

(2000) 11 GUJ CK 0031

In the Gujarat High Court

Case No : First Appeal No. 1026 of 2000 and Civil Application No. 5756 of 2000
& First Appeal No. 1026 of 2000 with Civil Application No. 5756 of 2000

Kandla Port Trust, Trustees of Board

APPELLANT

Vs

Asia Foundation and Construction Ltd.

RESPONDENT

Date of Decision : 21-11-2000

Acts Referred:

Arbitration Act, 1940 — Section 17, 30, 35
Civil Procedure Code, 1908 (CPC) — Section 96

Citation : (2001) 45 GLH 21 : (2001) 21 GLH 45 : (2001) 2 GLR 1459

Hon'ble Judges : M.R. Calla, J;D.A. Mehta, J

Bench : Division Bench

Advocate : S.R. Brahmbhatt, for the Appellant; Mihir J. Thakore, Senior Advocate and Ketan D. Shah, for the Respondent

Final Decision : Partly Allowed

Judgement

M.R. Calla, J.—This is a defendant's First Appeal u/s 96 of the CPC against the judgment and decree dated 29-1-2000 passed by Civil Judge (S.D.), Gandhidham-Kutchh in Special Civil Suit No. 293 of 1995 whereby he has made Umpire's award dated 5-5-1994 to be the rule of the Court u/s 17 of the Arbitration Act, 1940 and has upheld the rejection of the claim of defendant and decreed the claim of the original plaintiff.

2. The appellant i.e., original defendant, namely, Board of Trustees of the Port of Kandla, is a body corporate constituted under the Major Port Trusts Act, 1963, (hereinafter referred to as "K.P.T." for the sake of brevity) and the respondent herein i.e., original plaintiff is Asia Foundation and Constructions Ltd. (hereinafter referred to as "A.F.C.O.N.S.").

3. Briefly stated the facts giving rise to the present Appeal are as under :-

K.P.T., invited sealed item rate tenders for "Construction of Seventh Cargo Berth

at New Kandla". The work consisted of construction of Quay and Transit Structures on R.C.C., bored pile foundation, paved open stacking area including ground treatment, construction and maintenance of Defence Dyke, Container Freight Station and allied works. The complete tenders were to be submitted with complete offer at the office of the Chief Engineer, Kandla Port Trust, not later than 12.00 hours on 29-10-1987.

-- On the basis of the aforesaid notice inviting tenders, tenders received were opened on 1-7-1988. The Tender Committee evaluated the tenders and after considering all the aspects recommended the acceptance of the offer made by the present respondent-A.F.C.O.N.S., for a firm price of Rs. 17,77,72,348/-. Acceptance of the tenders of A.F.C.O.N.S., was conveyed on 28-7-1988 with the alternative design of defence dyke amounting to Rs. 17,46,21,720/-.

-- A.F.C.O.N.S., sent letters dated 8-10-1988 and 28-10-1988 to the Chief Engineer of K.P.T.

-- On 13-12-1988 first slippage of soil was observed.

-- On 9-3-1989 and 10-3-1989 site was visited by Port Consultants.

-- On 20-3-1989 A.F.C.O.N.S., was instructed vide site order No. 25 dated 20-3-1989 for providing temporary bracing to protect piles against the adverse effects of soil slippage.

-- On 16-5-1989 A.F.C.O.N.S., refused for providing temporary bracing stating that it was beyond the scope of work.

-- On 16-7-1989 tilting of 14 piles was observed.

-- On 29-8-1989 revised drawings were furnished to A.F.C.O.N.S. for damaged piles.

-- On 14-9-1989 A.F.C.O.N.S., refused to act as per revised drawings on the ground of clumsy arrangements and extra financial implications.

-- On 6-10-1989 Consultant, Port Trust Prof. V. S. Raju of I.I.T., Madras made his first visit to Kandla.

-- On 19-1-1990 Prof. V. S. Raju made recommendation for strengthening of the berth.

-- On 21-2-1990 work for strengthening of berth was commenced by A.F.C.O.N.S..

