
(2014) 06 OHC CK 0014
In the Orissa High Court
Case No : Misc. Appeal No. 491 of 1993

Marketing Manager

APPELLANT

Vs

L.M. Hati and Co.

RESPONDENT

Date of Decision : 18-06-2014

Acts Referred:

Arbitration Act, 1940 — Section 8

Citation : (2014) 4 ARBLR 375 : (2014) 118 CLT 592 : (2014) 2 OLR 966
Suppl. : (2014) 2 OLR 966

Hon'ble Judges : I. Mahanty, J

Bench : Single Bench

Judgement

I. Mahanty, J.—This appeal has been filed by the Appellants seeking to challenge a decree dated 15.05.1993 passed by the Learned Sub-Judge, Jagatsinghpur in T.S. No. 194 of 1992 making an arbitral award rule of the Court. The impugned decree was passed in the suit whereby, the Plaintiff-Respondent had prayed to make an award dated 26.09.1992 passed by the sole arbitrator rule of the Court with costs & interest.

2. The case of the Plaintiff-Respondent was that it had entered into an agreement with the Appellant-Defendants & had been entrusted with a work of stevedoring, clearing & forwarding of imported fertilizers received by the Defendant through various ships arriving at Paradeep Port, in the State of Orissa. The dispute arose between the parties regarding payment of dues of the Plaintiff-Respondent by the terms & conditions of contract. The dispute was referred to the sole arbitration of the General Manager (Marketing) of the Fertilizer Corporation of India Appellant-company or his nominee. The said General Manager appointed Sri P. Vijaya Gopal as the sole Arbitrator & referred the dispute to him. The Arbitrator issued notices to the parties & after going through the claims, objections & evidences in support of their respective cases, signed the award on 26.09.1992. The Respondent-Plaintiff filed Misc. Case No. 271 of 1992 for issue of direction to the said Arbitrator to file the award & documents

before the said Court & the Arbitrator, in response to the notices issued by the Learned Court, sent the award along with other documents. Accordingly, the present suit i.e. T.S. No. 194 of 1992 was registered. Upon notice to the parties, the Trial Court arrived at the following findings:

i) The Learned Sub-Judge came to hold that it had the necessary jurisdiction over the subject matter of the suit & for making the award, rule of the Court.

ii) That, the appointment of the Arbitrator was in accordance with the agreement between the parties.

iii) That, the sole Arbitrator had considered the materials on record & had passed the award & was not obliged to give reasons for his decision. Accordingly, all these issues were answered in favour of the Plaintiff-Respondent & against the Appellant.

iv) The Learned Sub-Judge came to a further finding that there is no prima facie material on record to indicate that the Appellant-Defendants had ever raised objections relating to the jurisdiction before the Arbitrator. Apart from the above, he came to a further finding that, insofar as limitation is concerned, the allegation of the Appellants that the contract in question was completed in March, 1986 & therefore, the claim was barred by limitation (since it was raised after four years therefrom) also came to be rejected by the Learned Trial Court, on the basis of the materials on record, from which it was found that, in view of the correspondence with regard to the payment of final bills, the said claims were never settled, since the claims made by the Respondent in the final bill was not paid. Apart from the above, the Learned Sub-Judge found that, right from the beginning, there were negotiations between the parties on various terms of the contract & in respect of rates therein & since the dispute arose only when there was no settlement between the parties through the claim made by the Respondent-Plaintiff in their final bill, the claims raised were not barred by the law of limitation. Insofar as Clause 15(a) of the agreement is concerned, the Learned Sub-Judge came to a finding that the said Clause can only apply to a case where "termination of contract" was made & since admittedly, in the present case, it is not disputed that there was no termination of contract & instead, the contract was duly completed & since the parties could not resolve the pending issues between themselves regarding release of payments hence the dispute/differences still existed & the cause of action continued till final payment is made or settlement of all disputes. Accordingly, the Learned Sub-Judge came to hold that the claim for arbitration by the Plaintiff-Respondent was not barred by the law of limitation & further, that since the parties had agreed that the award of the arbitrator, would be final, conclusive & binding between themselves, this issue was answered in favour of the Plaintiff-Respondent & against the Appellants.

v) The findings of the Learned Arbitrator that law was well settled that interest for the period prior to the commencement of the arbitration proceeding can be granted by the Arbitrator was upheld by Civil Judge as a finding that the

Arbitrator had jurisdiction to award interest & answering the said issue in favour of the Plaintiff-Respondent & against the Appellants.

