
(2008) 03 BOM CK 0044
In the Bombay High Court
Case No : First Appeal No. 24 of 2008

Jimmy Construction Pvt. Ltd.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 19-03-2008

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 34, 34(2), 75, 81

Citation : (2008) 3 ALLMR 729 : (2008) 4 BomCR 648 : (2008) 3 MhLj 141

Hon'ble Judges : C.L. Pangarkar, J

Bench : Single Bench

Advocate : A.S. Jaiswal, for the Appellant; None, for the Respondent

Judgement

C.L. Pangarkar, J.—This appeal is preferred by the original applicant to the application u/s 34 of the Arbitration and Conciliation Act, 1996, which came to be rejected by the District Judge.

2. The facts giving rise to this appeal are as under:

The appellant/applicant is a Contractor while respondent/N.A.I is Indian Railway. Non-applicants No. 2 to 4 are the Arbitrators. Non-applicant No. 1 invited tenders for Gauge Conversion of Railway Line running between Gondia and Jabalpur. The tender cost was Rs. 33,87,212/-. The tender of the applicant was accepted. The work was to be completed within period of twelve months from 31-12-1999 and the agreement was executed on 1-4-1999. The agreement provides that if a dispute arises between the parties, it will be referred to the Arbitrators. It is the allegation of the applicant/appellant that due to the hindrance caused by the officials of non-applicant No. 1, there was a delay in completion of the work. However, the time was extended up to 31-12-2001. The applicant could complete the work worth Rs. 8,76,631/-. Thereafter, it is alleged that non-applicant No. 1 refused permission to applicant No. 1 to commence the work of the second phase. Due to the stiff hike in the diesel prices and royalty charges, the applicant had made a request to revise the rates. The said request was rejected. The final

bills were not prepared by non-applicant No. 1. The matter, therefore, was referred to the Arbitrators and non-applicant No. 1 appointed Arbitrators in the matter. The Arbitrators did not commence the work for a period of twenty months. As a result, the applicant was required to move the High Court for appointment of other Arbitrators. While the application was pending before the High Court, non-applicants No. 2 to 4 resumed hearing of the Arbitration. The applicant, however, informed them that the matter is pending before the High Court and therefore, the proceedings should be kept in abeyance. It is contended that in haste the proceedings were completed and the award has been passed. The applicant contends that the constitution of the arbitral itself was not in accordance with the law and the applicant has not been given any opportunity to participate in the arbitration proceedings. It is contended that false statements were made before the High Court by the Railway authorities and therefore, the award was liable to be set aside.

3. Non-applicant No. 1 filed reply to the application and denied all allegations made against it. It denies that any haste was made by the Arbitrators in concluding the proceedings. It is contention of the non-applicant that the applicant had left the place of meeting stating that he would come within ten minutes but did not turn up and intentionally remained absent.

4. The learned District Judge found that the objections to the award as raised by the applicant were not correct and he therefore dismissed the application. Being aggrieved by that, this appeal has been preferred. The learned District Judge has refused to set aside the award. Section 34 of the Arbitration Act, 1996 gives out the grounds on which an award came to be challenged and set aside. Section 34 of the Arbitration Act reads thus:

34. Application for setting aside arbitral award. - (1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with Sub-section (2) and subsection (3).

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

(a) the party making the application furnishes proof that:

(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 Arbitrators or of the arbitral proceedings nor 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.

5. Shri A.S. Jaiswal, Advocate for the appellant contends that composition of the arbitral was not in accordance with the agreement and secondly; it was ex parte and therefore in breach of the principles of natural justice. He also assailed the award on the ground that the award should not have been passed since the matter as to the appointment of other arbitrators was subjudice and this action was sort of a misconduct.

6. Shri Jaiswal submits that the Arbitration agreement itself provides as to what should be the composition of the Arbitral. He submits that since there is a specific clause in the agreement, the parties are bound to compose or constitute the arbitral according to that clause only and any deviation from it would result in illegality. Section 34(2)(v) of the Arbitration Act says that the award can be set aside if the arbitral is not according to the contract or if the contract does not provide for composition, it should be according to the provisions of the Act and if it is not in accordance with the Act, the composition is itself illegal and the award could be set aside. The composition, it appears to me, is not as provided in the agreement but is different. It would, therefore, be necessary to reproduce here Clause No. 64 of the agreement which provides for composition of arbitral.

