
(2015) 04 KAR CK 0071

In the Karnataka High Court

Case No : Miscellaneous First Appeal No. 5125/2010 (AA)

Kwality Constructions Engineers

APPELLANT

Vs

The Executive Engineer and Others

RESPONDENT

Date of Decision : 16-04-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 31(3), 34, 37(1)(b)

Citation : (2015) 04 KAR CK 0071

Hon'ble Judges : N.K. Patil, J; Rathnakala, J

Bench : Division Bench

Advocate : A. Madhusudhana Rao, for the Appellant; S.C. Mahadeva Murthy, Advocates for the Respondent

Final Decision : Allowed

Judgement

Rathnakala, J.—This appeal filed under Section 37(1)(b) of the Arbitration and Conciliation Act, 1996 ("the Act" for brevity) arises out of the Arbitration Suit No. 6/2002 on the file of the Prl. Dist. Judge at Mysore; vide judgment dated 6.3.2010, whereby the case of the appellant herein was dismissed.

For the sake of convenience, parties will be referred to as per their ranking in the court below.

2. Facts succinctly stated:--

"The petitioner is a partnership firm; the construction work of Regional Telecom Training Centre at Mysore was awarded by the first respondent/Executive Engineer; the estimated value of the work was Rs. 1,78,05,713/- with stipulated dates of commencement and completion as 9.3.1990 and 8.3.1992 respectively. Because of the delay and defaults on the part of the Executive Engineer, the work could be completed only on 28.2.1994. Owing to the responsibility of delay, time was extended from 9.3.1992 to 28.3.1994 without levy of compensation. Several claims were due to the respondents in respect of the above contract. Same was referred to second respondent/Chief engineer (Arbitration). Arbitration

proceedings were held. The petitioner received the award on 21.2.2002; by way of award, second respondent allowed only 12 claims of the petitioner and rejected 49 claims. Aggrieved petitioner challenged the 24 claims out of rejected 49 claims before the District Court under Section 34 of the Act."

3. The learned Court below after giving audience to both the parties has dismissed the petition.

4. Sri. A. Madhusudhana, learned Counsel appearing for the petitioner submits that, the court below while appreciating the case, once came to the conclusion that a part of the award passed by the Arbitrator is illegal, passed without considering the materials placed on record and requires to be remanded. But abruptly by misconstruing the judgment of the Apex Court reported in Pooran Chand Nangia Vs. National Fertilizers Ltd., (2003) 3 ARBLR 406 : (2003) 8 JT 273 : (2003) 8 SCALE 419 : (2003) 8 SCC 245 : (2003) 48 SCL 280 : (2003) 4 SCR 531 Supp came to the conclusion that the petitioner having received the amount awarded by the Arbitrator should not have challenged the award. But the facts and circumstances of the said case were of no relevance to the present case. The petitioner had challenged the correctness of that part of the award whereby without assigning reasons, his claims were rejected. The petitioner subsequently had made supplementary petition in respect of rejection of additional claims. But they were rejected as barred by time. Since the original petition was filed in time, supplementary petition should have been treated as continuation of the original proceedings or as amendment to the main petition. With the above submission, learned Counsel for the petitioner concludes that the matter may be remanded to the court below with a direction to further remand the matter to the Arbitrator for reconsideration of the claims rejected in respect of claims Nos. 1, 5, 8, 10, 11, 13, 14, 20, 21, 25, 26, 27, 32, 33, 35, 36, 37, 39, 42 to 45.

5. In reply, Sri. S.C. Mahadeva Murthy, learned Counsel for the respondents submits that the estimated cost of the work was Rs. 1,33,77,394/-. However, after working out the cost involved in the work, it was tendered to Rs. 1,78,05,713/-. The Arbitrator is a technical person/Chief Engineer; he is a person of sterling integrity and character. He has awarded additional amount of Rs. 7,62,520.16 paise and rejected the claims which were not proved. The amount claimed by the petitioner for Rs. 1,68,04,000/- was without any basis. Having accepted the award and having received the amount, the petitioner cannot challenge the award of the Arbitrator and the court below has rightly rejected his petition and the appeal deserves to be rejected with cost.

6. In the light of the above rival submissions, we have perused the impugned judgment.

7. The learned District Judge has taken note of the fact that the petitioner claimed an amount of Rs. 2 lakhs in respect of difference in cost of 6 mm M.S. rounds provided in half brick work and in the item of half brick work, 2 numbers

of 6 mm dia Mild Steel bars were to be provided at every third course embedded in cement mortar in half brick work in super structure in all floors. The steel as per the agreement had to be supplied by the first respondent at the rates specified in the agreement itself. The case of the petitioner was, said mild steel was not supplied and he had to purchase the same from the open market. The difference of rate between the rate quoted in the contract and the rate at which he had to purchase the mild steel in the market along with interest was the subject matter of the claim. But the Arbitrator without assigning any reason had held that the petitioner was not justified in making the said claim; as per the terms and conditions of the agreement, rate quoted by the claimant for item No. 4, brick work is inclusive of 2 numbers 6 MM dia mild steel bars at every 3rd course and it was the duty of the claimant to procure the mild steel from this item at his own cost.