-- On 6-9-1990 high power Technical Committee was appointed by Ministry of Surface Transport (M.O.S.T.), Government of India to pin- point the responsibility for the failure of piles.

-- In July, 1991 the report of the Technical Committee was received.

-- On 16-8-1991 A.F.C.O.N.S., were asked to deposit the amount with K.P.T.

towards share of responsibility on account of failure of piles.

-- In August, 1991 the work was slowed down by A.F.C.O.N.S.

-- In August, 1991 the payment of running bills was stopped to the A.F.C.O.N.S.

-- In November, 1991, the payment of the work done after 10-10-1991 was made.

-- The actual date of completion of work was 27-12-1991 and the date of issue of completion Certificate with defects as per clause 52 of conditions of contract was 15-1-1992.

-- On 15-9-1992 completion of the rectification of defects was issued.

-- Arbitration Clause 63, as per arbitration Agreement was invoked on 21-7-1992 by A.F.C.O.N.S., and on 31-7-1992 the Arbitration clause was also invoked by K.P.T., requesting the Arbitrator to give reasons and pass the award claimwise.

-- One Shri A. Jayagopal was appointed as the Arbitrator by A.F.C.O.N.S., and Shri Ananthakrishnan was appointed as Arbitrator by K.P.T., on 21-7-1992. These Arbitrators did not agree and they chose to appoint an Umpire. Thereupon one Shri T. V. Ramana Rao, retired Chief Engineer, Visakhapatnam Port Trust was appointed as the Umpire on 23-10-1992 and on 7-12-1993 records were submitted to the Umpire.

-- Umpire gave Award on 5-5-1994 at Vishakhapatnam.

-- On 18-9-1994 Special Civil Suit No. 145 of 1994 was filed before Civil Judge (S.D.), Bhuj, which was later on re-numbered as Special Civil Suit No. 293 of 1995, through which the respondent-A.F.C.O.N.S., sought an order that the Umpire's award be made the rule of the Court.

4. The Court of Civil Judge (S.D.), Bhuj has passed the order on 29-1-2000. It is this order, which has been made the subject-matter of challenge in this Appeal.

5. The Umpire declared the Award as under :-

-- Regarding Claim No. 1 -

-- That demand of the K.P.T. on the A.F.C.O.N.S., for damages by way of deposit or in any other form for any sum is not sustainable and the K.P.T., is not entitled to make any claim on the A.F.C.O.N.S., for such damages.

-- Regarding claim No. 2 -

(i) K.P.T. was directed to pay to A.F.C.O.N.S., the amount to the tune of Rs. 53,22,286.75 Ps. which was withheld from payment due to the A.F.C.O.N.S.

(ii) K.P.T., was directed to pay to A.F.C.O.N.S., the amount to the tune of Rs. 8,12,942.00 Ps., which was withheld as penal recovery by the K.P.T., for issue of cement and steel.

(iii) K.P.T., was directed to pay to A.F.C.O.N.S. the amount to the tune of Rs. 3,78,445.65 Ps., which was withheld by the K.P.T., towards damages from earnest money submitted by the A.F.C.O.N.S., for tender and bills and Launch Jetty at Kandla.

The K.P.T., was also directed to release the two bank guarantees each of Rs. 10 lacs submitted by the A.F.C.O.N.S., to the K.P.T., as security deposit, as in view of the award as above the K.P.T., was not found to be entitled to make any claim under the same. The K.P.T., was also directed to pay to A.F.C.O.N.S., the interest at the rate of 12% P.A. from the date of award till date of decree or payment whichever is earlier.

-- Regarding K.P.T.'s counter claim - The prayer of the K.P.T., to pass an Award in their favour to the extent of responsibility fixed on the A.F.C.O.N.S., by the high level Technical Committee which was subsequently quantified as Rs. 113.65 lacs in their letter dated 9-9-1993 and lastly revised to Rs. 227.25 lacs by their letter dated 30-9-1993, was found to be not sustainable and the same was rejected.

