

(2010) 10 CAL CK 0021

In the Calcutta High Court

Case No : A.P.O.T. No. 187 of 2010, A.P. No. 395 of 2008 and A.P.O. No. 201 of 2010

Graphic Industries Company

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 05-10-2010

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 31(6), 34

Citation : (2011) 1 CHN 792

Hon'ble Judges : Pinaki Chandra Ghose, J; Ashim Kumar Roy, J

Bench : Division Bench

Advocate : Reetobrata Mitra and Debangshree Biswas, for the Appellant;
Somendra Nath Das, for the Respondent

Final Decision : Allowed

Judgement

Pinaki Chandra Ghose, J.—This appeal is directed against an order and/or judgment dated 11th February, 2010 passed by the Hon'ble First Court where His Lordship was pleased to set aside the interim award published by the learned Arbitrator on 12th May, 2008.

2. The facts of the case briefly are as follows:

Pursuant to tenders invited by the Union of India through the Ministry of Railways in the year 1987-1989, the Petitioner was the lowest bidder and successful tenderer for supply of store items.

3. It is the further case of the Appellant is that during the period commencing from 1987-1989 when supplies, were made of such store items, those were duly received by the Respondent herein and used beneficially. Respective bills were raised for such purchase orders aggregating to Rs. 48,51,675.19. After making payment of a sum of Rs. 11,16,528.80, the Respondent failed, neglected and/or refused to make any further payment of the 124 bills submitted by the Appellant/Petitioner. The Respondent had admittedly withheld payment of 108 bills. To

recover such money due and payable to it, the Petitioner/Appellant had instituted various proceedings including the writ petition and filed a suit before this Hon''ble Court by appointing an Arbitrator to resolve the disputes between the parties herein on 16th February, 2004.

4. The case of the Appellant is that the arbitral reference commenced on 24th August, 2007 and the statement of claim was filed by the Petitioner/ Appellant herein on 3rd September, 2007 and on 14th April, 2007, the Appellant also filed an application for an interim order where the Respondent filed objection in respect thereof. The counter-claim was also filed by the Respondent.

5. The learned Arbitrator on 12th May, 2008 published an interim award of Rs. 25 lacs in favour of the Appellant. The Respondent challenged the said interim award u/s 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the said Act). The said application was allowed and the interim award was set aside by the Hon''ble First Court.

6. Being aggrieved, this appeal has been filed.

7. Mr. Reetobrata Mitra, learned Advocate appearing on behalf of the Appellant contended that the Hon''ble Judge considered each and every ground raised by the Respondent before the Hon''ble First Court and His Lordship on each and every ground held against the Respondent. In fact, it was further held by His Lordship that the learned Arbitrator gave the railways an opportunity to produce further documents. In spite thereof the railways did not produce any further evidence. Such facts would be evident from the documents appearing at page 385 of the Paper Book.

8. Mr. Mitra further contended that the Hon''ble First Court held that there is no doubt that the conduct of the railways in the reference has been far from exemplary. It is apparent from the minutes of the meeting relied upon by the railways that from 2007 the Railways has failed to produce any materials despite the indulgence shown by the Arbitrator.

9. Mr. Mitra further contended that the only ground which impressed His Lordship was that there was no indication to the parties that an interim award was forthcoming and had there been any such prior notice, the interim award was otherwise perfectly justified. He further submitted that there is no requirement under the statute for a prior notice to be given before the passing of the interim award. However, he drew our attention to page 420 of the Paper Book and submitted that prior notice of the interim award dated 12th May, 2008 was expressed in the presence of both the parties. Hence, he submitted that the parties were aware of the fact that an interim award was forthcoming. He contended that the other grounds raised by the Respondent herein were considered and rejected by the learned Trial Court.

10. He further submitted that the written objection which was filed by the Respondent was duly considered by the learned Arbitrator and he drew our

attention to 2nd paragraph appearing at page 270 of the Paper Book. According to him, the learned Arbitrator categorically considered the counter-claim of the Respondent and it would be evident from the last paragraph of the said interim award appearing at page 272 of the Paper Book which states as follows:

It appears that the entire counter-claim is based on surmises and conjecture and there is no material produced before this Tribunal to prove its existence. I, therefore, pass the following award for the counter-claim:

Nil

11. Therefore, in the interim award the learned Arbitrator duly considered the counter claim. He further submitted that the learned Arbitrator duly considered the counter claim submitted by the Respondent before publishing the interim award on 12th May, 2008.

