
(2012) 02 CHH CK 0036
In the Chhattisgarh High Court
Case No : Arbitration A. No. 33 of 2007

Central Mine Planning and Design Institute Ltd.	APPELLANT
Vs	
Shri Saurav Agrawal and Another	RESPONDENT

Date of Decision : 23-02-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 16(2), 31(3), 34(2), 37

Citation : (2012) 2 CGBCLJ 261

Hon'ble Judges : Prashant Kumar Mishra, J; I.M. Quddusi, J

Bench : Full Bench

Advocate : Jagdip Dhankar, with Mr. P.S. Koshy and Mr. Vivek Verma, for the Appellant; S.C. Pandey with Shri Anil Pandey and Shri K.R. Nair, for the Respondent

Final Decision : Allowed

Judgement

Prashant Kumar Mishra, J.—This appeal u/s 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act of 1996") has been preferred by the appellant/non-claimant challenging the order passed by the District Judge, Bilaspur in MJC No. 39/06 dismissing its appeal, which in turn had arisen out of the award dated 31-1-2006 passed by the sole Arbitrator thereby awarding an amount of Rs. 2,07,27,733.83/- inclusive of interest in favour of claimant Shri Saurav Agrawal, son of late B.P. Agrawal and against the appellant. The Arbitrator also allowed counter claim made by the appellant/non claimant to the tune of Rs. 34,04,863.88/- inclusive of interest and thus after deducting the said amount of counter claim, total amount for which award was passed in favour of claimant/respondent was Rs. 1,73,22,869.95/-. Briefly stated facts of the case are that on 23-12-1994 a tender notice was issued by the appellant inviting tender for construction of residential complex of the Central Mine Planning and Design Institute Limited, Bilaspur (for short "CMPDIL"). At the end of tender process, the claimant was found to be successful and was thus awarded contract by work order dated 21-8-1995 for the contract value of Rs. 2,48,76,391.51/-.

The work was to be completed within the stipulated period of 20 months as detailed in the tender document. An agreement was executed on 5-1-1996 and the claimant started execution of the work, however, differences arose between the parties and the work could not be completed as per the agreement signed by them. Clause 14 of the agreement provided for settlement of disputes by way of arbitration and on the requests made by the claimant, the arbitrator was appointed on 15/17-3-2004. Before the arbitrator, the claimant submitted a claim to the extent of Rs. 9,55,57,702.47/- inclusive of interest @ 18% till 31-3-2004 and thereafter till the actual payment. Break up of the claim has been mentioned at para 4(x) of the award.

2. The appellant/non-claimant denied the claim in its entirety and stated that the claim is not maintainable as the internal mechanism provided in the contract agreement has not been adhered and otherwise also, the claim deserves to be dismissed on merits. The non-claimant raised a counter claim to the tune of Rs. 2,67,20,323.84/- inclusive of interest @ 18%, the details of which are mentioned in para-7(vi) of the award.

3. The Arbitrator passed an award in favour of the claimant as mentioned in para-1 of this judgment. The appellant preferred an appeal before the District Judge u/s 34(2) of the Act of 1996. The learned District Judge has dismissed the appeal, which is under challenge before this Court.

4. Shri Jagdip Dhankar, learned Senior Advocate with Shri P.S. Koshy, Advocate for the appellant argued that arbitration process was set in motion contrary to the contract stipulations and particularly the arbitration clause, therefore, the award and the appellate order deserve to be set aside. Secondly, they argued that the claim was not arbitrable in terms of the contract and thus the award is in flagrant disregard of express stipulations in the contract. It has been argued that the award is perverse and untenable as the appointment order has been seriously misread by reading into it a fact situation that is not there and statutory provisions have been overlooked. Lastly, it has been vehemently put forth that the award was required to be a reasoned award whereas no reason towards the name has been discussed while awarding the amount under different heads and for this reason also, the award deserves to be set aside.