AND

-- Further that -

Each party shall bear its own costs for conduct of the arbitration. The fees and expenses of the umpire for the conduct of the arbitration, including the filing of the Award in the Court, shall be borne in equal share by the A.F.C.O.N.S., and the K.P.T.

The award as above was issued on 5-5-1994.

6. In the Special Civil Suit, which was filed before the Court of Civil Judge (S.D.), Bhuj by the A.F.C.O.N.S., the Court made the Umpire's Award dated 5-5-1994 as the Rule of the Court on 29-1-2000 and passed the decree accordingly in favour of A.F.C.O.N.S., and against the K.P.T.

7. Mr. S. R. Brahmbhatt appearing on behalf of the appellant - K.P.T. has challenged the validity, correctness and propriety of the Award, as has been made the Rule of the Court by the Court, on the grounds that it has been passed contrary of the terms of contract and that the Umpire has exceeded the scope of arbitration and has thereby misconducted. He has also submitted that the Report of the Expert Committee, which was appointed by M.O.S.T. (Ministry of Surface Transport), has not been taken into consideration while fixing the liability of A.F.C.O.N.S., and the claim of K.P.T., has been wrongly rejected and he has submitted that the report of M.O.S.T., ought to have been taken into consideration. Mr. Brahmbhatt has placed reliance in support of his submissions on the following decisions.

(i) AIR 1990 1426 (SC) .

(ii) AIR 1999 SCW 3160 (State of J. & K. v. Dev Dutt Pandit)

- (iii) AIR 1999 SCW 3258 (Steel Authority of India Ltd. v. J. C. Budharaja)
- (iv) AIR 1999 SCW 3644 (Rajasthan State Mines and Minerals Ltd. v. Eastern Engineering Enterprises).
- (v) AIR 1999 SCW 2303 (Grid Corporation of Orissa Ltd. v. Balasore Technical School).
- (vi) Food Corporation of India Vs. Jagdish Chandra Saha, .

8. Learned Counsel for the respondent-A.F.C.O.N.S. Mr. Mihir Thakore has invited our attention to the various clauses of the Agreement and submitted that the deflection of piles was the result of the faulty design. The fact that the design was faulty had already been pointed out to the Technical Officers of K.P.T., by A.F.C.O.N.S., and yet the Officers of K.P.T., ignored the same. Mr. Mihir Thakore has submitted that so far as first and third claims are concerned, they were with regard to the amounts, which had been withheld on the ground of negligence in the construction of piles and the second claim was against A.F.C.O.N.S., for use of excessive cement and steel, which was supplied by K.P.T., under the terms of the Agreement. Mr. Mihir Thakore has submitted that the only question, which is required to be examined, is as to whether these claims were within the jurisdiction of the Umpire or not. He made reference to the evidence as was led, only to submit that it cannot be looked into and appreciated by this Court and he also submitted that the copy of the Report of the M.O.S.T., was not made available to A.F.C.O.N.S. He tried to show by producing the Minutes of the arbitration proceedings that despite the order passed by the Umpire, K.P.T., did not produce the Report of the Committee appointed by M.O.S.T. He submitted that even M.O.S.T., had found only 50% fault on the part of A.F.C.O.N.S., 40% fault was found to be that of Consultants and K.P.T., itself was held liable for 10%. He has also submitted that this Report by itself is not an evidence nor the gist thereof can be said to be any evidence in the eye of law and even the gist, which was supplied, did not include such portion of the Report of M.O.S.T., which contained allegations against Consultant or K.P.T. He has further submitted that there is no error apparent on the face of the record and merely because the Award is not in conformity with the Report given by M.O.S.T., is no ground for setting aside the Award. In support of his submissions, Mr. Mihir Thakore has placed reliance on the following decisions :-

- (i) AIR 1990 SC 1426 (Raipur Development Authority v. M/s. Chokhamal Contractors)
- (ii) Food Corporation of India and Another Vs. Great Eastern Shipping Co. Ltd.,
- (iii) Food Corporation of India Vs. Jagdish Chandra Saha,
- (iv) Himachal Pradesh State Electricity Board Vs. R.J. Shah and Company,
- (v) Hindustan Steelworks Construction Ltd. Vs. C. Rajasekhar Rao,
- (vi) Sudarsan Trading Co. Vs. Government of Kerala and Another,