12. He further drew our attention to page 340 of the Paper Book and submitted that in the affidavit filed by the Railways before the Hon'ble Supreme Court in SLP (Civil) No. 8873 of 1992 (Union of India and Ors. v. Graphic Industries Company and Ors.) categorically stated on oath that "The Railway Administration has withheld payment in relation to 108 bills submitted by the Respondent (in the instant appeal), Appellant herein. Therefore, it is a clear admission that the Respondent withheld payment due and payable to the Petitioner/Appellant. In the said affidavit, the Respondent unequivocally admitted that they are prepared to release a sum of Rs. 9.98 lakhs to the Petitioner/Appellant herein, which is a part payment of the amount due and payable to the Petitioner/Appellant. Hence it is a clear admission of the liability on behalf of the Respondent to the Petitioner.

13. He further contended that ample opportunities had been granted to the Respondent to place its case at the time of hearing of the application for the interim award. No prayer was made by the Respondent to cross-examine the Petitioner/Appellant. In fact, the Appellant had not led any evidence.

14. On the contrary, Mr. Somendra Nath Das, learned Advocate appearing on behalf of the Respondent submitted that the learned Arbitrator has exceeded his jurisdiction in passing the interim award totally overlooking the counter-statement of claim of the Respondent railway specifically and stated that the Railway Authority had made an excess payment of Rs. 42 lakhs to the Respondent for which a counter-claim of Rs. 42 lakhs was made in the counter-statement filed before the learned Arbitrator.

15. He further submitted that learned Arbitrator proceeded erroneously and passed the interim award ignoring the arguments made by the Petitioner in the sitting held on 17th January, 2008 whereby it was submitted that in terms of clause 2403 of IRS Condition of Contract any amount is due and payable to the contractor (including the security deposit refundable to him) under the contract may withhold or retain the same by way of lien by Government against any claim of the contractor in respect of payment of a sum of money arising out of or under

any other contract is made.

16. He also submitted that the learned Arbitrator overlooked the several clauses of the agreement and passed an award which cannot be executed by the parties and the award so passed is beyond the scope of reference. He further submitted that the learned Arbitrator did not consider the clauses of the agreement.

17. He further contended that the learned Arbitrator overlooked the several clauses of the agreement and passed an award which cannot be executed by the parties and the award so passed is beyond the scope of reference. He further contended that the learned Arbitrator did not consider the clauses 3000, 3001, 3002, 3300, 0300, 3003, 3303, 2401, 2403, 2502, 0788, 1502, 2900 of the Indian Railways Standard Conditions of Contract while passing the impugned award dated 12.05.2008 (Pages 258,259,261,263 of the Paper Book).

18. He further contended that the impugned interim award dated 12th May, 2008 is vitiated by misconduct on the part of the learned Arbitrator and is ex facie bad in law and is contrary to the said reference as the learned Arbitrator declined to rely upon the Committee's report placed by the Union of India (pages 52, 55, 61, 62 of the Paper Book).

19. He further contended that the learned Arbitrator passed an interim award without taking evidence and exhibiting the original documents and thereby the same is vitiated and bad in law.

20. Mr. Das drew our attention to the following decisions:

1. K.V. George Vs. Secretary to Government, Water and Power Department, Trivandrum and Another,

2. Union of India (UOI) Vs. Jain Associates and Another,

3. M.B. Patel and Co. Vs. Oil and Natural Gas Commission,

21. Mr. Das further contended that the learned Arbitrator in the minutes of the Meeting dated 11th April, 2008 did not give any indication to the parties. He further contended that the application was filed by the Respondent Railway on 28.02.2008 for production of original documents by the claimant. He further contended that the learned Arbitrator did not deal with such application.

22. He further contended before us that the award published by the learned Arbitrator is against the public policy. Hence, the award is liable to be set aside.

