
(2015) 10 TP CK 0004
In the Tripura High Court
Case No : Arb. A. No. 3 of 2011

Kali Karmakar

APPELLANT

Vs

The State of Tripura and Others

RESPONDENT

Date of Decision : 05-10-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34, 34(2), 37, 75, 81
Constitution of India, 1950 — Article 226

Citation : (2015) 10 TP CK 0004

Hon'ble Judges : Deepak Gupta, C.J.; S. Talapatra, J

Bench : Division Bench

Advocate : S.M. Chakraborty, Senior Advocate and B. Chakraborty, for the Appellant; T.D. Majumder, G.A., Advocates for the Respondent

Final Decision : Dismissed

Judgement

S. Talapatra, J—This is an appeal under Section 37 of the Arbitration and Conciliation Act, 1996 challenging the judgment and order dated 25.01.2011 delivered in Misc.(ARB) No. 04/2009 by the District Judge, West Tripura, Agartala on refusing to set aside the arbitral award dated 09.10.2009 passed by the sole Arbitrator in case No. ARB/ACD/2009(2).

2. The claim of the appellant was denied by the said arbitral award dated 09.10.2009. Being aggrieved thus, the appellant herein filed an application under Section 34 of the Arbitration and Conciliation Act, 1996 in the court of the District Judge, West Tripura, Agartala on the ground, fundamentally that the arbitral award stands in conflict with the public policy of India as the sole Arbitrator has not followed the settled principles of law while passing the said arbitral award. To illustrate such conflict, the appellant referred to a note of the sole Arbitrator dated 15.11.2005 where, according to the appellant, admission of the respondents as to the execution of earth filling inside the foundation and the canal sides has been recorded having referred the letter No. F.12(4)/AE/IFMSD-V/MLG/104-05 dated 05.02.2002 (Exbt. C-4).

3. There is no dispute that the reference was made to the sole Arbitrator by the Chief Engineer, Water Resources. The dispute as referred are as under:

"(i) Whether the claimant is entitled to get Rs. 65,617/- from the respondent being the payment due on account of execution of extra item of earth work in rough excavation and filling of excavated earth etc.?

(ii) Whether the claimant is entitled to get Rs. 31,714/- from the respondent by way of refund of security money lying deposited at his credit?

(iii) Whether the claimant is entitled to get interest @15% per annum on his demanded sum from the date of dispute i.e. 28.11.2002 till date of actual payment? And

(iv) Whether the claimant is entitled to get Rs. 5,000/- being the cost of arbitration proceedings and incidental thereto?"

4. In support of the claim and objection raised thereto, both the claimant and the respondent placed their statements before the sole Arbitrator. The sole Arbitrator, after hearing the parties on the relevant issues, dismissed the claim by the award dated 09.10.2009.

5. According to the sole Arbitrator, as the proper measurement is the only basis for arriving at the conclusion whether the work has been done in part or not executed at all, the respondent was directed to submit the measurement of pre-level and final-level recorded in the level book, test checked by the A.E., J.E. and E.E. and duly signed by the contractor as a token of acceptance of that measurement by the contractor. The respondent had categorically stated that no such level book was maintained for the work as the appellant did not do any work. For refusing to award the refund of the security money, the sole Arbitrator has accepted that since the rectification work was not carried out by the appellant it cannot be observed that the work was satisfactorily completed. As corollary, the appellant is not entitled to get the refund of the security money. The other claims of the appellant were denied as consequence of denial of the main claims.

6. While dismissing the application filed by the appellant under Section 34 of the Arbitration and Conciliation Act, 1996, the District Judge, West Tripura, Agartala, by the impugned judgment, has held that there was no violation of "public policy" as alleged. On the contrary, on appreciation of the materials, the sole Arbitrator has correctly held that the appellant had failed to adduce any evidence to support his claim. As the application under Section 34 of the Arbitration and Conciliation Act, 1996 has been dismissed by the impugned judgment and order, the appellant has filed this present appeal questioning the legality and propriety of the said judgment and order.