- (vii) P.V. Subba Naidu and Others Vs. Government of A.P. and Others,
- (viii) Hindustan Construction Co. Ltd. Vs. State of Jammu and Kashmir,
- (ix) Coimbatore District Podu Thozillar Samgam Vs. Balasubramania Foundry and Others,
- (x) Gopal Krishnaji Ketkar Vs. Mahomed Haji Latif and Others,
- (xi) K.P. Poullose Vs. State of Kerala and Another,

9. We have heard learned Counsel for both the sides at length. It is clearly discernible from the perusal of Section 30 of the Arbitration Act, 1940 itself that the award cannot be set aside except for the grounds mentioned in Section 30 i.e., unless the arbitrator or Umpire has misconducted himself or the proceedings, or that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid u/s 35 and that an award has been improperly procured or is otherwise invalid.

So far as misconduct of the Arbitrator himself i.e. personal conduct is concerned, the illustrative cases are as under :-

- (i) Bribery or corruption,
- (ii) Partiality and bias.
- (iii) Disqualification or want of qualification of arbitration. (iv) Dishonesty. (v) Personal interest in the dispute.
- (vi) Defect in appointment of arbitrator. The cases of defects in procedure are enumerated as under :-
 - (a) Violation of principles of natural justice :-(i) Sufficient opportunity not given, (ii) Evidence shutout. (iii) Evidence taken behind the back of the other.
 - (b) Award beyond Reference.
 - (c) Award influenced by extraneous circumstances.
 - (d) Error apparent on the face of the Award.
 - (e) Decision by ignoring very material documents on the record.
 - ((f) Award based on no evidence.
 - (g) Award on inconsistent findings.

Besides it :-

- (i) Legal misconduct must be apparent on the face of the Award. (ii) Wrong decision on law or facts is not legal misconduct.

10. In the instant case, there is no question of any personal misconduct, but we

have to examine as to whether the Umpire has exceeded the scope of subject-matter of Arbitration agreement or not? For this purpose Clauses 62 and 63 of the Agreement in question are relevant and the same are reproduced as under :-

"62. DECISION OF THE ENGINEER TO BE FINAL :

(i) The decision of the Engineer shall be final, conclusive and binding on all parties to the Contract upon all questions relating to the meaning and interpretation of the specifications, designs, drawings and instructions herein before mentioned and as to the quality of workmanship or material used on the work or any matter arising out of or relating to the specifications, designs and drawings and instructions concerning the works or the execution of or failure to execute the same, arising during the course of the works and in the guarantee period. The above shall not be the subject for arbitration, and in no case shall the work be stopped consequent on such a dispute arising and the work shall also be carried out by the Contractor strictly in accordance with the instructions of the Engineer.

(ii) If the Contractor claims that the decision or the instruction of the Engineer is unjustified and that accordingly he is entitled to extra payment on account thereof, he shall forthwith notify this to the Engineer to record his decision and the reasons therefore in writing and shall within two weeks state his claims in writing to the Engineer thereafter.

The "Engineer" shall thereafter within four weeks of the receipt of the claim reply to the points raised in the claim. Unless resolved by negotiation or discussion immediately thereafter within a further four weeks, the question of liability for such payment will be treated as one of the disputes.

63. SETTLEMENT OF DISPUTES :

All disputes between the parties shall be referred to the award of two arbitrators (one to be nominated by the "Contractor" and one by the "Chairman"), or in case of the said arbitrators not agreeing, then to the award of an Umpire to be appointed by the said arbitrators in writing before proceeding in the reference. The decision of the arbitrators or in the event of their not agreeing, of the Umpire appointed by them shall be final and binding on all parties to the Contract and the provisions of the Indian Arbitration Act of 1940 and the rules thereunder and any statutory modification thereof shall be deemed to apply to such reference and deemed to be incorporated in the Contract. The arbitration award shall be given claimwise."