23. On the contrary, Mr. Mitra in reply submitted that the learned Arbitrator in the minutes of the meeting held on 5th February, 2008 had categorically indicated that that the Respondent was making bald statement without any substance. However, for the purpose of natural justice and to afford the Railways" adequate opportunity of representation, the Arbitrator had given a further time of 10 days to submit requisite document to substantiate the claim of the Respondent.

24. He further contended that from the Minutes of the Meeting held on 11th April, 2008 the Respondent had not disclosed a shred of evidence before the learned Arbitrator to substantiate their defence, which was in any event false and frivolous as to why payments were being withheld. In view thereof, in the presence of the Deputy Chief Materials Manager on behalf of the Respondent, the learned Arbitrator had indicated that the interim award would be published and the Petitioner/Appellant as a claimant was advised to submit stamp paper for adequate denomination to enable the learned Arbitrator to publish the award.

25. He further contended that the Respondent repeatedly failed to disclose any evidence to substantiate its defence which was nothing but a sham, illusory and moonshine. The Respondent, in spite of repeated opportunities being granted to it, could not produce any substantive evidence. The only evidence produced by the Respondent was the report of internal committee which had been duly considered by the learned Arbitrator. The Respondent failed even to produce a certified copy of such report. The Railways failed to produce any proof or evidence over a period of almost a year to produce any evidence to substantiate their frivolous claim.

26. Mr. Mitra submitted that the decision of K.V. George (*supra*) has no application to the case at hand simply because the judgment relates to the Arbitration Act of 1940 and the concept of an interim award was alien to the Act. Further in the aforementioned case, the learned Arbitrator had not considered the counter-claim before making the award. In the instant case, the counter-claim has been considered and dealt with accordingly. Thus, the case aforementioned is of no use to the case of the Respondent.

27. In support of his submission Mr. Mitra submitted that in the case of Union of India v. Jain (*supra*) is a case under the Arbitration Act of 1940 and justifies the allegation of misconduct as learned Umpire had not considered the counter-claim of the Appellant and his award was held to have been vitiated. The said Umpire had passed a final award in the case. This is only an interim award passed after taking into consideration the counter statement of claim and the counter-claim of the Respondent which have been duly considered. Clearly it can not be said that the learned Arbitrator in the instant case had not considered the counter-claim or committed any misconduct.

28. He submitted that the case of M.B. Patel (*supra*) is also under the Arbitration Act of 1940. In the said decision the Hon"ble Apex Court held that there was an error apparent on the face of the record/award inasmuch as the clause under the Arbitration Agreement prohibited the payment of interest of the contract which had been allowed by the Arbitrator *ex facie*. The Arbitrator had failed to consider the clause of the Arbitration Agreement on any account whereof the award was held to be vitiated in the instant case. There is no such allegation and none have been indicated nor committed on any account whereof, the instant case has no application to the facts of the present case. He further contended that the interim award has been made and published on the admission of the Respondent

and hence could not have been denied by the Respondent.

29. He further contended that the statute is extremely clear on the following propositions:

a) An interim award can be made at any stage of the Arbitration Reference as indicated u/s 31(6) of the Arbitration and Conciliation Act of 1996;

b) The statute does not cast any liability on the Arbitrator to give any prior notice before publication of any interim award to the parties concerned. However and in any event, in the instant case, the Arbitrator had by his notice of 11th April, 2008 intimated categorically to both the parties that the interim award was forthcoming for which the Appellant was advised to furnish requisite stamp paper.

c) In view of the aforesaid, it is absolutely imperative that the impugned order dated 11th February, 2010 passed by the learned First Court be set aside and the Respondent who has repeatedly admitted having withheld the payments due to the Appellant be directed to make for such payment to the tune of Rs. 25,00,000/- within a period of 14 days from the passing of order herein.

30. After considering the facts and circumstances of this case it appears from the facts that the Arbitrator found on the basis of the materials although the railways had asserted that they have rejected six items of supply against those purchase orders but there was no communication of rejection of any goods and railways had failed to produce any material to substantiate their claim of rejection of the said six items.

