

(2007) 05 DEL CK 0006
In the Delhi High Court
Case No : OMP No. 105 of 2004

Flex Engineering Ltd.

APPELLANT

Vs

Antartica Construction Co. and Another

RESPONDENT

Date of Decision : 04-05-2007

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 3, 34, 34(2), 41, 75
Civil Procedure Code, 1908 (CPC) — Section 34

Citation : (2007) 2 ARBLR 387 : (2007) 96 DRJ 90

Hon'ble Judges : S.N. Dhingra, J

Bench : Single Bench

Advocate : H.L. Tikku and Manjeet Singh and Asha Arora, for the Appellant;
Anusuya Salwan, for the Respondent

Judgement

Shiv Narayan Dhingra, J.—The petitioner has filed this application u/s 34 of Arbitration and Conciliation Act, 1996 for setting aside the arbitral award dated 24th November, 2003 alleging that the petitioner received the award on 5th December, 2003. In the application, the petitioner has submitted that the award of the arbitrator was tainted with fraud, misrepresentation, cheating and forgery committed by the respondent and the learned Arbitrator despite having knowledge about the acts of omission and commission committed by the respondent while presenting the statement of claims along with forged documents, did not consider the submissions made by the applicant pointing out glaring discrepancies on the record and allowed the false and frivolous claim of the respondent. The award was in conflict with public policy of India.

2. The respondent was awarded contract for road work by the petitioner in respect of site A-1, Sector 60 NOIDA vide work order dated 6th April, 1995. The respondent claimed that they had completed the road work to the entire satisfaction of the petitioner and submitted their final bills in respect of this work for a sum of Rs. 11,57,212/-. The petitioner corrected the final bill for an amount of Rs. 11,21,953.50 and gave an endorsement on the bill ?Rate checked and

found correct?. The said bill was duly signed by claimant/respondent as well, however, the petitioner later on reduced the bill to Rs. 9,91,545/-. The petitioner did not even pay the amount of Rs. 9,91,545/- to the claimant/respondent. The respondent Therefore, raised a dispute and the matter was referred to the Arbitrator. The other disputes raised by the respondent were in respect of rates applicable for the items of earth work, for providing curbstone and in respect of road work at site A-1, Sector 60, NOIDA. The respondent also raised a dispute in respect of another contract regarding construction of concrete road at site A-2, Sector 60 NOIDA for which a separate work order and a separate schedule of rates was allegedly issued by the petitioner. The work order for site A-2 was dated 2nd December, 1995 and schedule of rates was dated 15th September, 1995. The petitioner disputed that there was a separate work order for site A-2 and took the plea that the claimant was awarded road work contract in respect of site A-2 in lieu of the site A-1 in terms of contract documents dated 6th April, 1995 and contended that the contract document filed by the respondent in respect of site A-2 was forged. It was a document for some other contractor and did not apply to the respondent. The said contract was for contractor Mr. Bhupender, whose signatures appeared on the contract. The respondent/claimant forged the last page of the contract agreement by writing words "accepted by contractor" in his own hands.

3. The claimant/respondent claim before the Arbitrator was in respect of several items. The Arbitrator party allowed the claim of the respondent and passed item-wise award allowing following claims.

Claim No. 1 : Construction of Road work at A-1 Sector 60, NOIDA : the claimant was awarded admitted amount of Rs. 9,91,544.47/- plus an amount of Rs. 1,69,457.28 on account of surface excavation of earth work. Another amount of Rs. 46,000/- was awarded for admittedly providing 1000 curbstones. Thus, a total amount awarded is Rs. 12,07,001/-

Claim No. 2 : Claimant claimed an amount of Rs. 55,762/- against construction of CC platform. This amount was allowed on the basis of admission of the petitioner that amount was payable.

Claim No. 3 : Claimants had claimed an amount of Rs. 42,69,965/- for construction of concrete road at A-2, Sector 60 NOIDA. The arbitrator discussed the plea of petitioner applicant about the rate schedule/contract being forged and found the plea to be false. The Arbitrator then analyzed the sub-heads under the claim and gave award sub-head/item wise and awarded a total sum of Rs. 42,12,668/- under this claim.