3. Sri Ganeswar Rath, Learned Counsel for the Appellants-company raised the following contentions:

A. The claimant-Respondent, in response to a letter dated 09.07.1990 of Fertilizer Corporation of India Ltd. had given notice for appointment of arbitrator in terms of Clause-15(a) of NIT agreement on 24.12.1990. Accordingly, it was submitted that, since the request for arbitration had not been made within three months from 09.07.1990, in terms of Clause-15(a) of the NIT, the claimant-Respondent must be deemed to have waived their claim & the Appellants had been discharged from their liability, if any.

B. Clause-16 of the NIT envisaged that the decision of the Marketing Manager shall be binding on the contractor. So far as the question of particular services is concerned, reliance was also placed on Clause 5 of the NIT, which envisaged that the assessment or determination of loss of cargo and/or recovery of cost thereof, shall be decided on the merits in each case, by the Marketing Manager, whose decision shall be final & binding on the contractor. Similarly, Clause-20 of the NIT envisaged that all demurrage & other claims under the contract, as assessed by the Marketing Manager, shall be final & binding on the contractor & shall be made or deducted from its dues. The claims raised by the Plaintiff-Respondent clearly relate to "deductions made due to demurrage wharfage, shortage, claim for work not completed" under the contract etc. &, therefore, the claims advanced by the claimant was not "absolute" as they were "excepted matters". In this regard, it is further submitted that the Learned Trial Court without discussing or making an analysis of these objections, came to hold that the Arbitrator had possessed the necessary jurisdiction to pass the impugned Award. Therefore, the non-adjudication of Issue No. 3 is an error apparent on the face of the record.

C. Clause B(ii) of the NIT envisaged that the contract shall remain in force for one year only from the date of award of contract. The work order had been issued on 07.06.1985 & as such, no contract could be said to be in existence beyond 07.06.1986. Therefore, since no contract was existing beyond the aforesaid date, the arbitration clause can no longer be claimed to continue to exist & since reference had been made to a void contract, the Judgment & decree passed by the Learned Sub-Judge was consequently void.

D. It is further submitted that even though the Arbitrator had the authority to submit an "unreasoned award" even then, where an Arbitrator travels beyond the scope of the contract & thereby, it must be held to have exceeded its competence. Alternatively, it has open for the Court to take note of the nature of claims as submitted to the Arbitrator. Therefore, even in an unreasoned award, if an Arbitrator has committed an error in the construction of the contract & if he travels outside the contract & deals with matters not allotted to him, he commits

a "Jurisdictional error" & a Court is empowered to look into the extrinsic evidence to determine the same. Rational of this issue is that the nature of the dispute is something which has to be determined at the outset & if a Court finds that an Arbitrator has exceeded his jurisdiction, such award may be struck down as being beyond his jurisdiction.

E. A further issue has been raised regarding non-framing of issues raised in the written statement filed by the Appellants & the same amounts to an error on the face of the record & since the non-framing of such issues, mentioned in the appeal memo, go to the root of the case, the same is an error apparent on the face of the record.

F. Insofar as the direction in the award, to refund the "security amount" to the claimant-Respondent is concerned, it is stated that no such Claim for refund of security deposit was raised by the Respondent before the Learned Arbitrator & in the absence of any such claim, the Arbitrator had clearly acted beyond the scope of the reference.

4. Sri K.N. Jena, Learned Counsel appearing for the Respondent, on the other hand, submitted that insofar as the pleas by the Appellants, that there is no arbitration agreement, is fallacious & contrary to the materials on record. It is submitted on behalf of the Respondent that once the contesting parties have submitted to the jurisdiction of the Arbitrator & have participated in the arbitration proceeding, that too over a long period of time, without challenging the appointment & authority of the Arbitrator, such a party cannot be permitted to raise any such plea, after the award has been passed. The Appellants cannot turn back & say that there is no arbitration clause or that the Arbitrator had no jurisdiction to decide the dispute referred to him. It is further contended that the issue of jurisdiction was neither raised by the Appellants in the Court below nor before the Arbitrator &, therefore, they cannot be permitted to raise such an issue or question at the Appellate stage. It is stated that Clause-15 of the NIT contains the arbitration clause for adjudication of dispute & differences arising out of the contract. The Appellants participated in the arbitral proceeding &, therefore, in such a situation the participation of the Appellants in the proceeding before the Arbitrator before passing of such award, binds the Appellants to such award & they can no longer raise such a plea. Accordingly, Sri Jena submitted that the Appellants are now estopped from raising such an issue or taking such a stand at the appeal stage, which was not taken in the Court below. In this respect, reliance was placed on a decision rendered in Punjab State Electricity Board and others Vs. Ludhiana Steels Private Ltd., as well as AIR 1963 SC 230.

