

(1989) 05 CAL CK 0006
In the Calcutta High Court

Case No : Ordinary Original Civil Jurisdiction Award Case No. 47 of 1988

Hindustan Steel Works Construction Ltd.	APPELLANT
Vs	
Messrs. Banerjee and Banerjee and Others	RESPONDENT

Date of Decision : 18-05-1989

Acts Referred:

Citation : 94 CWN 359

Hon'ble Judges : P.K. Majumdar, J

Bench : Single Bench

Advocate : Ajay Nath Ray and Maharaj Sinha, for the Appellant; A.C. Bhadra and Dipak Basu, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Majumdar, J.—The petitioner has challenged the award dated 30th January, 1988 passed by Joint Arbitrators, K.K Mishra and S.P, Roy Chowdhury on several grounds mentioned in the petition.

2. By a letter of intent dated 15th March, 1984, the petitioner awarded contract to the respondent for earth work, concreting, masonry and other allied work at various elevation in the-main power house for Farakka Super Thermal Project of S.T.P.C. at Farakka. A formal agreement to that effect was entered into between the petitioner and the respondent on 12th May, 1984. The said agreement contains an arbitration clause, Disputes and differences arose between the parties with regard to settlement of the final bill of respondent no. 1 and accordingly the said disputes or differences were referred to arbitration before the Joint Arbitrators, K.K. Misra, the then General Manager (Projects) of the Steel Authority of India at Bokaro Steel Plant, nominated by the petitioner and D.P. Roy Chowdhury, Retired Commissioner of the West Bengal Housing Board, nominated by the respondent no. 1, The Joint Arbitrators entered upon the reference on 18th October, 1986.

3. The Joint Arbitrators made and published the said award dated 30th January,

1988. The operative portion of the said award is as follows:

We, Sri D.P. Roychowdhury and Sri K.K. Mishra, on perusal of all pleadings filed by the parties and the evidence adduced by them and on careful bearing of the arguments offered by the Ld. Advocates appearing for the parties, do hereby make and publish our following Award in full and final settlement of all the disputes referred to us as claims of the claimant and the counter claims of the Respondent as under:

(1) We Award and direct that the Respondent M/s. Hindustan Steel Works Construction Ltd. shall pay to the claimant M/s. Banerjee & Banerjee, a sum of Rs. 14,43,000.00 (Rupees Fourteen lakhs forty three thousand) only in full and final settlement of their claims, after adjustment/set off the counter claims agitated by the Respondent.

(2) We further Award that the Respondent M/s. Hindustan Steel Works Construction Ltd. shall return to the claimant, M/s. Banerjee & Banerjee the following Bank Guarantees duly endorsed in favour of the claimant:

Bank Guarantees against Mobilisation Advances:

1) LG/G/S/2/84 dated 7.3."84

.. Rs. 4 lacs

Bank of Madura Ltd.

2) LG/BR/US/2/84 dated 28.4.84

.. Rs. 1 lac

" "

3) LG/BR/US/3/84 dated 28.4.84

.. Rs. 1 lac

" "

4) LG/BR/US/4/84 dated 28.4.84

.. Rs. 1 lac

" "

Security Deposit:

5) LG/G/S/3/84 dated 15.3.84

.. Rs. 2 lacs

" "

6) LG/G13/12/84 dated 15,9.84

.. Rs. 1 lac

Indian Overseas Bank

(3) We further confirm the implementation of interim award given by us on 24.6.87 for return of Bank Guarantee No. LG/013/8/84 dated 15.5.86 for Rs. 1.5 lacs of Indian Overseas Bank by the Respondent M/s. Hindustan Steel Works Construction Ltd. to the claimant, M/s. Banerjee & Banerjee.

(4) We further Award that M/s. Banerjee & Banerjee shall have no claim on the machinery, equipments and materials including their temporary structures left at the site of the works of the respondent at Farakka as stood on the date of reference and the ownership of the same shall vest on the Respondent.

(5) We further Award that the Respondent, M/s. Hindustan Steel Works Construction Ltd. shall pay an interest on the aforesaid amount of Rs. 14,43,000.00 (Rupees Fourteen lakhs forty three. thousand) only at the rate of 12 % (Twelve percent) per annum with effect from 24.7.85 till the date of payment thereof or decree whichever is earlier.

(6) We further Award that the parties shall bear their respective costs as already borne by them.