5. Per contra, Shri S.C. Pandey, learned Senior Advocate with Shri K.R. Nair, Advocate for the respondent argued that the award is a reasoned award as reasons have been given in various paragraphs, therefore, no interference is called for. They also argued that the Arbitrator has also allowed and awarded part of the counter claim raised by the appellant which is not challenged in this appeal and since part of the award cannot be challenged, the present appeal is not maintainable, as the appellant cannot be allowed to blow hot and cold in the same breath. It has also been argued that the claim was arbitrable and in spite of settlement dated 4-2-2000 between the parties, the right of the claimant under the arbitration agreement does not extinguish.

6. This Court shall deal with the grounds of attack raised by the appellant one by one. However, the ground concerning the issue that arbitration mechanism has been set in motion dehors the provisions of the arbitration clause, therefore, the arbitration as well as the consequent award and the appellate order is bad in law, if taken up for consideration firstly. In this regard, the arbitration clause needs to be referred which is reproduced hereunder for ready reference:-

14.1. It is incumbent upon the contractor to avoid litigations and disputes during the course of execution. However, if such disputes take place between the contractor and the department, effort shall be made first to settle the disputes through committees at different levels made for this purpose by the company. The contractor should make request in writing to the Engineer In charge for settlement of such disputes/claims failing which no disputes/claims of the contractor shall be entertained by the company. If differences still persist the contractor may request in writing to the Engineer In charge for referring the matter to a Sole Arbitrator. Such request shall be made by the contractor within 90 (ninety) days of receiving the intimation from the Engineer In charge about the final decision of the above committee in regard to the disputes/claims failing which the claim, differences or disputes of the contractor will be deemed to have been waived and the company shall be released and discharged of all liabilities under contract in respect of this claims. However, it is the prerogative of the company to accede to the request of the contractor for appointment of a sole arbitrator.

14.2. Except where otherwise provided for in the contract, all questions and disputes relating to meaning of the specification, designs, drawings and instructions herein-before mentioned and as to the quality of workmanship or materials used on the work or to any other question, claim, right, matter or tiling whatsoever in any way arising out of or relating to the contract, design, drawings, specification, estimates, instructions, orders or the conditions or otherwise concerning the work or the execution or failure to execute the same whether arising during the commencement of the progress of the work or after the completion of abandonment thereof shall be referred to, on failure of settlement of disputes by the company and on request of the contractor as per clause 14.1 above, the sole arbitration of the person "appointed by the Chairman-cum-Managing Director of the company or any other person authorized by him, to appoint such arbitrator.

There shall be no objection to any such appointment that the arbitrator so appointed is an employees of the company and that in the course of his duties as an employee of the company, he had expressed views on all or any of the matters in dispute or differences.

The Arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason whatsoever, the C.M.D. of the company or any such person authorized by him, to appoint an arbitrator as aforesaid at the time of such transfer, vacation of office or unable to act, shall

appoint another person to act as arbitrator in his place in accordance with terms of the contract. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor. It is also a term of this contract that no person other than a person appointed by the C.M.D. of the company as aforesaid should act as arbitrator and if for any reason that is not possible, the matter is not to be referred to arbitration at all. In all cases where the amount of the claim in dispute is Rs. 75,000/- (Rs. Seventy five thousand) and above, the Arbitrator shall give reasons for the award. Subject to the aforesaid, the provisions of the Arbitration Act, 1940 or any statutory modification or reenactment thereof and the rules made there under and for the time being in force shall apply to the arbitration proceeding under this clause.

It is a term of the contract that they party invoking arbitration shall specify the dispute or disputes to be referred to arbitration under this Clause together with point-wise details and the amount or amounts claimed in respect of each such dispute in writing.

Work under the contract shall be continued by the Contractor during the Arbitration proceeding unless otherwise directed In writing by the company or unless the matter is such that the work cannot be continued until the Award of the arbitrator is given. Payment due or payable by the company shall not be with held on account of such arbitration proceedings unless it is the subject matter of reference. The arbitrator shall be deemed to have entered on the reference on the date of issue notice to both the parties fixing the date of the first hearing.

The final bill of the contractor will be paid for all the items of work completed to the satisfaction of Engineer In charge as/per contract other than the items of work for which the matter has been referred to a sole Arbitrator as per the terms of the Contract.

