

(2011) 07 GAU CK 0051
In the Gauhati High Court
Case No : Criminal (P) No. (SH) 68 of 2007

Inderjeet Mehta, MES Contractor

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 20-07-2011

Acts Referred:

Arbitration Act, 1940 — Section 14, 14(2), 17, 30, 33
Limitation Act, 1963 — Article 158

Citation : (2011) 4 GLT 161

Hon'ble Judges : T. Vaiphei, J

Bench : Single Bench

Advocate : PDB Baruah, for the Appellant; R. Deb Nath, CGC, for the Respondent

Judgement

T. Vaiphei, J.—This revision is directed against the judgment and order dated 9-7-2007 passed by the learned Additional Deputy Commissioner, Shillong in F.A.O. (ARB Misc. Appeal) No. 7(T) of 2003 allowing the appeal against the order dated 2-9-2003 in (ARB) Misc. Case No. 4(T) of 1998 making the award dated 20-12-1997 passed by the Sole Arbitrator the rule of the Court.

2. The facts giving rise to this case, briefly stated, are that Petitioner and the Respondent had entered into the contract agreement No. CESZ/MHB/11 of 87-88 for certain Accn work allied services at Mohanbari and that during the currency of the work, a dispute arose between the parties in connection with the execution of the work. The dispute was accordingly referred to arbitration by the parties. The Respondent No. 2 was appointed as the sole arbitrator, who, after hearing the parties on the claim and counter-claim, had published the award on 20-12-1997. The Petitioner thereafter asked the learned Assistant to Deputy Commissioner, Shillong under Sections 14 and 17 of the Arbitration Act, 1940 ("the Act" for short) for making the award rule of the Court. In the meantime, the Respondent No. 1 also filed an application under Sections 30 and 33 of the Act for setting aside the award on the ground of misconduct. The Respondent No. 1 had challenged the award on the grounds of non-application of mind by the arbitrator,

who also misconducted himself and proceeded to pass the impugned award without jurisdiction and also on the ground that the application filed under Sections 30 and 33 of the Act was hopelessly time-barred. The facts found by the learned Additional Deputy Commissioner (ADC) are that the application under Sections 14 and 17 of the Act was filed on 2-2-1998; that on 9-4-1998, the Court had recorded the filing of the award in Court by one A.K. Balmiki on behalf of the arbitrator; that by the same order, the Court had directed the Respondent to issue notice upon the Petitioner; that on 27-5-1998, the Court had recorded that notice had been duly served and thence fixed 19-3-1998 for filing of written objection, if any and that, according to the learned A.D.C., the Respondent No. 1 had received the notice only on 27-5-1998. The A.D.C. had, however, noted that the summons report was not in the records of the Lower Court. The learned A.D.C. also recorded that the Respondent No. 1 had filed the objection petition under Sections 30 and 33 of the Act on 26-6-1998, and the same was duly received on 29-6-1998. According to the learned A.D.C., the petition u/s 30 and 33 was filed within the time period of 30 days from the date of receipt of the notice or intimation from the Court, and the finding to the contrary made by the learned Assistant was clearly erroneous. As for the allegation of misconduct on the part of the sole arbitrator, the learned ADC did not find any infirmity in the findings of the sole arbitrator and took the view that the claim were justified and did not cast any negative aspersion on the conduct of the sole arbitrator. However, the learned ADC found fault with allowing the counter-claim of the Petitioner on the ground that the same were excepted matters, which could not have been awarded. He accordingly allowed the appeal by upholding the award sans the award on counter-claim amounting to Rs. 6,94,700/-. The correctness of these findings are under challenge in this revision.

3. Mrs. P.D.B. Baruah, the learned Counsel for the Petitioner, contends that in deciding the issue of limitation, the appellate court has overlooked the glaring fact that the award was filed before the learned Assistant to DC on 9-4-1998 by one A.K. Balmiki of Chief Engineer (AF) vide the letter dated 30-3-1998 as representative of the Respondent, which amounts to filing of the award by the Respondent itself and is to be construed as notice by the Respondent itself thereby obviating the need to issue separate notice: the period limitation, therefore, started from 9-4-1998 when the award was filed, not from the date of receipt of notice from the Court and the period of limitation of 30 days got expired on 9-5-1998. Thus, according to the learned Counsel, as the period of limitation for filing objection got expired on 9-5-1998, such objection filed on 29-6-1998 is hopelessly time-barred. She strongly relies on the decisions of the Apex Court in Food Corporation of India and others Vs. E. Kuttappan, and Nilkantha Shidramappa Ningashetti Vs. Kashinath Somanna Ningashetti and Others, to fortify her submission. She next contends that the appellate court has failed to properly apply his mind by interfering with the award in respect of the counter-claim when no objection was ever raised by the Respondent at any point of time during the arbitral proceedings either on its admissibility or on merit or on