Claim No. 4 : A sum of Rs. 1,08,000/- for dismantling and construction of heavy foundations for large machines at site A-2, Sector 60 NOIDA was allowed and awarded the full claim.

Claim No. 5 : Claimants had claimed an amount of Rs. 5,05,658/- for providing and fixing RCC pipes. This amount was allowed by the Arbitrator in full.

Claim No. 6 : Claimants had claimed an amount of Rs. 1,99,519/- on account of construction of civil yard at A-2 Sector 60, NOIDA. The claim was allowed by the Arbitrator.

Claim No. 7 : Claimants had claimed an amount of Rs. 2,81,639/- on account of construction of underground water tank at Sector 57, NOIDA. There was no dispute that work was executed by contractor. However, petitioner made certain deductions from final bill. The Arbitrator found that the petitioner could not justify some deductions but had been able to justify part of deductions. Thus, the Arbitrator awarded an amount of Rs. 2,19,132/- in favor of the claimants/respondents.

4. The total amount found due in favor of the claimant by the Arbitrator was Rs. 65,07,740/- and considering that out of this amount, an amount of Rs. 42,04,041/- was already received by the claimant and Rs. 3,00,750/- had been adjusted by way of T.D.S., the respondent was held entitled to receive an amount of Rs. 20,02,949/-.

5. The claim of the respondent in respect of damages on account of breach of contract by petitioner was rejected by the Arbitrator. Similarly, claim for compensation for loss of profit due to non-execution of the whole work and prolongation of the contract period was also rejected. The interest was claimed by the respondent @ 24% p.a. the Arbitrator found that the claimant has been deprived of the money of the final bill of the work which was concluded on 5th February, 1996 for such a long period and awarded an interest @ 15% p.a. from 16th August, 1996 up to the date of publishing of award and awarded further interest @ 18% p.m. from the date of the publishing of award till payment. The Arbitrator also allowed Rs. 50,000/- towards cost of arbitration. Counter claims of the respondent on account of liquidation damages on account of delay was dismissed. Similarly, counter claim on account of repair of underground water tank and damages and hire charges for equipment and charges for additional provisions were dismissed.

6. The applicant has challenged awarding of amount by the Arbitrator against each item. As far as first item is concerned the contention of the claimant is that the Arbitrator wrongly interpreted the earth work item and wrongly awarded the amount against earth work to the respondent/claimant. Similar contentions have been raised by the petitioner in respect of other items. It is settled law that the Court while considering the application u/s 34 of Arbitration Act has limited jurisdiction and an award can be set aside only on the following grounds, as given in Section 34 Sub-section 2 which reads as under:

(2) An arbitral award may be set aside by the Court only if

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in

force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or failing such agreement, was not in accordance with this Part; or

(b) the Court finds that

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation ? Without prejudice to the generality of Sub-clause (ii) it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81.

7. The petitioner has failed to demonstrate in the application as to on which of the above grounds the award is challenged by the petitioner. The only ground taken by the petitioner is that the arbitration award was in conflict with public policy of India. The petitioner has failed to show as to what public policy of the State has been contravened by the award. During arguments, the only contention raised by the petitioner counsel was that the respondent had placed before the Arbitrator a forged rate schedule and contract and the award was based on this forged rate schedule and agreement. This aspect was specifically considered by the Arbitrator and the Arbitrator after analyzing the evidence, led by both the parties, came to the conclusion that the agreement and rate schedule relied upon by the respondent was not forged, rather the petitioner had taken a false plea that the signatures on the agreement were of third party (or of some other contractor). The Arbitrator found that the signature on the rate schedule / agreement was that of an employee of the petitioner. A perusal of the agreement showed that it was counter signed by one Bhupender and the petitioner took the stand before Arbitrator that Bhupender was an other contractor. The Arbitrator asked the petitioner to produce Bhupender. The petitioner failed to produce the so-called other contractor Bhupender. However,

