

(2017) 02 TP CK 0034
In the Tripura High Court
Case No : 03 of 2012

Delux Engineering Represented by its sole proprietor Shri
Narayan Debnath

APPELLANT

Vs

The Commandant, 6th Bn. Tripura State Rifles (IR-II)
Teliamura, P.O. Chakmaghat, & Anr.

RESPONDENT

Date of Decision : 22-02-2017

Acts Referred:

[Arbitration and Conciliation Act, 1996](#), [Section 34](#), [Section 37\(1\)\(b\)](#) - Application for setting aside arbitral award - Appealable orders

Citation : (2017) 02 TP CK 0034

Hon'ble Judges : T. Vaiphei, S.C. Das

Bench : Division Bench

Advocate : SM Chakraborty, N Majumdar

Final Decision : Allowed

Judgement

1. This appeal under Section 37(1)(b) of the Arbitration and Conciliation Act, 1996 is directed against the judgment/order dated 14.08.2012 passed by the learned District Judge, West Tripura, Agartala in case No. Misc. (Arbitration) 08 of 2010 whereunder the learned District Judge refused to interfere with the arbitral award dated 06.03.2010 passed by the sole arbitrator namely, Director General of Police in Arbitration case No. 02/2007.

2. We have heard learned senior counsel, Mr. SM Chakraborty for the appellant and learned counsel, Mr. N Majumdar for the respondents.

3. A very short but interesting and important question of law is involved in this appeal. It is - Whether an arbitral tribunal has got jurisdiction to initiate and/or entertain an arbitral proceeding in absence of any dispute raised and referred to the arbitrator?

4. Shorn of unnecessary details, the undisputed facts are that the respondent

No.1 floated a tender notice No. TSR/736/MT dated 08.04.2002 for construction of four numbers of aluminum district bus body on TATA chassis model LP-1510/52 as per the approved specification and in response to that tender notice, the petitioner submitted his tender and became the lowest tenderer. Accordingly work order No. TSR/736/MT/7930-35 dated 26.07.2002 was issued in favour of the petitioner and an agreement on the same date was also signed between the petitioner and the respondent regarding execution of the work, the terms and conditions, penalty clause, etc. etc. According to the claimant, the petitioner was supposed to construct the bus body at a cost of Rs.3,50,132/- per bus and the construction work should be completed within 100 days from the date of delivery of the chassis. Some dispute arose between the parties in respect of execution of the work and the petitioner could not complete the construction of the bus bodies and he claimed Rs.4,59,706/- for the works he had done in course of execution of the work. Respondent No.1 refused to entertain the claim of the petitioner and hence a dispute arose between the parties requiring resolution of the dispute.

5. There was an arbitration clause in the agreement (clause- 14) which reads as follows:- "14. In case of any dispute of difference arising between the parties on relation to or out of this contract the same shall be referred to the Director General of Police, Govt. of Tripura, Agartala for arbitration and such arbitration proceedings shall be governed by the provisions of the Indian Arbitration Act, 1940 and the decision of the arbitration shall be final and binding on both the parties. Finalization of dispute, if any, in course of this deal shall be restricted to the legal jurisdiction at Agartala only".

Since the petitioner raised claim and it was denied by the respondent, the dispute as per the agreement, as aforesaid, was referred to the sole arbitrator, the Director General of Police.

6. The reference so made was registered as Arbitration Case No. 01 of 2007 and both side appeared before the sole arbitrator and petitioner submitted his claim statement and the respondent submitted objection/counter claim.

7. After appearance before the sole arbitrator, the respondent submitted a separate claim petition claiming an amount of Rs.34,42,604/- against the appellant and the sole arbitrator registered that claim as a separate Arbitration Case No. 02 of 2007.

8. The sole arbitrator decided both the arbitral proceedings together and disposed of the same by separate judgment on the same date, i.e. on 06.03.2010. In the Arbitration Case No. 01 of 2007, i.e. the disputed claim of the appellant, the arbitrator awarded a sum of Rs.1,66,500/-. In Arbitration Case No. 02 of 2007 the arbitrator awarded a sum of Rs.2,80,105.60/-

9. The appellant, felt aggrieved, challenged the award made by the sole arbitrator in Arbitration Case No. 02 of 2007 by filing a petition under Section 34 of the Arbitration and Conciliation Act before the District Judge, West Tripura

raising inter alia, the point of jurisdiction of the sole arbitrator on the ground that no claim was raised by the respondent to have a dispute for reference and therefore Arbitration Case No. 02 of 2007 was beyond jurisdiction of the arbitrator. Learned District Judge by the impugned judgment dated 14.08.2012 dismissed the petition of the appellant under Section 34 and hence the present appeal.