the amount claimed therein: he is thus barred from raising such objection before the appellate court. In support of her contention, she relies on the decision of the Apex Court in Jugal Kishore Prabhatilal Sharma and others Vs. Vijayendra Prabhatilal Sharma and another, . She, therefore, urges this Court to set aside the impugned judgment and order and restore the award of the sole arbitrator in toto. Refuting the submission of the learned Counsel for the Petitioner, Mr. R. Debnath, the learned Central Government Counsel (CGC) appearing for the Respondents, submits that issuance of notice u/s 14(2) by the Court is a mandatory requirement, and the period of limitation for filing objection seeking setting aside of the arbitration award would commence only from the date of service of notice issued by the Court upon the parties and not from the date of knowledge of the award. To buttress his contention, reliance is placed by him on the following decisions of the Apex Court: (a) Union of India (UOI) and Others Vs. Neelam Engineering and Construction Company, ; (b) Oil and Natural Gas Corporation Ltd. Vs. Nippon Steel Corporation Ltd., ; (c) Bharat Coking Coal Ltd. Vs. L.K. Ahuja, ; (d) Secretary to Government of Karnataka and another Vs. V. Harishbabu, and (e) Madan Lal Vs. Sunderlal and Another, .

4. There is no dispute at the bar that the award was published by the arbitrator on 20-12-1997; that copies of the award was sent to the parties on that day itself; that on receipt of the notice, the Petitioner on 2-2-1998 filed an application under Sections 14 and 17 of the Act for making the award rule of the Court, which was registered as (ARB) Misc. Case 4(T) of 1998 before the Ld. Assistant to Deputy Commissioner, Shillong; that it was on 9-4-1998, the Court recorded the filing of the award by one A.K. Balmiki on behalf of the arbitrator that the sole arbitrator is none other than the Chief Engineer (Air Force), Shillong, who had represented the Respondent-Union of India ; that on the same day, the Court directed the Petitioner to issue notice upon the Respondent; that on 27-5-1998, the Court had recorded the fact that notice was duly served upon the Respondent authorities on that day and fixed 19-3-1998 for filing of objection, if any and that it was only on 27-5-1998 that the Respondent received the notice and that the Respondent filed the objection under Sections 14 and 17 of the Act on 26-6-1998, which was received by the Petitioner on 29-6-1998. As already noticed, the award was filed by the representative of the arbitrator, who was at the relevant point of time the Chief Engineer (Air Force) and also representing the Respondent authorities, on 9-4-1998.

5. The legal position is that if a party wants an award to be set aside on any of the grounds set forth in Section 30, it must apply within 30 days of the date of service of notice of filing the award as provided in Article 158 of the Limitation Act. If no such application is made within that period, the award cannot be set aside on any of the grounds mentioned in Section 30 of the Act. According to Article 158 of the Limitation Act, the notice need not be in writing and such notice includes constructive or informal notice. This is what the Apex Court said in Nilkantha Shidramappa Ningashetti Vs. Kashinath Somanna Ningashetti and Others, :

10. We see no ground to construe expression "date of service of notice" in col. 3 of Article 158 of the Limitation Act to mean only a notice in writing served in a formal manner. When the Legislature used the word "notice" it must be presumed to have borne in mind that it means not only a formal intimation but also an informal one. Similarly, it must be deemed to have in mind the fact that service of a notice would include constructive or informal notice. If its intention were to exclude the latter sense of the words "notice" and "service" it would have said so explicitly. It has not done so here. Moreover, to construe the expression as meaning only a written notice served formally on the party to be affected, will leave the door open to that party, even though with full knowledge of the filing of the award at any time upon the ground that for want of proper notice his right to object to the filing the award had not even accrued. Such a result would stultify the whole object which underlies the process of arbitration the speedy decision of a dispute by a tribunal chosen by the parties.

