
(2002) 04 DEL CK 0126
In the Delhi High Court
Case No : Suit No. 79 of 1995

Late Shri Somnath Sahu

APPELLANT

Vs

Hindustan Door-Oliver Limited

RESPONDENT

Date of Decision : 23-04-2002

Acts Referred:

Arbitration Act, 1940 — Section 33

Citation : (2002) 3 ARBLR 421 : (2002) 99 DLT 729

Hon'ble Judges : Jiwan Dass Kapoor, J

Bench : Single Bench

Advocate : S.K. Bagga and S.K. Sanghaneria, for the Appellant; A.K. Gupta, for the Respondent

Judgement

J.D. Kapoor, J.—Admittedly the award is a non-speaking award. The respondent/objector is the Government of India Undertaking.

2. The objector awarded the contract to respondent no. 1 Hindustan Dorr-Oliver Limited (in short DHOL) for setting up Phosphatic Acid Plant. The HDOL gave a sub-contract to the claimant vide letter of intent dated 18th February, 1987 and handed over the site to the claimant on 23.2.87. The total value of the award was Rs. 2,06,47,500/-. The work was to be completed by 31.1.1988. Since the work could not be completed by the stipulated date the contract was terminated on 11.9.89 and the balance work was re-tendered.

3. On disputes being raised and as a result of compromise in this Court the claimant and HDOL jointly appointed Mr. Justice J.K. Mohanty as an Umpire.

4. Initially the claim for Rs. 1,52,65,746.84 was made. On 7.3.82 the claimant raised additional claim raising it to Rs. 3,18,16,762/-. However the objector also preferred the counter claim to the tune of Rs. 67 crores. After examining the claim and counter claim, the Arbitrators made the unanimous award as under:

"In full and final settlement of the claims of the claimant and the counter claims of the co-respondents we decide and award Rs. 30.95 (Rupees Thirty Lakhs

Ninety Five thousand) only to the claimant. We Therefore further decide and award that the co-respondent (2) (two) (Paradeep Phosphates Limited) shall pay to the claimant Rs. 30.95 lakhs (Rupees Thirty Lakhs Ninety Five Thousand) only in full and final settlement of all his claims and co-respondents" counter claims.

The respondent (2) (two) (Paradeep Phosphates Limited) shall also pay simple interest @ 13% (Thirteen Percent) per annum to the claimant on the above awarded sum of Rs. 30.95 lakhs (Rupees Thirty Lakhs Ninety Five Thousand) only with effect from 13.11.1989 (date of submission of final Bill) to the date of payment or decree whichever is earlier.

Each party to bear its own cost of arbitration."

5. The award has been assailed mainly on the following grounds:-

(i) That the Arbitrators have misconducted themselves by not deciding the additional counter claims raising the issue of the maintainability of the claims filed by the petitioner/claimant inasmuch as that the sub-contractor i.e the petitioner had without exhausting the remedy under Clause 21(iii)(b) had directly referred the disputes for arbitration. Clause 21 enjoined upon the sub-contractor that it shall by written notice to the contractor within three days after receiving any decision or order of the contractor in writing or written confirmation thereof intimate that the disputes are raised for decisions/instructions or order giving his reasons for doing so.

(ii) That all the claims preferred by the claimant were de hors the contract and not maintainable. For instance Article 38(1) of the sub-contract provided that all rates shall be fixed for the duration of the contract and shall not be for escalation but still the claimant made the claim on account of escalation.

(iii) That there has been non-application of mind by the Arbitrators. It is mentioned in the award that additional counter was filed on 13.4.1992 raising the plea of limitation. The fact is that the said counter was filed only raising the plea of maintainability of the arbitration proceedings. It was stated in the award that the pre-condition for invoking the arbitration clause under Article 35 was not satisfied in as much as Clause 21(iii)(b) of the sub-contract has not been complied with by the claimant. This fact has not been taken into consideration by the Arbitrators.

(iv) That misconduct and non-application of mind is apparent from the fact that as per Clause 6.5.88 of the Special terms/conditions of contract payment to the claimant becomes due after 120 days of the submission of the final bill but by awarding interest from the date of submission of final bills the Arbitrators have acted beyond the scope of the contract.