10. Learned senior counsel, Mr. Chakraborty submitted that the respondent did not raise any claim against the petitioner in respect of execution of work under the agreement. The petitioner only raised his claim which was denied by the respondent and therefore reference was made and the Tribunal was supposed to dispose of that reference only. The respondent had no authority to raise the fresh claim before the arbitrator and the arbitrator had no jurisdiction to entertain such a claim.

11. Arbitration is basically an alternative dispute resolution mechanism. There must be a dispute between the parties to the agreement and once a claim is raised and it is denied by the other party to the agreement it would be amounting to a dispute and when such a dispute has arisen and is referred to the arbitrator, the arbitrator is supposed to adjudicate and/or decide that dispute only. The arbitrator cannot usurp the jurisdiction of entertaining a dispute at his own during pendency of the referred arbitration. Unless a party to the agreement raised a claim and the claim is denied or disputed by the other party to the agreement there cannot be dispute and if there is no dispute raised in terms of the agreement, there cannot be a reference to the arbitrator.

12. What is a "dispute" is not defined in the Arbitration and Conciliation Act. It is to be understood that a dispute means a party to the agreement raised a claim against the other party and the other party to the agreement denied that claim. So there must be raising of a claim and denial of the same between the parties to the agreement for invoking the jurisdiction by an arbitrator. The Apex Court in the case of Canara Bank and Ors. Vs. National Thermal Power Corporation and Anr., reported in (2001) 1 SCC 43 in para 12 of the judgment observed, - "..... the meaning of the word "dispute" is , "a controversy having both positive and negative aspects. It postulates the assertion of a claim by one party and its denial by the other.".

13. In the present case, it is an admitted position that there was an agreement signed by the petitioner and the respondent in respect of execution of the work of fabrication of four numbers of bus bodies and the agreement was signed on 26.07.2002 and the work order was issued on the very date. The petitioner being the contractor as per the agreement was supposed to execute the work within 100 days but he could not execute the work within the stipulated time because of alleged default/lapses on the part of the respondent. He, therefore, raised his claim for the work he performed in respect of the fabrication of bus bodies which was denied by the respondent and therefore, the dispute was referred to the sole arbitrator, i.e. the Director General of Police, Tripura. After that reference was

made, the respondent also raised a claim before the arbitrator and learned arbitrator entertained that claim and registered it as a separate case, i.e. Arbitration Case No. 02 of 2007.

The petitioner raised objection in respect of such entertaining of the claim of respondent as a dispute but that objection was not considered. The sole arbitrator, as already stated hereinbefore, decided both the cases and made part award.

14. The award made in Arbitration Case No. 01 of 2007 has not been challenged by the respondent. But the petitioner challenged the award made in Arbitration Case No. 02 of 2007 by filing application under Section 34 before the District Judge but the District Judge did not at all answer that question as to whether there was any claim raised by the respondent before the reference and whether there was any dispute.

15. Mr. Chakraborty, learned senior counsel has, in support of his contention, referred to the case of Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority reported in AIR 1988 SC 1007 wherein in para 4 of the judgment, the Apex Court observed: "4. A dispute arises where there is a claim and a denial and repudiation of the claim. The existence of dispute is essential for appointment of an arbitrator under S.8 or a reference under S.20 of the Act. There should be dispute and there can only be a dispute when a claim is asserted by one party and denied by the other on whatever grounds. Mere failure or inaction to pay does not lead to the inference of the existence of dispute. Dispute entails a positive element and assertion in denying, nor merely inaction to accede to a claim or a request. When in a particular case a dispute has arisen or not has to be found out from the facts and circumstances of the case."

16. He has also referred to the case of S.N. Prasad, Hitek Industries (Bihar) Limited vs. Monnet Finance Limited and Ors. reported in (2011) 1 SCC 320 wherein the Supreme Court in para 8 of the judgment observed: "8. Thus there can be reference to arbitration only if there is an arbitration agreement between the parties. The Act makes it clear that an Arbitrator can be appointed under the Act at the instance of a party to an arbitration agreement only in respect of disputes with another party to the arbitration agreement. If there is a dispute between a party to an arbitration agreement, with other parties to the arbitration agreement as also non-parties to the arbitration agreement, reference to arbitration or appointment of arbitrator can be only with respect to the parties to the arbitration agreement and not the non-parties."