64.(3) (a) ARBITRATION : Matters in question, dispute or difference to be arbitrated upon shall be referred for decision to:- 3.(a)(i) A Sole Arbitrator who shall be the General Manager or a Gazetted Railway Officer nominated by him in that behalf in cases where the claim in question is below Rs. 5,00,000/- (Rupees five lakhs) and in cases where the issue involved are not of a complicated nature. The General Manager shall be the sole Judge to decide whether or not the issues involved are of a complicated nature.

3. (a)(ii) Two Arbitrators who shall be Gazetted Railway Officers of equal status

to be appointed in the manner laid in Clause 64(3)(b) for all claims of Rs. 5,00,000/- (Rupees five lakhs) and above, and for all claims irrespective of the amount of value of such claims if the issues involved are of a complicated nature. The General Manager shall be the sole Judge to decide whether the issues involved are of a complicated nature or not. In the event of the two Arbitrators being divided in their opinion the matter under disputes will be referred to an umpire to be appointed in the manner laid down in Clause 3(b) for his decision.

3.(a) (iii) It is a term of this contract that no person other than a Gazetted Railway Officer, should act as an Arbitrator/Umpire and if for any reason, that is not possible, the matter is not to be referred to Arbitration at all.

3.(a) (iv) In cases where the claim is up to Rs. 3,00,000/- (Rupees three lakhs), the Arbitrator(s)/Umpire so appointed, as the case may be, shall give the award on all matters referred to arbitration indicating therein break-up of the sums awarded separately on each individual item of dispute. In cases where the claim is more than Rs. 3,00,000/- (Rs. three lakhs), the Arbitrator(s)/ Umpire so appointed, as the case may be, shall give intelligible award (i.e. the reason leading to the award should be stated) with the sums awarded separately on each individual item of dispute referred to arbitration.

(b) For the purpose of appointing two arbitrators as referred to in Sub-clause (a) (ii) above, the Railway will send a panel of more than three names of Gazetted Railway Officers of one or more departments of the Railway to the Contractor, who will be asked to suggest to the General Manager one name out of the list for appointment as the Contractor's nominee. The General Manager, while so appointing the Contractor's nominee, will also appoint a second arbitrator as the Railway's either from the panel or from outside the panel, ensuring that one of the two arbitrators so nominated is invariably from the Accounts Department. Before entering upon the reference the two Arbitrators shall nominate an Umpire who shall be a Gazetted Railway Officer to whom the case will be referred to in the event of any difference between the two arbitrators. Officers of the Junior Administrative grade of the Accounts Department of the Railways shall be considered as of equal status to the Officers in the intermediate administrative grade of other departments of the Railway for the purpose of appointment as arbitrators.

7. Clause 3(a)(iv)(b) of the Arbitration Act makes it clear that Railway will send a panel of more than three names of the Gazetted Officers to the Contractor and the contractor is supposed to approve one name out of them, then General Manager is supposed to appoint the second arbitrator. Thus, the Contractor and the Railways are supposed to appoint an Arbitrator each. The clause further says that before entering into a reference, both the contractors are to nominate one Umpire to whom the case will be referred in case of difference between the two. Obviously, the arbitral is to consist of only two arbitrators. The matter is required to be referred to an Umpire only in the case of difference of opinion between the two. Essentially, therefore, the dispute was to be heard by the two and decided

by the two. The question of referring it to a third umpire was to arise only in case of difference or disagreement. In the instant case, the composition itself is wrong, i.e. not as per agreement. The document No. 20 i.e. letter dated 10-12-2001 written by the General Manager to the Arbitrators shows that in all three arbitrators were appointed by the General Manager. He could not appoint three arbitrators. He was supposed to appoint two i.e. one of the contractor and other of the railways. These two were to appoint an Umpire and not a third arbitrator at all. Here, the railways have appointed all three persons as arbitrators, which is contrary to the agreed terms. The composition could not be even according to Section 11 since there is a specific contract to the effect as to how the arbitral is to be constituted.

8. Not only the composition was improper but even the award is delivered three arbitrators. Three arbitrators could not have passed the award. The award does not show that there was any disagreement between the two and therefore, the matter was referred to the third Umpire. Therefore, the third person would have come into picture only upon a disagreement. To my mind, the award is certainly vitiated due to the above facts.