This Award is declared in full and foal settlement of all the disputes raised before us.

In witness whereof we, the Joint Arbitrators have set our hands to this Award on this day of 30th January, 1988.

Sd/- K.K. Mishra 30.1.88 (K.K.Mishra)

Sd/- D.P. Roy Chowdhury 30.1.88 (D.P.Roy Chowdhury)

4. The petitioner has challenged the said award on several grounds. According to the petitioner, the said award is vitiated by mistake in that the said Joint Arbitrators erred and inadvertently omitted to deduct the admitted recoverable amount from the bill amounts, thus awarding a shocking over payment. It is also challenged by the petitioner that the said Joint Arbitrators by mistake failed to deduct the said recoveries which are admittedly recoverable by the petitioner and thus the said Joint Arbitrators committed a gross mistake in computation of the amount of the award. The petitioner has also challenged the award by contending that the said Joint Arbitrators have misconducted themselves by committing a gross mistake by filing to deduct the sum which is admittedly deductible. The said impugned award has also been challenged on the ground that the said Joint Arbitrators misconducted themselves and committed an error of law by failing to give reasons for the award made in favour of respondent no. 1 and also the said Joint Arbitrators failed to express their true intention in the award as a result of gross mistake. The petitioner has also challenged the award in respect of interest as awarded by the said Joint Arbitrators by contending that the arbitrators are not competent to award any pendente lite interest or any

interest at all inasmuch as no notice pursuant to the Interest Act, 1978 was served upon the petitioner by respondent no. 1.

5. Mr. Ajay Nath Ray along with Mr. M. Sinha, learned Counsel appearing for the petitioner has submitted that the act of the said Joint Arbitrators amounted to legal misconduct in omitting to consider the essential relevant matters. Mr. Ray submits that the said Joint Arbitrators misconducted themselves by omitting to deduct the admitted recoverable amounts or failed to deduct the said recoveries which are admittedly recoverable by the petitioner and thereby the said Joint Arbitrators committed gross mistake.

6. Mr. Ray has submitted that it is an admitted position that respondent no. 1 had received payment against the 5th running account bill for a total sum of Rs. 30,26,749.93 and advance of Rs. 53,500.00 against non-scheduled items. According to Mr. Ray, the petitioner was further entitled to claim back the amounts mentioned in paragraph 26 of the petition. It is therefore, submitted by Mr. Ray, Learned Counsel for the petitioner that the impugned award is entirely a product of a clear mistake. As submitted by Mr. Ray, the said Joint Arbitrators took the values of scheduled and non scheduled items and deducted from those only the payments made of Rs. 2,34,298.00. Thus, the figure arrived at by the Joint Arbitrators was Rs. 14,43,000 as awarded. It is the contention of Mr. Ray that the said Joint Arbitrators by mistake omitted to give credit for any recoveries at all. According to Mr. Ray, this amounts to legal misconduct and the impugned award is liable to be set aside on the ground of such legal misconduct. Mr. Ray has also submitted that the impugned award is not clear and from this it is very difficult to gather that the said Joint Arbitrators intended to award. Mr. Ray has drawn the attention of the Court to the first part of the award which is to the effect that the Arbitrators award and direct that the respondent, Hindustan Steel Works Construction Ltd. shall pay to the claimant, M/s. Banerjee and Banerjee a sum of Rs. 14,43,000/- only in full and final settlement of their claims after adjustment/set off counter claims agitated by the respondent". Mr. Ray submits that this award is not really final in the sense that it is subject to settlement of the claims "after adjustment or set off counter claim agitated by the respondent". Therefore, according to Mr. Ray, this impugned award is vague in the sense whether the said sum of Rs. 14,43,000.00 was arrived at after adjustment or the said sum was, subject to further adjustment or set off to be made later. Mr. Ray has referred to a passage in Russell on Arbitration, 18th Edition, page 390. In that passage it has been observed that the arbitrator has a duty to state his award in a form in which it can be enforced as a judgment and failure to do so amounts to misconduct. Mr. Ray citing that passage in Russell on Arbitration submits, that if there is any failure on the part of the arbitrator to make an enforceable award, such an award is liable to be set aside on the ground of legal misconduct. Mr. Ray further submits that if there is any ambiguity in the award then such an award cannot be sustained and should be set aside.