the respondent produced documents containing signatures of Bhupender, an employee of the petitioner who had taken delivery from the respondent on behalf of petitioner showing that Bhupender was not an other contractor but an employee of the petitioner. In face of this evidence Arbitrator concluded that the rate schedule dated 15th September, 1995 was in respect of the work for site A-2 Sector 60 NOIDA and it was not an agreement in respect of some other contractor. The Arbitrator also considered the other documents placed on record by the parties and the correspondence in this respect and after considering the entire evidence came to the conclusion that petitioner had taken false stand in respect of rate schedule applicable to site A-2 Sector 60 NOIDA. Once the Arbitrator had come to the conclusion that the allegations of forgery made by the petitioner were false the award based on the documents does not amount to violation of any public policy of India.

8. It is settled law that if a matter has been referred to an Arbitrator, he becomes the sole and final judge of all questions both of law and of fact and the Court cannot sit in appeal over the award and re-appreciate the evidence and come to its own conclusion in respect of issues decided by the Arbitrator. This legal position has been categorically laid down in Union of India (UOI) Vs. A.L. Rallia Ram, . An award can be set aside only on the grounds of corruption or misconduct of the arbitrator or that a party has been guilty of fraudulent concealment or willful deception which are the factors which can be considered contrary to the public policy of the State. But the Court cannot set aside an award on the ground that the decisions appears to be erroneous. The award of the Arbitrator is ordinarily final and conclusive and it is binding on the parties. The Court can set aside the award only if a party succeeds in making out a case u/s 34 of the Arbitration Act. The petitioner has miserably failed in showing that the award was suffering from any infirmity.

9. The counsel for the petitioner also argued that the Arbitrator has wrongly awarded sum of Rs. 12,07,001/- against claim no. 1 by adding the difference in the admitted amount. He argued that since the dispute raised was only in respect of curbstones and excavation, the Arbitrator could have awarded only an amount of Rs. 46,000/- and Rs. 1,69,457.28. The Arbitrator could not have added this amount to Rs. 9,91,545/- since a final bill in this respect had already been approved. This contention also must fail as it is not the case of petitioner that the final bill had been paid. Moreover after the arbitrator has taken into account all payments made and TDS deducted by petitioner before awarding the balance amount.

10. Another issue raised by the petitioner is in respect of interest allowed by the Arbitrator. A perusal of the award would show that a substantial part of the amount allowed by the Arbitrator are admitted amounts which were to be paid by the petitioner to the respondent. It is not understood why the due amount was not paid by the petitioner when there was no dispute in respect of major part of the claims and the dispute was restricted only in respect of few items of

unsubstantial amount. If the petitioner had withheld the amount of the respondent without any justification and without there being any material dispute in respect of substantial amount, I consider that the Arbitrator was justified in awarding interest at the rate of prevalent bank rates at the time when the amount was due. In *Bhagawati Oxygen Ltd. Vs. Hindustan Copper Ltd.*, Supreme Court had considered the question of power of Arbitrator to award interest and observed as under:

So far as interest for pre-reference period is concerned, in view of the conflicting decisions of this Court, the matter was referred to a larger Bench in *Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa, Vs. N.C. Budharaj (Dead) by Lrs. etc. etc.*, . The Court, by majority, held that an arbitrator has power to grant interest for pre-reference period provided there is no prohibition in the arbitration agreement excluding his jurisdiction to grant interest. The forum or arbitration is created by the consent of parties is a substitute for conventional civil court. It is, Therefore, of unavoidable necessity that the parties be deemed to have agreed by implication that the arbitrator would have power to award interest in the same way and same manner as a Court.

Regarding interest pendente lite also, there was cleavage of opinion. The question was, Therefore, referred to a larger Bench in *Secretary, Irrigation Department, Government of Orissa and others Vs. G.C. Roy*, . The Court considered several cases and laid down the following principles: (SCC pp. 532-33, para 43)

43. The question still remains whether arbitrator has the power to award interest pendente lite, and if so on what principle. We must reiterate that we are dealing with the situation where the agreement does not provide for grant of such interest nor does it prohibit such grant. In other words, we are dealing with a case where the agreement is silent as to award of interest. On a conspectus of aforementioned decisions, the following principles emerge:

(i) A person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, call it by any name. It may be called interest, compensation or damages. This basic consideration is as valid for the period the dispute is pending before the arbitrator as it is for the period prior to the arbitrator entering upon the reference. This is the principle of Section 34, CPC and there is no reason or principle to hold otherwise in the case of arbitrator.