This takes me to consider the second ground i.e. of delay. It is contended by Shri Jaiswal, learned Counsel for the appellant, that for about twenty months after the appointment, the arbitrators did not act at all and hence the appellant was required to move the Court for appointment of some other arbitrators. The appointment of arbitrators was made on 10-12-2001, as can be seen from the document (Exh.20). Document No. 25 is the letter written by the Arbitrator to the appellant on 17-7-2003 informing that the papers were misplaced and hence the arbitration work could not be commenced. It is, therefore, clear that the arbitrators did not at all care for the job entrusted to them for a period of almost two years. They seem to have woke up only when the matter had reached this Court for replacing the arbitrators. It is the contention of the appellant that the appellant had informed the arbitrators that since he has already approached the Court and the matter is subjudice, they should not now proceed with the arbitration. Document No. 28 is the same letter dated 15-8-2003. It is also contended by the appellant that the Arbitrator had issued a letter dated 3-9-2003, being document No. 30, falsely alleging therein that the arbitration shall be held at Nagpur on day-to-day basis as desired by the Court. It is contended that this was absolutely a false statement. This appears me to be really a false statement made therein. It would, therefore, be necessary to refer to the order passed by this Court. The Court observed as follows:

1) Heard Shri Dharmadhikari, the learned Counsel for the applicant and Shri Bhangade, the learned Counsel for the respondent.

2) By this application, the applicant submitted that Arbitral Tribunal had been appointed after it failed to take any proceedings for a period of 18 months. Accordingly, they sought the appointment of an arbitrator for adjudicating their claim.

3) During the course of hearing, it was brought to the notice of the Court by the learned Counsel for the respondents that arbitration is being proceeded with by an Arbitral Tribunal with one S.S. Guru, CTPM/GRC, South Eastern Railway as the Presiding Officer. The learned Counsel for the applicant had made an oral submission regarding the validity of the appointment of said Mr. Guru on the ground that he is third Arbitrator, who has been appointed by a request; whereas according to learned Counsel he was to be appointed by two Arbitrators in case of any difference between them. This Court, therefore, expressed that it would be fitting if Mr. Guru did not proceed to take a final decision while the matter is being considered. It, however, appears that despite communication of the above to Mr. S.S. Guru by the respondent No. 1, it appears that the Arbitral Tribunal has proceeded and published an award on 13-11-2003; in the circumstances with undue haste. In any case, that has rendered this application infructuous and the remedy of the applicant lies elsewhere.

4) In the circumstances, Mr. Dharmadhikari, the learned Counsel for the applicant seeks permission to withdraw this application. Allowed to withdraw with liberty to proceed in accordance with law, without prejudice to the applicant's right.

9. The order clearly shows that there was a challenge to the composition of the arbitral as well as the delay in taking up of the arbitration. It further shows that the Court had expressed that in view of this, Shri Guru, one of the arbitrators, should not proceed to take the final decision until the matter is considered by the Court. Thus, in fact the Court had expressed that the Arbitrators should not proceed further, since a decision with regard to appointment of arbitrators is to be taken and yet the arbitrators informed the appellant falsely that the matter is to be taken up on day-to-day basis on the direction of the Court and even concluded the hearing and delivered the award. The haste on the part of the arbitrators, in fact, amount to a misconduct. Result of this was that an ex parte award came to be passed, when there was no fault on the part of the appellant. As the award was passed behind the back of the appellant, there was no proper composition, the award could be said to be falling in Clause (ii)(b) of Sub-section (2) of Section 34 of 1996 Act and is, therefore, liable to be set aside. The learned District Judge did not consider all these aspects in a proper perspective. The order, therefore, suffers from illegality and it is set aside.

10. The order passed by the District Judge is set aside. The award is set aside. Non-applicant/respondent No. 1 shall now reconstitute the arbitral. It shall appoint a nominee of the contractor as one of the Arbitrators. The Railway shall nominate the second Arbitrator. Both Arbitrators shall thereupon appoint an umpire. The umpire is supposed to act only in case the Arbitrators appointed disagree with each other. Respondent No. 1 is directed to make the appointment of Arbitrators within period of one month and the Arbitrators should pass the award within period of three months from the date of appointment. No order as to costs.