As per item (i) of Clause 62 it is clear that all questions relating to the meaning and interpretation of the specifications, designs, drawings and instructions and as to the quality of workmanship or material used on the work or any matter arising out of or relating to the specifications, designs and drawings and instructions concerning the works or the execution of or failure to execute the same, arising during the course of the works and in the guarantee period, the

decision of the Engineer shall be final. At the same time, the clause also contains a condition that the above shall not be subject for arbitration and in no case the work be stopped consequent to such a dispute arising between the parties and the work was to be carried out by the Contractor strictly in accordance with the instructions of the Engineer. As per Clause 63 all the disputes between the parties have to be referred for arbitration to the two arbitrators (one to be nominated by the Contractor and one by the Chairman) and in case of disagreement between the two arbitrators the Umpire is to be appointed by the said arbitrators in writing before proceeding with the reference. The decision of the arbitrators or in the event of their not agreeing, the decision of the Umpire shall be final and binding on all parties to the Contract and the provisions of the Indian Arbitration Act and the rules thereunder and any statutory modification thereof shall be deemed to apply to such reference and deemed to be incorporated in the Contract and the arbitration award shall be given claimwise. While the position of law with regard to the dealing with the Awards under the Arbitration Act and the same being made rule of the Court and the grounds and scope of interference in such matters is quite limited, in view of the principles, as laid down by the Supreme Court in various decisions, one thing is certain that in case the Arbitrator or Umpire exceeds the scope of arbitration agreement in any form, such an Award and decree of the Court making such an award the rule of Court, is liable to be set aside. Mr. Mihir Thakore himself has very candidly stated before us that in case it is found that the Umpire has exceeded the scope of the Arbitration Agreement and has acted contrary to the terms and scope of the Agreement, such Award may be set aside but he maintains that in the case at hand such grounds are totally wanting.

11. If we apply the well recognized principle, that as and when the Arbitrator has exceeded the scope of the subject-matter of Arbitration Agreement, the Award cannot be sustained, on the facts of the present case, we find that so far as the question of fault in design is concerned, the same was kept out of the scope of Arbitration in terms of Clause 62(i). The question of fault in design was raised as a dispute by A.F.C.O.N.S, to claim the withheld payments. The contention that it was the defence raised by A.F.C.O.N.S., against the stand of K.P.T., and therefore, it could be considered by the Umpire while passing the Award does not appear to be correct and tenable proposition in our view for the simple reason that what cannot be done directly cannot be done in an indirect manner, and therefore, when the question of defect in design could not be a subject-matter for arbitration at all, that could not be made a ground so as to reject the claim of K.P.T., and accept the claim of A.F.C.O.N.S., so as to pass an Award in favour of A.F.C.O.N.S., and against the K.P.T. In our considered opinion the Umpire has clearly and certainly exceeded the scope of the subject-matter of Arbitration Agreement in the facts of the present case. We, therefore, find that the Award passed by the Umpire, as has been made the rule of the Court, cannot be sustained in the eye of law, and the matter, therefore, deserves to be remanded back to the Umpire to re-consider the Reference de novo without taking into

consideration the A.F.C.O.N.S.'s, plea with regard to the fault in design, in terms of the Contract and in the light of the observations made in this order as above and we order accordingly.

12. The impugned judgment, order and decree passed by the Court on 29-1-2000 in Special Civil Suit No. 293 of 1995 and the Award, as has been passed by the Umpire on 5-5-1994 are hereby set aside. The Umpire may proceed de novo in accordance with law as directed by us in Para 11. It will be open for both the sides to produce any more document or material and lead evidence on which they seek to place reliance before the Umpire.

13. This appeal is partly allowed in the terms, as aforesaid. In the facts and circumstances of this case, the parties are left to bear their own costs.

14. In view of the order passed in the main Appeal, no further orders are required to be passed in Civil Application No. 5756 of 2000 and the same is hereby rejected. Rule is discharged therein.

15. Appeal partly allowed.