(ii) An arbitrator is an alternative forum for resolution of disputes arising between the parties. If so, he must have the power to decide all the disputes or differences arising between the parties. If the arbitrator has no power to award interest pendente lite, the party claiming it would have to approach the court for that purpose, even though he may have obtained satisfaction in respect of other claims from the arbitrator. This would lead to multiplicity of proceedings.

(iii) An arbitrator is the creature of an agreement. It is open to the parties to confer upon him such powers and prescribe such procedure for him to follow, as

they think fit, so long as they are not opposed to law. (The proviso to Section 41 and Section 3 of the Arbitration Act illustrate this point.) All the same, the agreement must be in conformity with law. The arbitrator must also act and make his award in accordance with the general law of the land and the agreement.

(iv) Over the years, the English and Indian courts have acted on the assumption that where the agreement does not prohibit and a party to the reference makes a claim for interest, the arbitrator must have the power to award interest pendente lite. *Seth Thawardas Pherumal Vs. The Union of India (UOI)*, has not been followed in the later decisions of this Court. It has been explained and distinguished on the basis that in that case there was no claim for interest but only a claim for unliquidated damages. It has been said repeatedly that observations in the said judgment were not intended to lay down any such absolute or universal rule as they appear to, on first impression. *Unit Jena case Executive Engineer (Irrigation), Balimela and Others Vs. Abhaduta Jena and Others*, almost all the courts in the country had upheld the power of the arbitrator to award interest pendente lite. Continuity and certainty is a highly desirable feature of law.

(v) Interest pendente lite is not a matter of substantive law, like interest for the period anterior to reference (pre-reference period). For doing complete justice between the parties, such power has always been inferred.

As to post-award, the point is covered by the decision of this Court in *Hindustan Construction Co. Ltd. Vs. State of Jammu and Kashmir*, . It was held there that an arbitrator is competent to award interest for the period from the date of the award to the date of decree or date of realization, whichever is earlier.

In view of the aforesaid decisions, we hold that it was within the power of the arbitrator to award interest. As to the rate of interest, the contention of HCL is that it ought to have been at the rate of six per cent only. The learned Counsel for HCL has strongly relied upon the decision of this Court in *State of Rajasthan and Another Vs. Nav Bharat Construction Co.*, . In that case, interest was awarded by the arbitrator at the rate of fifteen per cent. The said action was challenged by the State Government as well as the contractor. The contention of the State Government was that the arbitrator could not have awarded interest at the rate of fifteen per cent and it was exorbitant. The contractor, on the other hand, urged that interest ought to have been awarded at the rate of eighteen per cent. This Court held that it would be appropriate if interest at the rate of six per cent is awarded.

In our view, however, a relevant and germane factor weighed with the arbitrator in awarding eighteen per cent interest, that at that rate HCL had given advance to BOL. In view of the said circumstances, in our opinion, even that part of the award passed by the arbitrator did not deserve interference and the learned Single Judge and the Division Bench were not right in reducing rate of interest.

11. I find no merits in the objections raised by the applicant regarding the claims allowed by the Arbitrator and the pendente lite interest awarded by the Arbitrator. However, the Arbitrator has awarded 18% interest from the date of passing of award till payment of the amount. This rate of interest does not seem to be rationale and appropriate in view of the fact that the interest rates have substantially gone down after the economic reforms in our country. I am of the view that the interest awarded by the Arbitrator at 18% for the post award period is too high. I, Therefore, reduce the same to 8% and the claimant shall be entitled to 8% interest for post award period. I am supported this view by judgment of Supreme Court in Krishna Bhagya Jala Nigam Ltd. Vs. G. Harischandra Reddy and Another, .

12. The award is modified only to the extent that the claimant shall be entitled to 8% interest over the awarded amount from the date of award till payment of the amount.