Sri Jena submitted that various "work orders" were issued to the Respondent-claimant on different dates by the Appellants for stevedoring, clearing & forwarding of imported fertilizer brought to Paradeep Port by different ships & such work orders were issued on 07.06.1985, 08.08.1985, 01.10.1985 & 25.11.1985. The work orders issued to the Respondent was to execute the work in terms of the NIT. The Respondent-claimants executed the works in terms of

the NIT & the General Manager (Marketing) of the Appellants company, on receipt of notice u/s 8 of the Arbitration Act from the Respondent by letter dated 11.01.1991, appointed Sri P. Vijay Gopal as Arbitrator in terms of Clause-15(a) of the NIT to resolve all disputes. The Appellants did not chose to challenge the competency or authority of the Arbitrator in any Court of law & on the contrary, participated in the proceedings & was, therefore, estopped to raise any objection against them. He further submitted that there is no error apparent on the face of the award either on any questions of law or on record &, therefore, the award cannot be set aside. Moreover, since no document has been made part of the award, no Court can go behind the award & re-assess the evidence & materials placed before the Arbitrator as a Court of appeal in order to find out if any error has been committed by the Arbitrator in giving any unreasoned award. In the letter of reference dated 11.01.1991 & in particular, Para. 4 thereof, reads as follows:

"Now, pursuant to the aforesaid request of M/s. L.M. Hati & Co., 59, Madhuban Market Complex Paradip Port, Cuttack, Orissa-754142 & without prejudice to the rights & contentions of the parties, I do hereby appoint you as an arbitrator in respect of the question, dispute & difference in terms of the aforesaid clause 15(a) of the agreement entered between the Fertilizer Corporation of India Ltd., & M/s. L.M. Hati & Co., dated 7.6.1985. Aforesaid term of the reference read with Clause-18 has given no scope to think that the only question of limitation was referred to Arbitrator for adjudication as contended by the Appellant."

Learned Counsel for the Respondent submitted that reliance, placed by the Appellants on the Respondent's letter dated 29.01.1991, is of no consequence in view of the terms of the reference made to the Arbitrator dated 11.01.1991 quoted hereinabove. Further more, it is stated that the Appellants never responded to the Respondent's letter dated 29.01.1991, neither did the appointing authority had overacted upon such letter nor modified the terms of the reference. Therefore, both the parties fully participated in the Arbitral proceedings & thus, cannot be questioned thereafter more so, when the authority of the Arbitrator was never challenged nor questioned by the Appellants before any Court of law during the arbitration proceeding.

5. After taking note of the submissions made by the Learned Counsel for the respective parties, it would be most relevant at this juncture to note that the Award passed by the Learned Arbitrator is a non-speaking Award. Insofar as a non-speaking Award is concerned, this Court in a Judgment in the case of State of Orissa & Anr. v. M/s. Consolidated Construction Company (Engineers & Contractors) & Anr., reported in AIR 1981 SC (Orissa) 166 has dealt with the issue as to whether an Arbitrator was required to give reasons for the conclusions arrived at & whether non-provision of such reasons was obligatory or not. The Bench presided over by Justice R.N. Mishra, the Chief Justice (as the then was) came to conclude that, an Arbitrator is entitled to give reasons but there is no obligation for him to support his conclusions in favour of or against a

party by giving reason.

6. Apart from the aforesaid proposition of law, it has been well settled by the Hon''ble Supreme Court in the case of N. Chellappan Vs. Secretary, Kerala State Electricity Board and Another, that when a party participates in an arbitral proceeding without any demur to his jurisdiction, the only inference from this conduct on the part of such a party is that, it had no objection to the order appointing an Arbitrator for adjudication to its disputes. Therefore, by acquiescence a party who has participated, was precluded from challenging the issue of the Arbitrator. This Judgment is also supported by the subsequent Judgment of the Hon''ble Supreme Court in the case of Prasun Roy Vs. Calcutta Metropolitan Development Authority and Another, wherein the Judgment rendered by Hon''ble Mr. Justice Sabyasachi Mukharji (as His Lordship the then was) came to bold that, although the parties aware from the beginning that by reason of some disability, the matter is legally incapable of submitting matters to arbitration, participation in the arbitral proceeding without protest & fully avails of the entire arbitration proceedings & then when he sees that the award has gone against him, he comes forward to challenge the whole of the arbitration proceedings as without jurisdiction on the ground of known disability, the same cannot be allowed. This principle applies both before & after making of the Award. The principle is that, a party shall not be allowed to blow hot & cold simultaneously. Long participation & acquiescence in the proceeding preclude such a party from contending that the proceedings were without jurisdiction.