7. Mr. A.C. Bhabra, learned Counsel along with Mr. Dipak Basu appearing for

respondent No. 1 has submitted that the alleged mistake said to have been committed by the said Joint Arbitrators by omitting to deduct the admitted recoverable amount is no mistake at all. Mr. Bhabra has placed reliance on Annexure H to the petition which sets out the items dropped by M/s. Banerjee & Banerjee which have been shown in the statement showing the major difference in quantities by the claimants, M/s. Banerjee & Banerjee. This Annexure-H is prepared by one N.K. Saha and is dated 25th February, 1988. It is the contention of the petitioner as appearing from the petition that it was agreed by and between the parties that certain scheduled and non-scheduled items would not be claimed by respondent No. 1. A list of such items is annexed to the petition and marked Annexure - H. Mr. Bhabra has submitted that this list, as sought, to be prepared by the petitioner on 25th February, 1988: was never submitted before the Joint Arbitrators for their consideration as it would appear from the impugned award, that the said award was passed on 30th January, 1988. Similarly, it is the contention of the petitioner that, as would appear from the petition, it was agreed between the parties after joint reconciliation that some items would be admitted by the petitioner and the agreement was further reached with regard to the values of the items which were not admitted by the petitioner. The petitioner also prepared a chart being Annexure-I to the petition. Regarding Annexure-I to the petition, Mr. Bhabra submitted that this chart was not also before the Joint Arbitrators.

8. In this proceeding, pursuant to an order made by this Court, the Arbitrators were directed to file affidavits. Accordingly, both the Arbitrators have filed affidavits in this proceeding. The affidavit of the Arbitrator, Krishna Kumar Mishra, nominee of the petitioner, was affirmed on 22nd April, 1988. It appears from the said affidavit that the deponent, Mr. Mishra has said that he has read, a copy of the affidavit affirmed by his co-arbitrator, Mr. B.P. Roy Chowdhury on 20th April, 1988 and understood the contents and purport of the same. In para 6 of the said affidavit it is stated that the deponent, Mr. Mishra adopts the affidavit affirmed by the said co-arbitrator on 20th April, 1988 and the same may be treated as a part of his affidavit affirmed on 22nd April, 1988. The other Arbitrator, Mr. D.P. Roy Chowdhury has also affirmed an affidavit dated 20th April, 1988. It is stated in that affidavit that in obedience to the order passed by this Court the said Arbitrator, Mr. D.P. Roy Chowdhury affirms this affidavit. In para 7 of the affidavit he has denied that the said award dated 30th January, 1988 was a product of clear misconduct, as alleged. The deponent says that both the Arbitrators had considered the statement of facts, counter statement of facts, counter claim, rejoinder to the counter statement, additional rejoinder to the counter statement filed before them as also other documents and pleadings filed in support of the respective cases and the Joint Arbitrators had considered the recoveries to be effected from respondent No. 1, the claimant in terms of the contract. In para 8 of the affidavit it is stated that there was a dispute between the parties, viz. the petitioner and respondent No. 1 as to whether certain items of work come within the category of scheduled items or non-scheduled items. It

is further stated in the said affidavit that the Arbitrators had directed the parties to reconcile the quantities of both scheduled items and non-scheduled items which were in dispute and as the value of such work was not agreed upon by the parties the determination of the same was left to the Joint Arbitrators. The said Arbitrator with whom the other Arbitrator agreed has also denied that the Arbitrators deducted the sum of Rs. 2,34,298 only from the values of the scheduled and non-scheduled items, as alleged. It is further denied that the figures, Rs. 14,43,000/- was reached by the Arbitrators by omitting to give credit for the recoveries sought to be made in the petition. Therefore, it appears from the said affidavits filed by the Arbitrators that it is the categorical statement of both the Arbitrators that there has been no mistake nor any omission, as alleged by the petitioner, nor was the award a product of any mistake, as alleged by the petitioner. The Arbitrators have categorically said that the said sum of Rs. 14,43,000.00 was awarded or arrived at after consideration of all the material points involved in this proceedings.