But then whether the filing of the award by the said A.K. Balmiki, ASW, for Chief Engineer (AF) can be construed to be a notice of the award by the Respondent-authorities? In this connection, the letter dated 30-3-1998 of the said A.K. Balmiki of the Office of the Chief Engineer (AF) Headquarters, Shillong Zone addressed to the learned Assistant to DC Court, Shillong is instructive, the relevant portion whereof reads thus:

FILING OF ORIGINAL AWARD AND CONNECTED DOCUMENTS IN RESPECT OF CASE No. MISC (ARB) CASE No. 4(T) OF 1998 IN RESPECT OF CA No. CESZ/MHB/11 OF 88-89: M/S INDERJIT MEHTA

Sir,

The undersigned has been authorized by Engineer-in-Chief's Branch, Army Hq, New Delhi to file sealed envelope, stated to be containing original award and connected documents in respect of subject case, in this Court vide letter No. 13600/EC/385/E89 dated 04 Mar 98 (copy enclosed for ready reference please). In view of above, the sealed envelope as received from E-in-C's Branch, Army Hq, New Delhi is filed herewith.

Yours faithfully. ASW For Chief Engineer(AF).

Copy to:

-W.r.t. your letter No. 13600/EC/ 385/EB dt. 04 Mar '98.

1. Surveyor of Works Dte

Engineer-in-Chief's Branch

AHQ, Kashmir House, DHQ PO, New Delhi - 11.

2. Standing Panel of Arbitrators 5, Campbell Lines, Nehru Road, Lucknow Cantt - 226 002.

3. REGISTERED A/D M/S Inderjit Mehta G-1817, Trust Lane Birla Mill Colony

Bathinda - 151001.

6. The contents of the letter reproduced above will clearly indicate that the said A.K. Balmiki had filed the award for the Chief Engineer (AF), Shillong Zone. The said A.K. Balmiki was obviously ASW (Assistant Survey of Works) in the Office of the Chief Engineer (AF) Headquarters, Shillong Zone, who also represented the Respondent authorities in the Courts below. In the absence of anything to indicate otherwise, the inference is irresistible and the conclusion inescapable that the gentleman was filing the award on 9-4-1998 on behalf of the Respondent authorities and not on behalf of the arbitrator and that the Respondent authorities had the knowledge, or, at any rate, the constructive knowledge of the filing of the award as early as 9-4-1998. In other words, a strong prima facie case has been made out by the Petitioner that the Respondent authorities knew that the award was filed in Court in 9-4-1998. Once a prima facie case is made out by the Petitioner, the onus of proof shifts to the Respondent authorities to establish with evidence that they did not have the knowledge of the filing of the award till they received the notice from Court on 27-5-1998 even though an official from the Office of the Chief Engineer (AF) Headquarters, Shillong Zone had filed the award in Court on 9-4-1998. As observed by the Apex Court in Nilakantha Sidramappa Ningashetti case (supra) when the Legislature used the word "notice, it must be presumed to have borne in mind that it means not only a formal intimation but also an informal one and that similarly, it must be deemed to have in mind the fact that service of a notice would include constructive or informal notice. To construe the expression "notice" as meaning only a written notice served formally on the party to be affected, will leave the door open to that party, even though with full knowledge of filing of the award he has taken part in the subsequent proceedings of that case, to challenge the decree based upon the award at any time on the ground that for want of formal and proper notice, his right to object to the filing of the award had not even accrued. Such a result would defeat the whole object of arbitration process, namely, speedy resolution of a dispute by a tribunal chosen by the parties. Therefore, the contention of the Respondent authorities that only when formal notice was received by them from Court as prescribed by Section 14(2) of the Act appears to be hyper-technical in nature and cannot be countenanced by this Court. Since the objection to the award was filed by them only on 26-6-1998 and not within thirty days from date of knowledge of the filing of award in Court with effect from 9-4-1998, such an objection is hopelessly time-barred under Article 158 of the Limitation Act, 1963.

7. As for the award in respect of the counter-claim made by the Petitioner, it is submitted by Mrs. P.D.B. Baruah, the learned Counsel for the Petitioner, that the counter-claim made by the Petitioner was not in respect of "excepted matters" inasmuch as no final and binding decision was given by the specified authority nor was such plea taken by the Respondent during the arbitral proceedings, and the learned ADC has clearly acted illegally in setting aside the award in respect of the counter-claim made by the Petitioner. On the contrary, Mr. R. Debnath, the

learned CGC, argues that the learned ADC did not consider the objection of the Respondent with regard to the arbitrariness of such claims, which fall within "excepted matters" falling under Appendix "B" when the Respondent authorities themselves had withdrawn their claim for Rs. 25,579/-on the ground that they fell within Appendix "B". He also contends that the arbitrator also did not record any finding as to whether the counter-claim of the Petitioner pertains to matters falling within Appendix "B" and, therefore, not within the scope of reference for arbitration matter and proceeded to award Rs. 6,94,700/-to them thereby misconducting himself. Admittedly, no objection was raised by the Respondent authorities against this counter-claim of the Petitioner. Ordinarily, a claim or, for that matter, a counter-claim not objected is deemed to have been accepted. However, there is a rider to this, namely, whether any prima facie case was made out on the own pleadings of the counter-claimant. At this stage, the legal position on excepted matters expounded by the Apex Court in *Bharat Sanchar Nigam Ltd. and Another Vs. Motorola India Pvt. Ltd.*, may be adverted to:

1. These appeals by the grant of special leave pertain to the effect of the usual "excepted clause" vis-?-vis the arbitration clause in a government contract. While it is true and has been contended, that the authorization of the arbitrators to arbitrate, flows from the agreement but the High Court in the judgment impugned thought it fit to direct adjudication of "excepted matters" in the agreement itself by the arbitrators and hence these appeals before this Court.
2. At the outset, it is pertinent to note that in the usual governmental contracts, the reference to which would be made immediately hereafter, there is exclusion of some matters from the purview of arbitration and a senior officer of the department is usually given an authority and power to adjudicate the same. The clause itself records that the decision of the senior officer, being the adjudicator, shall be final and binding between the parties - this is what is popularly known as "excepted matters" in a government or governmental agencies" contract.
3. "Excepted matters" obviously, as the parties agreed, do not require any further adjudication since the agreement itself provides a named adjudicator concurrence to the same obviously is presumed by reason of the unequivocal acceptance of the terms of the contract by the parties and this is where the courts have been found lacking in their jurisdiction to entertain an application for reference to arbitration as regards the dispute arising there from and it has been the consistent view that in the event of the claims arising within the ambit of excepted matters, the question of assumption of jurisdiction of any arbitrator either with or without the intervention of the court would not arise. The parties themselves have decided to have the same adjudicated by a particular officer in regard to these matters; what these exceptions are however are questions of fact and usually mentioned in the contract documents and form a part of the agreement and as such there is no ambiguity in the matter of adjudication of these specialised matters and being termed in the agreement as the excepted matters.

8. As noticed earlier, no objection was raised by the Respondent authorities in respect of the counter-claim of the Petitioner. Therefore, it is difficult to say what are the excepted matters falling within the ambit of Appendix-B in the absence of pleading by the Respondent authorities. It is not even stated by the Respondent authorities as to who was to be the competent authority to adjudicate upon the excepted matters and whose decision shall be final. After all, such excepted matters are questions of fact, which should be mentioned in the contract documents. In other words, the parties are not at issue on the counter-claim of the Petitioner. The onus lies upon the Respondent authorities to prove that the payments claimed in the counter-claim are excepted matters, which could not be arbitrated upon in an arbitration reference. The matter could not be improved by the Respondent authorities in the appellate court. Under the circumstances, a prima facie case was made out by the Petitioner for the relief claimed in the counter-claim. In the absence of objection in the arbitral proceedings against the counter-claim, and proof by the Respondent authorities that the claim made by the Petitioner in the counter-claim are excepted matters, I, therefore, hold that the arbitrator did not misconduct himself in awarding Rs. 6,94,700/- to the Petitioner. The scope of interference by courts in regard to arbitral tribunal was reiterated by the Apex Court in *Kwality Manufacturing Corporation Vs. Central Warehousing Corporation*, in the following manner:

10. At the outset, it should be noted that the scope of interference by courts in regard to arbitral awards is limited. A court considering an application u/s 30 or 33 of the Act, does not sit in appeal over the findings and decision of the arbitrator. Nor can it reassess or re-appreciate evidence or examine the sufficiency or otherwise of the evidence. The award of the arbitrator is final and the only grounds on which it can be challenged are those mentioned in Sections 30 and 33 of the Act. Therefore, on the contentions urged, the only question that arose for consideration before the High Court was, whether there was an error apparent on the face of the award and whether the arbitrator misconducted himself or the proceedings.

The expression "an error apparent on the face of the award" was explained by the Apex Court in *Sudarsan Trading Co. Vs. Government of Kerala and Another*, as follows:

4. ... An error apparent on the face of the records would not imply closer scrutiny of the merits of documents and materials on record. Once it is found that the view of the arbitrator is a plausible one, the court will refrain itself from interfering...

9. For the reasons stated in the foregoing, this revision succeeds. The impugned judgment and order dated 9-7-2007 is hereby set aside. The award of the arbitrator dated 20-12-1997 is restored in toto. The parties shall bear their respective costs throughout.