7. The appeal under Section 37 of the Arbitration and Conciliation Act, 1996 is unique and unlike the appeals as generally understood in the legal parlance. The scope of the appeal filed under Section 37 of the Arbitration and Conciliation Act,

1996 is confined inter alia to setting aside or refusing to set aside an arbitral award under Section 34 of the said Act. As such, it is apparent that the scope or ambit of the appeal is restricted to assessment or appraisal whether the order passed in exercise of powers conferred by Section 34 of the Arbitration and Conciliation Act, 1996 was so exercised within the provinces as laid down. If the District Judge treats the award as non est and since such order does not amount to setting aside or refusing to set aside an order, it becomes non-appealable, as held by the apex court in *Uttar Pradesh Co-operative Federation Ltd. Vs. Sunder Brothers of Delhi*, AIR 1967 SC 249 : (1966) SCR 215 Supp . Section 34 of the said Act has provided recourse to a court against an arbitral award made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3). Since sub-section (3) of Section 34 deals with the limitation for taking the recourse and that being not relevant in the case in hand, this court would extract sub-section (2) of Section 34 of the Arbitration and Conciliation Act, 1996 as under:

"(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 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 matter 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) of clause (b), 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."

8. It is apparent from the application filed under Section 34 of the Arbitration and Conciliation Act, 1996 that the appellant has challenged the arbitral award for its being, according to him, in conflict with the "public policy" of India and that ground is entirely based on the sole Arbitrator as improper appreciation of evidence.

9. In *Viraj Holdings Vs. Motilal Oswal Securities Pvt. Ltd. and Others*, (2002) 4 ALLMR 713 : (2002) 6 BomCR 759 : (2003) 115 CompCas 102 : (2002) 4 MhLj 65 and *Union of India (UOI) Vs. Surendranath Kanungo and Another*, (2005) 2 ARBLR 106 : (2005) 1 CALLT 457, it has been succinctly held that the challenge to the award only on factual aspects cannot be maintained and such challenge does not come within the ambit of Section 34(2) of the Arbitration and Conciliation Act, 1996. The law as enunciated by Bombay High Court and Calcutta High Court is in harmonious to what has been held by the apex court in *Municipal Corporation of Delhi Vs. Jagan Nath Ashok Kumar and Another*, AIR 1987 SC 2316 : (1987) 4 JT 25 : (1987) 2 SCALE 695 : (1987) 4 SCC 497 : (1988) 1 SCR 180. In *MCD v. Jagan Nath Ashok Kumar*, the apex court has observed as under:

"Furthermore, in any event, reasonableness of the reasons given by the arbitrator, cannot be challenged. Appraisal of evidence by the arbitrator is never a matter which the court questions and considers. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisal of the evidence. The arbitrator is the sole judge of the quality as well as the quantity of evidence and it will not be for the court to take upon itself the task of being a judge on the evidence before the arbitrator."

[Emphasis supplied]

10. In *Bharat Construction Corporation Vs. Delhi Development Authority and Another*, (1997) 68 DLT 456, the Delhi High Court has held that while considering objections for setting aside an arbitral award the court cannot function as an appellate court and cannot substitute its own findings in place of evaluation of the Arbitrator. Even on broader compass, this ground also cannot come within the purview of proviso to Section 34(2) of the Arbitration and Conciliation Act, 1996 and to be precise, within the phrase "in conflict with public policy of India". The apex court had occasions to consider the ambit and scope of that phrase and observed that the grounds for interfering with an arbitral award are limited to those mentioned in Section 34(2) of the said Act and holding further that the merits of the award can be looked into only under the broad head of "public policy", in *Renusagar Power Co. Ltd. Vs. General Electric Co.*, AIR 1994 SC 860 : (1994) 2 ARBLR 405 : (1994) 81 CompCas 171 : (1993) 4 SCALE 44 : (1994) 1 SCC 644 Supp : (1993) 3 SCR 22 Supp, *Oil and Natural Gas*

