facie, a party agreeing to refer a matter to the arbitrator must accept his award as final. Ordinarily, the Court should be slow in setting aside such award. The Court can set aside the award on any of the grounds mentioned in Section 30 of the Act. The Court can set aside the award if there is a mistake of law apparent on the face of the record-The Court can also set aside the award in respect of the matter which was not referred to the arbitrator. The Court can also set aside the award if the arbitrators did not arbitrate on the question of law or fact referred to the arbitrators. While considering apparent mistake of law on the face of the record, the Court will look at the award or the document forming part of the award. In order to appreciate the apparent mistake of law on the face of it, the Court is not entitled to look at any extraneous evidence or record in order to review the decision of an arbitrator.

"Misconduct" is used as denoting irregularity or where there is a breach of natural justice. In the present case, the objector did not point out any irregularity in the award nor it was contended that there was any breach of natural justice. Hence, the arbitrators have not misconduted themselves while giving the award.

The Court can set aside an award on the basis of an error in law on the face of

the award. If an error in law is available on the face of the award, then only the Court can set aside the award. If on the face of the award, it is clear that the arbitrator based his reasoning on the basis of some legal proposition which is contrary to law, the Court is entitled to set aside such an award. In order to ascertain an apparent mistake on the face of the award, the Court will not be entitled to look at extraneous evidence except the award itself.

Ordinarily, the appellate Court should not allow the objector to raise any point of law unless such point has been raised in the objection petition. It is the duty of the Court to see that the litigation may not be prolonged between the parties, and, if the substantial justice has been done by the award, then the Court should not lightly interfere with the award unless on the grounds mentioned in Section 30 of the Act.

17. In the result, the appeal is dismissed. The parties will, however, bear their own costs.

S. SARWAR ALI, J.

I agree to the proposed order that the appeal be dismissed without costs.