The arbitrator shall give a separate award in respect of such dispute or difference/ claim referred to him. The venue of arbitration shall be either the headquarters of the company or the place where the cause of action has arisen as may be fixed by the Arbitrator in his sole discretion.

7. According to the appellant, the claimant having not adhered to the mechanism as provided in clause-14 of the agreement, the entire arbitration proceeding is void, whereas, according to the respondent, the appellant cannot challenge the jurisdiction of the Arbitrator, as the appointment has been made by the CMD of the company itself and as per last two lines of clause-14.1 of the agreement, it is the prerogative of the company to accede to the request of the contractor for appointment of sole arbitrator, which is in the nature of exclusive and special right which having been exercised, the appellant cannot challenge it subsequently. It is also stated that the appellant cannot question the action of its own CMD as it cannot take advantage of its own wrong and that in fact the claimant initially raised a dispute before the Engineer-in-charge.

8. Learned counsel for the appellant has relied on judgments in the matters of

Municipal Corporation, Jabalpur and Others Vs. Rajesh Construction Co.,] and India Household and Healthcare Ltd. Vs. LG Household and Healthcare Ltd.,

9. In the present case, clause 14.1 of the agreement provides that if disputes take place between the contractor and the department, efforts shall be made first to settle the disputes through Committees of the company at different level meant for this purpose and the contractor should make a request in writing to the Engineer-in-charge for settlement of such disputes/claims, failing which no disputes/claims of the contractor shall be entertained by the company. If differences still persist, the contractor may request in writing to the Engineer-in-charge for referring the matter to the Sole Arbitrator and such request shall be made by the contractor within 90 days of receiving intimation from the Engineer-in-charge about final decision of the above committee with regard to the disputes/claims, failing which claims/differences or disputes of the contractor will be deemed to have been waived and the company shall be released and discharged of all the liabilities under the contract in respect of these claims. From the record, it appears that a request was made by the claimant for referring the dispute to the arbitration in its letters dated 17-11-1999 and 29-11-1999 and thereafter a meeting took place between the parties on 4-2-2000 for amicable settlement and on the said date, a settlement in fact took place which was duly approved by the competent authority of the appellant on 11-2-2000. However, it appear, disputes persisted for which both the parties have shifted blame on each other and ultimately, the agreement came to be terminated on 12-4-2003. If according to the claimant, disputes still persisted, he should have requested the Engineer-in-charge for referring the matter to the sole arbitrator within 90 days, however, the claimant neither wrote to the Engineer-in-Charge raising disputes nor made request for referring the matter to the sole arbitrator.

10. In the matter of Municipal Corporation, Jabalpur & others (Supra), it has been held in para-16 that in a situation where arbitration agreement provides for other measures for securing appointment of an arbitrator, the same shall be followed and when such internal mechanism is not followed, the arbitrator cannot be appointed dehors the terms of agreement.

11. Similarly, it has been held in the matter of India Household and Healthcare Ltd. (Supra) vide para-24 & 27 that appointment of arbitrator is not legal and maintainable unless the procedure and mechanism agreed to by and between the parties is complied with. In the said case, the Hon''ble Supreme Court followed its earlier judgment in the matter of National Highways Authority of India and Another Vs. Bumihiway DDB Ltd. (JV) and Others, .

12. It has been urged by the claimant/respondent that the appellant having participated in the arbitration proceeding and having raised a counter claim is not entitled to and is rather estopped from challenging the jurisdiction of the Arbitral Tribunal. The Arbitrator, in para-16 of the award has also dealt with this preliminary objection raised by the appellant, to hold that since the appointment of arbitrator was by consent, as the appointment itself says in clear terms that

both the parties agreed to settle the dispute by way of arbitration, the matter was referred to arbitration, such preliminary objection is irrelevant and deserves to be rejected.

