

(2011) 12 CAL CK 0072
In the Calcutta High Court

Case No : G.A. No. 3524 of 1999 with A.C. No. 380 of 1992

Eastern Coalfields Ltd

APPELLANT

Vs

Deep Sikha and Co

RESPONDENT

Date of Decision : 22-12-2011

Acts Referred:

Arbitration Act, 1940 — Section 20, 30, 31(4), 33
Arbitration and Conciliation Act, 1996 — Section 42
Civil Procedure Code, 1908 (CPC) — Section 21

Citation : (2012) 1 CALLT 599 : (2012) 2 CHN 201

Hon'ble Judges : Sanjib Banerjee, J

Bench : Single Bench

Advocate : S.S. Bose, for the Appellant;

Judgement

Sanjib Banerjee, J.—The Court : The primary challenge to the award is on the ground that the arbitral tribunal lacked authority in taking up the reference. The present challenge is under sections 30 and 33 of the Arbitration Act, 1940. The respondent is not represented even at the second call. The petitioner has issued several notices to the respondent but it appears that the respondent firm may not be existence and it does not carry on any business at 2, Church Lane. The petitioner will retain the notices issued to the respondent for future reference. On the merits of the award, the petitioner says that the arbitrator failed to indicate any reasons as to why the petitioner's counter-claim was dismissed. The petitioner also assails the award in favour of the contractor. On a reading of the award, it appears that sufficient basis has been disclosed in allowing a part of the claim. The petitioner cannot now question the basis for the award by referring to the evidence that was before the arbitrator. On the basis of the reasons given in support of the award, to the extent it has been allowed, there is no ground for the petitioner to challenge the same.

2. As to the petitioner's challenge in the arbitrator having discredited the entirety of the counter-claim it appears that no reasons have been furnished. The

1940 Act did not mandate reasons to be given by the arbitrator. The petitioner cannot demonstrate that the agreement between the parties obliged the arbitrator to furnish reasons in support of any decision. In such view of the matter, the challenge, both on the merits of the amount awarded in favour of the respondent and on the dismissal of the counter-claim, appears unmeritorious.

3. That leaves the primary question that has been urged by the petitioner: the issue of jurisdiction. The petitioner contends that since the petitioner's registered office is in Sanctoria in the district of Burdwan and since the entirety of the work was to be performed in some coal mine thereabouts and there are no coal mines in the town of Calcutta, the respondent's petition u/s 20 of the 1940 Act could not have been filed in this Court. The petitioner says that this Court had erroneously assumed jurisdiction in the section 20 proceedings and, consequently, the order for setting up the arbitral tribunal and all proceedings before the arbitrator should be seen as a nullity. The argument is unacceptable and the petitioner is precluded from urging such matter.

4. To begin with, section 31(4) of the 1940 Act, which is comparable to section 42 of the Arbitration and Conciliation Act, 1996, provides that once an application pertaining to a reference has been carried to a particular Civil Court, if such Court was competent to receive it, future applications relating to the reference have to be carried to the same Court. The petitioner seeks to suggest that since the question of competence is left open in section 31(4) of the 1940 Act, unless it is found that the court which first received an application pertaining to a reference was competent, the provision would not come into play. To an extent the petitioner is right. However, since the petitioner was a party to the section 20 proceedings and ought to have objected to the jurisdiction of the Court to entertain it, the final decision having gone in favour of the respondent and against the petitioner would preclude the petitioner from urging the objection at a later stage. As to whether this Court was competent or not to receive the section 20 petition ought only to have been urged in course of the section 20 proceedings and cannot be agitated at this stage long after the conclusion of the section 20 petition. There is a good reason therefore. First an objection as to territorial jurisdiction does not go to the root of the matter nor is it incapable of waiver. Section 21 of the Code recognises the principle, both in course of a suit and in course of execution. Secondly, if the question of jurisdiction was taken by the petitioner herein at the section 20 stage and it was overruled, then the principles of res judicata would prevent the petitioner from urging the ground subsequently. Similarly, if the ground was available to the petitioner in course of the section 20 proceedings and was not taken, the petitioner is again precluded by the principles of res judicata from urging it at a later stage. Upon the order for filing of the arbitration agreement being made in the proceedings u/s 20 of the 1940 Act, the issue as to the competence of the Court to entertain the petition stood concluded. In the petitioner not having preferred an appeal, or having failed in the appeal, the petitioner could no longer have urged the ground.

5. The petitioner has referred to an unreported judgment rendered in Shafik Khan v. Eastern Coalfields Ltd. on November 2, 1998 in GA No. 2351 of 1998, Award Case No. 13/1994. The judgment was in course of the execution proceedings launched by a contractor against the petitioner herein. Though in that case the reference was pursuant to an order of this Court u/s 20 of the 1940 Act, the reasoning in the judgment would be inapplicable to the matter at hand because at the stage of execution of the award, the principle of section 31(4) of the 1940 Act would have no application. It is no different under the 1996 Act. The procedure in course of the reference and the treatment of the award which is a product of the reference is governed by the provisions of the applicable statute relating to arbitration. However, matters pertaining to execution are somewhat different. Under the 1940 Act an award has to be made a judgment of Court and the resultant decree executed as an ordinary decree passed in a civil suit. The procedure and mechanism for execution would be as recognised in the Civil Procedure Code. Similarly, under the 1996 Act, by virtue of section 36 thereof, an award is deemed to be a decree and is executable under the provisions of the Code. Section 42 of the 1996 Act does not come into play in the matter of execution. That is to say, that even if a petition for interim measures was entertained by a particular Court, it would not follow that the award in the related reference would have to be executed before the same court. It is in such circumstances, that the unreported judgment relied upon by the petitioner is of no relevance in the present context.

6. The other judgment that the petitioner has cited is one reported at 1997(1)CHN 343 (Sk. Yunis v. Eastern Coalfields) and was rendered on a petition u/s 20 of the 1996 Act where the challenge as to the competence of this Court was considered in course of the section 20 proceedings itself.

7. There is no merit in the petitioner's challenge on the ground that the arbitral award should be treated as a nullity since the arbitral tribunal did not have any authority to take up the reference as the reference thereto was made by a Court that was incompetent to receive the section 20 petition.

8. GA No. 3524 of 1999 is dismissed with costs. As a consequence, there will be a judgment and decree in favour of Deep Sikha and Co. in the sum of Rs. 4,81,068/- together with interest thereon at the rate of 9% per annum from the period beginning ninety days after the date of the award.

Urgent certified photocopies of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.