17. Mr. Chakraborty also referred to the case of Collector of Central Excise, Goa Vs. M/s. Phil Corporation Limited, reported in 2005 AIR SCW 5265 wherein the Apex Court in para 12 of the judgment has observed: "12. So far as the second ground is concerned, we have seen the two applications made by the Respondent. It prima facie appears that the two applications were for referring,

in all, 28 claims to arbitration. The Respondent then made 39 claims before the Arbitrators. The Umpire has awarded in respect of all the 39 claims. If claims not referred to Arbitration have been dealt with and awarded the Umpire would have exceeded his jurisdiction. However Mr. Moolchand Luhadia, partner of the Respondent who appeared in person, contended that all the claims were referred to the Arbitrators by the Order dt. 1st March, 1985. He submitted that this is clear from the directions to the Arbitrators to decide all disputes arising between the parties. We are unable to accept this submission. The Order dt. 1st March, 1985 allows "application dt. 9th April 1983 as part of application dt. 5th October, 1981". It is in the context of claims raised in these two applications that the Arbitrators are instructed to decide all disputes between the parties. Mr. Lohadia then submitted that all claims were included in the two applications made by them. It was submitted that in the applications some of the claims were clubbed together but whilst filing the statement of claims they were segregated and separated. As we are proposing to refer the matter back to an Umpire, we do not propose to go into the question as to whether or not the 39 claims were part of the two applications filed by the Respondent. In our view, this is a question which can be decided by the Umpire. All that we need to clarify is that if any claim did not form part of the two applications the same cannot be arbitrated upon and the Umpire will confine the reference to the claims made in the two applications. It must be mentioned that in the case of Orissa Mining Corporation Ltd. Vs. Prannath Vishvanath Rawlley reported in (1977) 3 SCC 535 this Court has held that when an agreement is filed in Court and an order of reference is made, then the claim as a result of the order of reference is limited to that relief and the arbitrator cannot enlarge the scope of reference and entertain fresh claims without a further order of reference. It must also be mentioned that Mr. Lohadia had relied upon the case of H. L. Batra & Co. vs. State of Haryana & Anr. Reported in (1999) 9 SCC 188. In this case the award of the arbitrator was set aside and a new arbitrator was appointed. The order stated that the new arbitrator was appointed "for settling disputes between the parties". Before the new arbitrator 7 additional claims, over and above the 30 claims originally made, were made. It was held that the award was not vitiated as the terms of reference did not confine the second reference to only 30 claims. This authority is of no assistance to the Respondent as it does not lay down that the arbitrator can entertain claims not referred to him."

18. Learned counsel, Mr. Majumdar for the respondent submitted that when the petitioner raised his claim against the respondent of an amount of Rs.4,59,706/-, the respondent by writing letter dated 04.02.2004 repudiated the claim and made a further claim of Rs.2,80,105.60/-. So it cannot be said that the respondent did not raise any claim.

19. Letter dated 04.02.2004 itself shows that it was a reply given by the respondent in respect of the claim raised by the petitioner. That claim was repudiated by the respondent and in that repudiation, the respondent taken the plea that petitioner was liable to pay Rs.2,80,105.60. There is no evidence that

the respondent raised a claim and that was repudiated or denied by the petitioner. The contention of the respondent, as stated in the reply dated 04.02.2004 may be at best treated as a defence taken by the respondent against the claim made by the petitioner. There is nothing to show that the respondent raised a claim against the petitioner and the petitioner repudiated the same and therefore there was a dispute cropped up and thereafter, there was any reference to the arbitrator.

20. From the judgment/award made by the sole arbitrator in arbitration case No. 02/2007 it is crystal clear that on the basis of a cross claim made by the respondent, the Arbitration Case No. 02/2007 was registered by the sole arbitrator. For reference we may quote here a part of para 1 of the judgment, which reads as follows: "The instant arbitration proceeding is advanced on the petition of the Claimant (Commandant, 6th Battalion, TSR) placed before the sole arbitrator as a cross claim against the Arbitration proceeding No. -1/2007. The subject matter of the two arbitration proceedings are same. In the Arbitration Proceeding no. 01/2007, the claim of the Claimant (respondent herein) and the claim of the claimant (Commandant, 6th Battalion, TSR) in the instant Arbitration case are in context of the disputes raised from the same set of facts/contract as such the two cases run simultaneously and the documents filed by both the parties in the said two arbitration proceedings were intermittently reline on to substantiate their claims."

The above observation of the arbitrator itself makes it clear that a cross objection was submitted by the respondent before the sole arbitrator and he registered it as a separate case and decided it simultaneously with the original case which was referred to the arbitrator.

21. We have no hesitation to arrive at a conclusion that there was no claim raised by the respondent in course of execution of the work against the petitioner, under the agreement, and, the petitioner repudiated such claim and thereby a dispute arose during the execution of the work in terms of the agreement and such a dispute was referred to the arbitrator for decision. The sole arbitrator acted beyond his jurisdiction while registering the cross objection as Arbitration Case No. 02/2007 and hence the judgment and award dated 06.03.2010 passed by the learned sole arbitrator is liable to be interfered with and set aside. Accordingly, the same is set aside.

22. If the respondents suffered any loss because of the act or omission on the part of the petitioner, they have a right to approach the appropriate forum (Civil Court) since no dispute raised by the respondent at the time of execution of the work, i.e. at the time the agreement was in force.

23. The appeal is accordingly allowed and stands disposed of. Send back the LC records alongwith a copy of this judgment.