In these circumstances, the learned Arbitrator records in the interim award as follows:

WHEREAS it is also necessary to record that allegations of malpractices against the claimants in the matter of securing the contracts was raised by the Respondents in their Statement of counter-claim, but the Respondents have failed to substantiate their allegations by submitting any proof or evidence, in spite of adequate opportunity given to them in the course of the arbitral hearings. Since no irregularity/malpractice in the matter of placement of the contracts have been provided, the contracts are considered valid, binding and enforceable, making the Respondents liable to make payments against materials received there against.

31. The Arbitrator has held that after deducting the bills relating to the alleged rejection of six items and the payment of Rs. 11,16,528.80 already received by the claimant, the residual figure came to Rs. 30,69,564.79. The Arbitrator accordingly held that "out of which, I am inclined to pass partial/ interim award for Rs. 25 lakhs for the present".

32. The grounds were taken by the Respondent before the Hon'ble First Court that the said interim award was published without taking any evidence. But from the facts it appears that before publishing the interim award our attention was

drawn by Mr. Mitra to the minutes of the two meetings which were held before the arbitrator and the learned Arbitrator recorded as follows:

The learned Arbitrator desire to note from the Respondent whether in their knowledge there is any evidence apart from the what ever has been submitted in his arguments by the learned Advocate supporting their counter-claim and allegation of exorbitant prices. Also documents showing the concern officers booked and penalized for awarding contracts on alleged exorbitant price. The Respondents are directed to submit any document as asked for positively ring the next hearing. (Minutes of the meeting held on January 23, 2008).

The learned Arbitrator who displeasure stated that the learned Advocate from the Respondents is trying to avoid the specific questions asked by the learned Arbitrator during previous hearing. The statement recorded above only shows that the Respondent have nothing to add further whatsoever documents they have submitted alongwith their counter statement of claims if this the case than it will be presumed that in support of their counter-claim, the Respondent have only one statement signed by some Railway Officer. Secondly the reply on the question of details of official booked and penalized for awarding contract on alleged exorbitant prices has not been given by the Respondent which may be processed that no Railway Officers has been booked and penalized and the Respondent are making merely statement without any substance. Still the learned Arbitrator can given some time if the Respondent can submit any documents as asked by the learned Arbitrator by next 10 (ten) days" (Minutes of the meeting held on February 5, 2008).

33. It is a fact that no oral evidence was adduced in the reference. It is also a fact that the said question has to be decided by the learned Arbitrator and further the learned Arbitrator gave railways an opportunity to produce further documents which railways did not avail. The Hon''ble First Court was pleased to hold as follows:

A fundamental question has arisen. There may have been a violation of the principles of natural justice in that the Railways may not have been aware that an interim award would follow if they did not submit their documents within the extended time or that their defence was, in effect, to be struck off. Though the Respondent here argues that the Railways do not suggest - far less demonstrate - even now that they have material to support their defence in the reference, it is plain to see from the minutes of the last meeting before the interim award was delivered that the parties had no inkling that an interim award was in the following.

34. The Court further held that there was no occasion therefore, at the advance stage of the reference to make an interim award. There was no indication in the minutes of the last meeting held before the interim award was made that the learned Arbitrator would consider the claimant's application for making an interim award or that the learned Arbitrator would make an interim award. It

appears from the fact and after considering the interim award that the learned Arbitrator left only the issue of the six allegedly rejected bills which were kept for final adjudication by the learned Arbitrator. The Hon''ble First Court held as follows:

Ordinarily, an interim award may not be made at the very end of the reference; its purpose is to provide the claimant a part of the relief at an early stage of what could be a protracted reference. An interim award for payment would imply that such part of the claim was indisputable.

35. The Hon''ble First Court after assessing the fact held that the Railways deserved to be told that their defence and counter claim were likely to be struck off for their failure to substantiate the same by any documentary evidence; or that an interim award was to be made if the documents were not forthcoming within the time fixed therefore.

36. Therefore, it was the duty cast upon the arbitrator to conclude the reference and to pass a final award. The Court further held that the principles of natural justice demanded that they were put on notice that the failure to produce any documentary evidence in support of their defence or counter claim would result in the same being annulled.