9. I have heard the respective submissions of the learned Counsel appearing for the parties. It appears that the impugned award is a nonspeaking award. There has also been a challenge to the impugned award that the Joint Arbitrators have failed to indicate reasons as they ought to have indicated and by failing to give reasons for such an award, the award is liable to be set aside. It is now the settled law that the arbitrator is not bound to indicate reasons in his award. It will appear from the impugned award that the said award is a non-speaking award, that is, without any reason. It is also a settled law now that a non reasoned award is not bad per se. There is also no dispute to this proposition that when no reasons are indicated in the award, it is not proper for the Court to probe the mind of the arbitrator or to speculate as to what impelled the arbitrator to arrive at the conclusion. I also feel that this Court, on this application, cannot go into the question whether the said Joint Arbitrators omitted any particular sum or omitted to take note of some admitted recoveries, as looking at the impugned award it is not possible for the Court to enquire as to whether the said Joint Arbitrators have failed to consider these aspects, as alleged by the petitioner or also whether the Joint Arbitrators had taken into consideration the alleged scheduled and non-scheduled items in the manner, as alleged by the petitioner in this petition. It is also a settled proposition of law that the Court cannot go into reasonableness of the reasons, of any, of the arbitrator. Unless the error, an error of law and not an error of fact, appears from the face of the award, the Court cannot interfere with the award.

10. Assuming that the said Joint Arbitrators committed some mistake which does not appear from the face of the award, the award cannot be set aside notwithstanding such mistake. Mr. Ray has referred to an unreported decision of this Court in the case of Hindustan Steel corks Construction Ltd. vs. Asian Technicals Ltd. & Ors. being Matter No. 1711 of 1985. In this case, the learned Single Judge of this Court, on the admission of mistake by the arbitrators, interfered with the award and instead of setting aside the award the learned

Single Judge had modified the award. It has been clearly observed by the learned Judge in the said judgment that the Joint Arbitrators did not deny the mistake but expressed their inability to correct the same. Therefore, according to the learned Judge, the mistake had been impliedly admitted by the Joint Arbitrators and in that view of the matter, the learned Judge accepted the contention of the petitioner that the arbitrators had committed misconduct and this procedural mistake had resulted in serious miscarriage of justice. But, in the present case there is no admission by the Joint Arbitrators and the said Joint Arbitrator have clearly and categorically denied that there has been any mistake on the part of the Joint Arbitrators.

11. Mr. Ray has also argued that the arbitrators are not competent to make an award of interest pendente lite, that is, from the date of reference to the date of award. Mr. Ray in this connection has relied on a recent Supreme Court decision in the case of Executive Engineer (Irrigation), Balimela and Others Vs. Abhaduta Jena and Others, , where it has been held by the Supreme Court that the arbitrator is not competent to award any pendente lite interest, that is, from the date of reference to the date of the award, if there is no claim for interest by a notice under Interest Act, 1978. It appears from the award, as set out above, that the Joint Arbitrators had made the award that the respondent, M/s. Hindustan Steel Works Construction Ltd. shall pay interest on the amount of Rs. 14,43,000/- at the rate of 12 per cent per annum with effect from 24th July, 1985, that is, the date of reference till the date of payment thereof or decree whichever is earlier. Therefore, it appears that the Joint Arbitrators have awarded interest at the rate of 12 per cent from the date of reference till the date of award and further till the date of payment or decree whichever is earlier. According to the said decision of the Supreme Court referred to above, the arbitrators are not competent to make any award for pendente lite interest, that is, from the date of reference till the date of award which is made on 30th January, 1988. The question before the Supreme Court in Abodhut Jana's case (supra) was whether the pendente lite interest or interest prior to the reference could be awarded by the arbitrator and accordingly Special Leave was granted only to consider the question about the competency of the arbitrator to award interest prior to the reference and also to award interest from the date of reference to the date of award which is known as pendente lite interest. Special Leave was not, however, granted on the question whether the arbitrator could award any interest from the date of the award till realisation or the decree whichever is earlier.

12. Following the decision of the Supreme Court in last cited case, Abodhut Juna's case I modify the award of interest to this extent that the respondent, Hindustan Steel Works Construction Ltd. shall pay interest on the said sum of Rs. 14,43,000 at the rate of 9 per cent per annum with effect from the date of the award, i.e. from 30th January, 1988 till payment thereof or decree whichever is earlier.

13. The impugned award together with the said modification is sustained. This petition therefore fails and is hereby dismissed. There will be no order as to cost.

14. Learned Advocate appearing for the petitioner prays for a stay of operation of this order and judgment. Let there be a stay of this order and judgment till 2nd June, 1989