The order dated 15th/17th March, 2004 regarding appointment of arbitrator needs to be referred to appreciate as to whether the appellant has consented to the appointment and if yes, what is the legal effect of the said consent. The relevant part of the order is extracted hereinbelow:-

Terms of Reference

To decide all the issues arising out of the contract which are referable, consistent with the "Arbitration Agreement", i.e. clause 14 of the Agreement, in accordance with the terms of contract document and the Arbitration and Conciliation Act, 1996. Party shall be at liberty to raise any question of law inclusive of the question of jurisdiction of Arbitral Tribunal, limitations and other questions of law at their choice. Arbitrator shall determine all the questions and dispute in accordance with law and shall also adjudicate counter claim if so raised by CMPDIL, R1-V.

This has reference to your consent dt. 03.10.03 for taking up the assignment to act as Sole Arbitrator and agreeing to terms and conditions of payment as per my letter dated 15.3.2004. The fees and expenses shall be equally shared by both parties.

You are requested to give your reasoned award at the earliest from the date of entering into reference.

13. From a reading of terms of reference, it does not appear to this Court that the appellant consented to the appointment of arbitrator. In fact, in the order appointing arbitrator itself, it has been mentioned that the party shall be at liberty to raise any question of law inclusive of question of jurisdiction of the Arbitral Tribunal, limitations and other questions of law at their choice, therefore, by virtue of Section 16(2) of the Act of 1996, it cannot be said that the appellant was estopped from challenging the jurisdiction of the Arbitral Tribunal. This objection was raised before the Arbitrator itself, therefore, it can also not be said that it is raised for the first time before this Court.

14. In view of the fact that internal mechanism provided in clause 14 of the agreement concerning appointment of arbitrator has not been adhered by the claimant, this Court is of the considered opinion that in view of the law laid down by the Hon'ble Supreme Court in the matters of Municipal Corporation, Jabalpur & others and India Household and Healthcare Ltd. (Supra), the Arbitral Tribunal had no jurisdiction to proceed with the arbitration as the appointment itself was contrary to the terms of agreement. Thus, the impugned order passed by the District Judge and consequently the award dated 31-1-2006 deserves to be set aside on this ground.

15. The subsequent ground of challenge to the legality and validity of the

appellate order and consequently the award is that the award is not a reasoned one and, therefore, it deserves to be set aside. In support of the argument, it has been canvassed by the appellant that under the appointment order itself, the arbitrator was called upon to give a reasoned award and otherwise also u/s 31(3) of the Act of 1996 unless the parties have agreed that no reasons are to be given, the arbitral award shall state the reasons upon which it is passed.

16. Elaborating the aforesaid argument, learned Senior Advocate appearing for the appellant has taken this Court to the relevant part of the award ((c) Operative Part), which is at page 58 onwards of the paper book. On the other hand, learned Senior Advocate appearing for the respondent has vehemently urged that the Arbitrator has assigned the reasons though they are not like reasons ordinarily assigned by a trained judge. According to him, the award runs into 70 pages and at least a part of the award is based on claim admitted by the appellant, therefore, it cannot be said that the award is not a reasoned one.

17. While delivering the award concerning claims claimed at page 58, it has been mentioned by the Arbitrator that the claimant has divided the financial claim into 9 heads with the first head having 6 sub heads and the second sub head of this having 20 counts with further pronouncement that "I have tried to go for reasoning while awarding or disagreeing, which is described here under." meaning thereby that the earlier part of the award only states the case of either party and the preliminary objections raised by the appellant and the reasoning for actual award has been dealt with starting from this paragraph of the award. However, in clause 1 (a) at page 59 while dealing with the claim for the value of work done without measurement, it has been observed that in construction works of this nature, there can always be some items left unmeasured, particularly when the measurements are done ex parte and thereafter it has been said that considering the stand taken by the parties and as final measurements made by the respondent/management were ex-parte, he is inclined to award 25% of Rs. 9,79,630.54/-. There appears complete guess work having no foundation at all much less any reasoning by the Arbitrator. Likewise in para 1(b), concluding part of which is at page 62, it has been observed that "After going through claims of the Claimant on these counts and the reply of the Respondents, it is found that in some items the entire claim is reasonable whereas in some others it is partly reasonable. There are few where the claim cannot be accepted". It further says that without going to all these, the Tribunal feels that 50% of the claim can be allowed under this head 1 (b) and so an award for Rs. 23,69,942.50/- is made under this sub head." If the Arbitrator was of the opinion that some claim is reasonable and some are partly reasonable and others cannot be accepted, he should have made efforts to segregate the claim instead of venturing into guess work and allowing 50% of the claim without assigning any reason as to on what basis 50% is allowed. Yet again, while passing the award under head 1 (c), 1 (f), 4, 5, 6, claim has been awarded on the basis of guess work and thus they clearly appeared to be without any reason.