37. In these circumstances, the Court held that in the absence of such indication in the minutes or otherwise, the interim award is vitiated and cannot be sustained. The Arbitrator did not specify in the minutes of the meeting immediately preceding the interim award that all other issues save the issue as to the six items of supply allegedly rejected would be conclusively pronounced upon.

38. The Hon''ble First Court on the basis of such findings came to the conclusion that the interim award should vitiate and set aside the said interim award dated 12th May, 2008.

39. We have considered the facts in this case minutely and in our opinion the learned Trial Court came to such conclusion on the ground of principles of natural justice which demands that Appellants should get an opportunity to produce any documentary evidence in support of their defence and or the counter-claims they have filed before the learned Arbitrator. The learned Arbitrator could have granted a time by fixing a date to produce such documentary evidence and in default of production of such document the learned Arbitrator would pass and publish an interim award.

40. It is not in dispute that the learned Arbitrator has power to pass an interim award in accordance with Section 31(6) of the Arbitration and Conciliation Act, 1996 but such interim award should be published on the basis of an admission only.

41. It further appears from the facts that the Respondent had admitted in an affidavit filed before the Hon''ble Supreme Court in 1992 admitting the fact

withholding payment of 108 bills. The said fact has also been corroborated in another affidavit filed before the High Court at Calcutta in 2002 by the railways and on the basis of such fact the learned Arbitrator found "clear judicial admission" and on the basis of the same the learned Arbitrator held as follows:

Constitute(d) adequate proof that the materials were supplied and also that Bills to realize the value of supplies made also raised by the claimants and submitted to the Respondents.

42. In these circumstances the learned Arbitrator has held that after deducting the bills relating to the alleged rejection of six items and the payment of Rs. 11,16,528.80 by the claimant, the residual figure comes to Rs. 30,69,564.79 and on such basis the learned Arbitrator held that "out of which I am inclined to pass partial/interim award for Rs 25 lakhs for the present".

43. After analyzing the materials placed before us it appears to us that the learned Arbitrator has the power u/s 31(6) of the Arbitration and Conciliation Act, 1996 that at any stage interim award can be passed by the learned Arbitrator. So far the question of granting an opportunity to the Respondent to produce any documentary evidence, it appears to us from the facts which have been placed before us and categorically mentioned in the minutes of the meeting held on 5th February, 2008 where the learned Arbitrator had indicated categorically that the Respondent was making bald statement without any substance. However, it appears to us that for the purpose of natural justice to offer the railways adequate opportunities for representation the learned Arbitrator had given a further time of 10 (ten) days to submit requisite documents to substantiate their submission.

44. It appears from the facts and from the minutes of the meeting held by the learned Arbitrator that the Respondent failed to disclose any evidence to substantiate their defence. It further appears that the learned Arbitrator duly pointed out in the presence of the Deputy Chief Manager appearing on behalf of the Respondent that the interim award would be published and the Appellant/claimant was directed to submit stamp papers for adequate denomination to enable the learned Arbitrator to publish the award. Therefore, after perusing such facts and the materials placed on record it appears to us that such facts escaped from the mind of the Hon"ble First Court and accordingly we come to the conclusion that there is no violation of the principles of natural justice in publishing such interim award by the learned Arbitrator, since time was granted to the Respondent to substantiate their appearance and the Respondent has failed to do so. Therefore, we find that on such ground also the Court should not have set aside the said interim award and the power of the learned Arbitrator has been specifically granted under the statute which gives an authority to the learned Arbitrator to publish interim award u/s 31(6) of the Arbitration and Conciliation Act, 1996. We also hold that there is no fault on the part of the learned Arbitrator which can call for any interference to set aside such interim award as published by him. Therefore, we do not find that the said interim award

suffers from any illegality or irregularity and accordingly, we accept the contention of Mr. Mitra and set aside the order so passed by the Hon''ble First Court and allow the appeal upholding the interim award so passed by the learned Arbitrator.

45. For the reasons stated hereinabove the appeal is allowed.

46. Photostat certified copy of this judgment, if applied for, be supplied to the parties.

Ashim Kumar Roy, J.

47. I agree.