Corporation Ltd. Vs. SAW Pipes Ltd., AIR 2003 SC 2629 : (2003) 2 ARBLR 5 : (2003) 3 CompLJ 1 : (2003) 4 JT 171 : (2003) 4 SCALE 92 : (2003) 5 SCC 705 : (2003) 44 SCL 89 : (2003) 3 SCR 691 : (2003) 2 UJ 1035 , McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others, (2006) 2 ARBLR 498 : (2007) 3 CompLJ 213 : (2006) 11 JT 376 : (2006) 6 SCALE 220 : (2006) 11 SCC 181 : (2006) 2 SCR 409 Supp and Oil and Natural Gas Corporation Ltd. Vs. Western Geco international Ltd., AIR 2015 SC 363 : (2014) AIRSCW 5727 : (2014) 10 SCALE 328 : (2014) 9 SCC 263 . The passages as under-noted in Oil & Natural Gas Corporation Ltd. v. Western GECO International Ltd., has taken care of the precedents to enunciate as under:

"35. What then would constitute the "fundamental policy of Indian law" is the question. The decision in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., AIR 2003 SC 2629 : (2003) 2 ARBLR 5 : (2003) 3 CompLJ 1 : (2003) 4 JT 171 : (2003) 4 SCALE 92 : (2003) 5 SCC 705 : (2003) 44 SCL 89 : (2003) 3 SCR 691 : (2003) 2 UJ 1035 does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression "fundamental policy of Indian law", we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian law. The first and foremost is the principle that in every determination whether by a court or other authority that affects the rights of a citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called a "judicial approach" in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of a judicial approach in judicial and quasi judicial determination lies in the fact that so long as the court, tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a court, tribunal or authority vulnerable to challenge.

36. In Ridge v. Baldwin : (1963) 2 All ER 66, the House of Lords was considering the question whether a Watch Committee in exercising its authority under Section 191 of the Municipal Corporations Act, 1882 was required to act judicially. The majority decision was that it had to act judicially and since the order of dismissal was passed without furnishing to the appellant a specific charge, it was a nullity. Dealing with the appellant's contention that the Watch Committee had to act judicially, Lord Reid relied upon the following observations made by Atkin L.J. in R. v. Electricity Commissioners, ex P London Electricity

Joint Committee Co. (1920) Ltd. : (1924) 1 KB 171:

"... Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

37. The view taken by Lord Reid was relied upon by a Constitution Bench of this Court in *Associated Cement Companies Ltd. Vs. P.N. Sharma and Another*, AIR 1965 SC 1595 : (1965) 11 FLR 77 : (1965) 1 LLJ 433 : (1965) 2 SCR 366 , wherein Gajendragadkar, C.J. speaking for the Court observed:

"14.... In other words, according to Lord Reid's judgment, the necessity to follow judicial procedure and observe the principles of natural justice, flows from the nature of the decision which the watch committee had been authorised to reach Under Section 191(4). It would thus be seen that the area where the principles of natural justice have to be followed and judicial approach has to be adopted, has become wider and consequently, the horizon of writ jurisdiction has been extended in a corresponding measure. In dealing with questions as to whether any impugned orders could be revised Under Article 226 of our Constitution, the test prescribed by Lord Reid in this judgment : (1963) 2 ALL ER 66 may afford considerable assistance."

38. Equally important and indeed fundamental to the policy of Indian law is the principle that a court and so also a quasi-judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated "*audi alteram partem*" rule one of the facets of the principles of natural justice is that the court/ authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian law.

39. No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law. Perversity or irrationality of decisions is tested on the touchstone of *Wednesbury* principle : (1947) 2 ALL ER 680 of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a Court of law often in writ jurisdiction of the superior courts but no less in statutory processes wherever the same are available.

40. It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is

it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest."

[Emphasis supplied]

11. The arbitral award does not suffer from any perversity or irrationality to hold that while passing the arbitral award, the sole Arbitrator came in conflict with the "public policy" of India. That apart, for a very limited purpose we have scrutinised the records relied by the appellant. But, from those records we do not find that the respondents ever admitted that the appellant executed the earth filling work to any extent.

12. Having observed thus, we are persuaded to hold that there is no infirmity in the impugned judgment and order. The appeal, therefore, stands dismissed.