7. In the present case, the parties not only participated in the arbitral proceeding before the Arbitrator, who was appointed by an Order Dated 11.01.1991 passed by the General Manager of the Appellant-company, & finally culminated in an Award dated 26.09.1992 but also held multiple sittings & further, as would be apparent from the award, the parties had also consented in writing to extend the period of the Arbitral sittings from time to time. In view of the acquiescence of the parties, neither could be allowed to challenge the arbitration proceeding on the ground of some disability & the matter could not have been referred to arbitration.

8. In view of the aforesaid decisions of the Hon''ble Supreme Court, the contentions raised by the Appellants vis-a-vis on the issue of apparent lack of jurisdiction on the part of the Arbitrator to enter into the arbitration as well as to render the Award must fail. It would also be important to take note of the fact that the Respondent (claimant) had raised its claim in its final bill submitted to the Appellant, which admittedly had not been finally settled. Consequently, compelling the Respondent to seek appointment of an Arbitrator & in terms of such request, the Arbitrator came to be appointed by the General Manager of the Appellant-company. Therefore, in the present case, the final bill admittedly having not been settled & since the claim of the Respondent had not been accepted & since it had not been afforded any payment according to its satisfaction, even though the work had been completed & measurements had

been taken, there can be no doubt that in such a situation, the dispute which had arisen in relation to the work done & the appointing authority had correctly directed for appointment of an Arbitrator to resolve such disputes in terms of such agreement. In this respect, reliance was placed in the case of Executive Engineer, R.E. Division, Dhenkanal and Another Vs. J.C. Budharaj,

9. It would also be relevant to take note herein that it is not the case of the Appellants that full & final settlement between the parties had been arrived at after the conclusion of the work, although it is contended that the claims were barred by, limitation. Insofar as this question is concerned, admittedly, the final bill raised by the Respondent (contractor) had not been paid nor rejected but, merely kept pending for consideration without responding to the claims of the contractor. Consequently, the present case is not a case where the Appellants can be permitted to raise the plea of full & final settlement between the parties. It would be relevant to note herein in the present facts & circumstances of the case that, neither the Appellants have raised any plea of full & final settlement nor have raised any plea of termination of contract.

10. A further plea by the Appellants relating to refund of security deposit as beyond the Arbitrator's competence, is merely recorded to be rejected. The very term "security deposit" itself signifies that a deposit being retained by the employer for the due discharge is of the obligation by a Contractor. In the present case it is not the case of the Appellants that the Respondent-contractor failed to discharge any part of his duty/obligation under the contract. As a consequence thereof, it is the obligation on the employer in such circumstances to refund the security deposit & the Arbitrator was wholly within its competence to issue necessary directions relating to refund of security deposit.

11. Insofar as the issue of pendente lite interest is concerned, it has been well settled by the Hon'ble Apex Court that unless there appears to be a mistake on the face of the award & the documents appended or incorporated thereto which forms part of the award, such an award cannot be set aside even with respect to interest part of it. Insofar as this issue of pendente lite interest is concerned, the Judgment of Hon'ble Supreme Court in the case of Executive Engineer (Irrigation), Balimela and Others Vs. Abhaduta Jena and Others, denying the interest pendente lite, came to be set aside by later Constitution Bench, in the case of Secretary, Irrigation Department, Government of Orissa and others Vs. G.C. Roy, where it came to hold that the decision in the case of Executive Engineer, Irrigation, Galimala (supra) did not a good law. The Constitutional Bench came to hold that an Arbitrator was competent & possessed the necessary power to award interest pendente lite. This view has been affirmed by the Hon'ble Supreme Court in the case of Paradip Port Trust and Others etc. Vs. Unique Builders etc., In conclusion, this Court comes to a finding that this Court cannot sit in appeal over the views of the Arbitrator by re-examining & re-assessing the materials produced before him & it is not necessary for a Court to examine the merits of the Award with reference to the materials produced before

the Arbitrator, since the Court cannot sit in appeal over the views of the Arbitrator by seeking to re-examine & re-assess the materials. Consequently, I find no merit in the appeal & the same stands dismissed. Accordingly, interim Order Dated 17.01.1994 passed in Misc. Case No. 14 of 1994 stands vacated. The Respondent is at liberty to seek to enforce the Award in accordance with law.