6. As is apparent substantive objections are two fold. Firstly that the claims were not maintainable because of the failure of the petitioner/claimant to give notice of three days and secondly that the award suffers from the non-application of mind as the Arbitrators did not even care to peruse and see the aforesaid clauses

and, Therefore, the award is beyond the terms of the agreement.

7. The scope of challenge of non-speaking award is very limited. In a reasoned award one can know as to the reasons for accepting or rejecting the claims and counter claims of the parties. In a non-speaking award it is difficult to gauge the mental process of the Arbitrator which guided him to allow or reject a particular claim or counter claim. But it does not mean that non-speaking award is immune from scrutiny or challenge. If the error or omission to consider a vital or material document or objection that hits at the very fount of the proceedings is pronounced and apparent on the face, the award is liable to be set aside or to be remitted for re-consideration. Similarly if the Arbitrator travels beyond the terms of the agreement he renders his award not only as a nullity but nugatory and tautologous.

8. In an identical case of non-speaking award the Supreme court in Union of India (UOI) Vs. G.S. Atwal and Co. (Asansole), took the view that the finding of the Arbitrator on the arbitrability of the claim is not conclusive, as u/s 33 ultimately it is the Court that decides the controversy and it can hardly be within the arbitrator's jurisdiction to decide whether or not a condition precedent to his jurisdiction has been fulfilled as the arbitrator has no power to decide his own jurisdiction. It is the court that decides finally the arbitrability of the claims in disputes or any clause or a matter or a thing contained or the construction thereof.

9. It cannot be gainsaid that any award without jurisdiction is a nullity. In this regard reference may be made to Tarapore and Co. Vs. State of M.P., and Tamil Nadu Electricity Board Vs. M/s. Bridge Tunnel Constructions and others, wherein the Supreme Court held that since the award contains claims, both arbitrable and non-arbitrable it would be difficult to discern as to what extent he had considered the admissible and inadmissible claims which he adjudged and as such it was held to be an error of jurisdiction.

10. In Associated Engineering Co. Vs. Government of Andhra Pradesh and another, the umpire acted without jurisdiction by deciding matters strikingly outside his jurisdiction as he over stepped the bounds of the contract and wandered far outside the designated area, the Supreme Court held that any error which goes to the root of the jurisdiction by way of disregarding the contract the award is in excess of his authority. However, such an error does not come within the ambit of misleading or misconstruing the terms of the contract.

11. In AIR 1990 1426 (SC) the Constitution Bench took the view that unless the parties expressly agree the arbitrator is not required to give any reasons in support of his award.

12. The objections raised by the respondent when seen in the light of the facts of the case and the proceedings before the Arbitrators are wanting in substance and merit. All the parties made their submissions before the Arbitrators. They filed their pleadings, adduced the evidence, filed the written notes and argued the

matter in extenso.

13. The allegation of non-application of mind by no stretch of imagination can stick to such an award where the parties are given full dress hearing and trial and submit extensive notes in support of their pleadings and arguments. The fact that the Arbitrators arrived at a figure of Rs. 30 lacs though the claims of the petitioners exceeded Rs. 3 crores whereas the counter claim of the respondent was somewhere near Rs. 67 crores shows not only the extensive application of mind but also the well accorded consideration to the arguments and counter arguments of the parties.

14. However the plea of non-maintainability of the arbitral proceedings is no more available to the respondent after they had participated extensively in the proceedings and also having appointed one of the Arbitrators of their choice. Such a conduct of a party not only amounts to waiver of right to raise such an objection subsequently but to acquiescence also.

15. As regards the objection that the petitioner/claimant did not give the notice of three days to the respondent before raising the disputes it loses its teeth in the face of submitting before the Arbitrators and participating before them so vigorously that they filed written notes in support of their counter claims and against the claims of the petitioner. Even otherwise this Court has taken similar view in the case of JK Anand v. DDA and Anr. 2001(2) ALR 663 and Rawla Construction Com 2001 ALR 469 wherein almost identical objections were raised.

16. Taking overall view of the matter I find no merit in the objections. Even otherwise the Arbitrators were guided by the plea of the respondent/objector that the petitioner had abandoned the work after completing 17-18 % and awarded almost proportionate claim.

17. However to be fair to the respondent also the rate of interest awarded by the Arbitrators for the pre-reference period is hereby modified to the extent that the interest will be applicable from the date of reference @ 8% till its realization.