8. The learned District Judge observes from the award challenged before him that in the terms and conditions of the agreement, rate quoted by the claimant in respect of item No. 4 is inclusive of providing 2 numbers 6 MM dia mild steel bars at every 3rd course and the claimant was required to procure mild steel for this item at his own cost. But the petitioner had written the letters as per Exs. C1 to C4 for supply of the steel long back and there was no response from the respondent in the interest of progress of work, he purchased the steel from the market and used the same for his work and claimed the difference of costs, but this aspect of the matter was not considered by the Arbitrator while rejecting the claim of the petitioner. The materials and the documents placed by the petitioner were not considered by him. When the documents were marked in support of the claim of the petitioner, he had to give reasons while rejecting the claims. In respect of claim No. 5 also, the learned District Judge has drawn the same inference. However, in respect of additional claims, which were rejected by the Arbitrator, the learned District Judge opined that the additional claims were time barred. At para-26 of his judgment, the learned District Judge quotes mandatory provisions of Section 31(3) of the Act along with several authorities, which contemplates the Arbitrator to assign reasons for rejecting the claim and records his finding that the Arbitrator has not assigned the reasons while considering the claim of the petitioner and it requires to be remitted for reconsideration.

9. Having stated so, he takes a "U" turn on referring to the judgment of the Apex Court reported in Pooran Chand Nangia Vs. National Fertilizers Ltd., (2003) 3 ARBLR 406 : (2003) 8 JT 273 : (2003) 8 SCALE 419 : (2003) 8 SCC 245 : (2003) 48 SCL 280 : (2003) 4 SCR 531 Supp wherein the appellant had received the money, which was due to him under the award and submitted to the jurisdiction of the Arbitrator unequivocally without reservation and then challenged the award. In the said circumstance, the Apex Court held, if he decides to challenge the award, he should have reserved his right to do so, which he did not. The learned District Judge in reference to the present case has drawn inference that the petitioner had not reserved the right and his own letter disclosed that he had received a cheque, which was delivered to him on

23.5.2002 beyond 90 days from the date of the award. By applying the ratio of the judgment of the Apex Court cited supra as conceived by him, he reaches the conclusion that, the petitioner had received the payments prior to filing of the petition and had informed the short fall of payment and without reserving the right, it was not open to him to challenge the award and nonsuited the petitioner.

10. The learned District Judge misdirected himself in understanding the ratio laid down by the Apex Court in the judgment cited supra. On facts, he had found that, the Arbitrator was mandatorily obliged to assign reason in the event of rejection of the claim. But by a sudden sweep dismissed the petition without any valid reason. In the above noted judgment of the Apex Court, the petitioner having enjoyed the usufructs of the award had gone to the extent of questioning the jurisdiction of the Arbitrator. It is in that context, the Apex Court held that "once the appellant submitted to the jurisdiction of the arbitrator unequivocally and accepted the award, he cannot challenge the same and if he decides to challenge the award, he should have reserved his right to do so". But the circumstances on hand differ, the petitioner was not questioning the jurisdiction of the Arbitrator, he has availed the benefits of the claims, which were allowed in his favour, but challenged the claims, which were rejected under Section 34 of the Act. At the first instance, the learned Judge on appreciation of claimant's contentions vis-?-vis the Award has found that the matter needs remittance. But his further understanding of the judgment of the Apex Court cited supra was on a misreading and it was a mismatch to compare the facts on hand to the judgment of the Apex Court. Obviously the impugned order is erroneous and illegal.

11. As regards the additional claims are concerned, the learned District Judge on appreciation of the facts has observed that the claims are barred by limitation. We do not propose to interfere with the said finding.

12. The matter requires to be dealt with, in accordance with the observations made by the learned District Judge from paragraphs-26 to 28 of his judgment. Hence, the following order:

The appeal is allowed.

The judgment and decree dated 6.3.2010 passed in Arbitration Suit No. 6/2002 by the Principal District Judge at Mysore, is hereby set aside.

The matter is remanded to the Principal District Judge at Mysore, for reconsideration of the matter in accordance with the observations made supra.

The court below is directed to dispose of the petition filed by the parties within a time frame of four months from the date of appearance of parties.

Without waiting for any notice from the Court, the parties are directed to appear before the concerned court on 2nd June 2015 at 11.00 a.m. either personally or through their Counsel and collect the further date of hearing.