18. In the matter of *Re Poyser and Mills*" Arbitration {(1963) 1 All ER 612 (QBD)}, it has been held thus:-

It is a very difficult matter to say whether that is properly to be treated as something wrong on the face of the award. I am bound to say this, and again I do not think that it was altogether disputed by counsel for the landlord, that a reason which is as jejune as that reason is not satisfactory, but in my view it goes further than that. The whole purpose of s.12 of the Tribunals and Inquiries Act, 1958, was to enable persons whose property or interests were being affected by some administrative decision or some statutory arbitration to know, if the decision was against them, what the reasons for it were. Up to then, a person's property and other interests might have been gravely affected by a decision of some official, the decision might have been perfectly right, but the person against whom it was made was left with the real grievance that he was not told why the decision had been made. The purpose of s.12 was to remedy that, and to remedy it in relation to arbitrations under the Agricultural Holdings Act, 1948. Now, Parliament having provided that reasons shall be given, in my view that must clearly be read as meaning that proper, adequate, reasons must be given; the reasons that are set out, whether they are right or wrong, must be reasons which not only will be intelligible, but also can reasonably be said to deal with the substantial points that have been raised, and in my view it is right to consider that statutory provision as being a provision as to the form which the arbitration award shall take. If the initial form of the award before the giving of the reasons had in any way failed to comply with the statutory provisions as to form, then it would have been ground for saying that the award was bad on the face of it, and, now that Parliament has required that reasons shall be incorporated, I think that if those reasons do not fairly comply with the form which Parliament intended that they should have, then that is an error on the face of the award, and equally if the reasons are given in a separate letter. In my view, having regard to para, (iii) of the letter of July 30, 1962 (4), this award, including the reasons so stated, does not, by virtue of s.12 of the Act of 1958, comply with the proper form and therefore there is an error on the face of the award; that is, on my view, an error of law on the face of the award, properly so described, rather than technical misconduct. No one here suggests actual misconduct on the part of the arbitrator, but it may well be that what has gone wrong here is something which is capable properly of being described both as misconduct and as error of law on the face of the award. If so, in my view, the fact that it is the latter brings it within the jurisdiction of this court.

I do not want it to be thought for a moment that I am saying that any minor or trivial error, or failure to give reasons in relation to every particular point that has been raised at the hearing, would be sufficient to invoke the jurisdiction of this court. Far from it. There must be something wrong and inadequate in the reasons that are given in order to enable the jurisdiction of this court to be invoked. In the present case para, (iii) has sufficient substance, and accordingly I hold that there is an error of law on the face of the award, that the motion

succeeds and that the award must be set aside.

19. The rationale of requirement of reasons is that reasons assured that the Arbitrator has not acted capriciously. The reasons reveal the grounds on which the Arbitrator reached the conclusion which adversely affects the interest of a party. Contractual stipulation of reasons means proper and adequate reasons.

Literal meaning of reasons is a ground or motive for a belief or a course of action. It is in this sense that the award must state the reasons for the amount awarded.

20. In the matter of Union of India Vs. Mohan Lai Capoor and others[(2003) 2 SCC 836], it has been held that "Reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject matter for a decision whether it is purely administrative or quasi-judicial. They should reveal a national nexus between the facts considered and the conclusions reached. Only in this way can opinions or decisions recorded be shown to be manifestly just and reasonable." Thus, where the Arbitrator has failed to make his mind known as to the basis on which he acted for awarding a particular amount on a particular head, like in the present case, by no stretch of reasoning, it can be reckoned as a reasoned award. Recording a satisfaction in general terms that the claimant may have suffered loss and thereafter awarding a particular percentage of the award without even trying to assign the reasons as to the basis for arriving at such a percentage cannot be construed as a reasoning for awarding amount.

21. In the present case, apart from statutory prescriptions u/s 31(3) of the Act of 1996, the order of appointment of Arbitrator also made it obligatory for the arbitrator to pass a reasoned award. However, since this Court has found that the award is not reasoned on several counts, it requires to be set aside on this ground also.

22. On the basis of judgment of the MP. High Court in the matter of Ramsahai Sheduram Vs. Harishchandra Dullchandji and Another, learned Senior Counsel appearing for the respondent/claimant argued that the counter claim preferred by the appellant has also been allowed and the same has been adjusted in the final claim amount and the appellant being not in a position to challenge the award in his favour is also not entitled to challenge other part of the award, which is in favour of the respondent/claimant, therefore, this appeal must fail on this ground. In the said judgment of the MR High Court, the following has been held in para-17:-

17. While at it, we find one aspect of the case to which the lower Court does not seem to have given due attention. Sometime in April, there was a decision by the arbitrator in a small part of the dispute involving about 6000/-. Again, towards the end of May, there was another in regard to the materials collected on the sites. While it is not clear whether the decision on the dispute involving 600/- has been included in this award, it is clear that the decision regarding the

building materials has not been (and could not be) included in the award, and was given separately. Both the parties have accepted that decision and have accordingly dealt with the materials allotted to them. Now it is not possible for a party to an arbitration having accepted and been benefited from part of the arbitrator's decision to question the rest. This arbitrator was to decide every one of the disputes arising between the parties out of these building contracts. As a matter of convenience, he gave the decision in the award in regard to such of them as could be calculated in terms of money while he decided separately the dispute regarding the materials as such in the end of May. The whole process is really one arbitration in which a piecemeal acceptance or challenge of the decision cannot be allowed. There is case law on this point; but the principle is very simple. A party to arbitration should take the decision of the arbitrator as a whole and cannot, having taken advantage of the part suitable to him, be heard to challenge a part which he finds not so suitable. On this view, the appellant should have been estopped from objecting to the award on any grounds whatsoever.

It appears, the award before the MP. High Court was passed by a separate order and one part of the order was complied with by the parties and the other part was challenged and in that fact situation, it has been held that a party to the arbitration having taken advantage of the part suitable to him cannot be heard to challenge a part which he finds not so suitable.

23. In the present case, the award is composite one. The entire award was under challenge before the District Judge and the order of the District Judge in which the award has merged is under challenge before this Court. Merely because counter claim has been raised and it has been allowed to some extent even though in the finality, the appellant was made to pay huge amount of Rs. 1,73,22,869.95/-, challenge to the award as a whole is quite different than challenging the award which was passed separately and one of which was acted upon, as happened before the MP. High Court in the matter of Ramsahai Sheduram (Supra).

24. In the opinion of this Court, since the entire award was under challenge before the District Judge, it cannot be said that the appellant has agreed to or has complied with that part of the award which was suitable to him. In fact, since the amount awarded has been calculated as a whole, challenge to the award shall have to be addressed within the four corners of law and the appellant is not estopped from challenging the award as a whole. If it is allowed, then in all such cases wherein counter claim is raised, award for a paltry sum under the head of counter claim may be awarded while allowing huge amount of claim raised by the claimant and the appeal filed by the aggrieved party will have to be dismissed as not maintainable. An aggrieved party cannot be denied his right to file appeal under the Act of 1996 on this ground if he is required to make payment of huge amount on the basis of unreasoned award.

25. In view of the above, since this Court has found that the Arbitral Tribunal has

no jurisdiction to proceed with the arbitration as the appointment itself was contrary to the terms of agreement and is squarely covered by the judgment of the Supreme Court in the case of Municipal Corporation, Jabalpur and others (supra) and also on the ground that the award is not reasoned, there is no necessity of dealing with the other grounds raised by the appellant. Accordingly, the appeal is allowed and the impugned award is set aside.