
(2021) 03 J&K CK 0076
In the Jammu And Kashmir High Court
Case No : Arbitration Application No.2 Of 2003

M/S K.B. Construction Company

APPELLANT

Vs

Union Of India And Others

RESPONDENT

Date of Decision : 29-03-2021

Acts Referred:

Jammu And Kashmir Arbitration And Conciliation Act, 1997 — Section 11, 11(6), 31(7) (a), 31(7)(b), 34, 34(2), 34(2)(b)

Citation : (2021) 03 J&K CK 0076

Hon'ble Judges : Sanjeev Kumar, J

Bench : Single Bench

Advocate : R.K.Gupta, Udhay Bhaskar, Ranjit Singh Jamwal

Final Decision : Disposed Of

Judgement

1. This is a petition under Section 34 of the Jammu & Kashmir Arbitration and Conciliation Act, 1997 ["the Act of 1997"] filed by the petitioner for setting aside the award dated 18.09.2002 passed by K.Thiruvengadam, the sole arbitrator, appointed by the parties to arbitrate and adjudicate upon the disputes pertaining to the agreement No.GE/AKH-48/95-96 entered into between the petitioner and the respondents.

2. Before advertng to the grounds of challenge urged on behalf of the petitioner to assail the arbitral award, it would be appropriate to notice few facts: Vide contract agreement aforementioned, the work of Special Repair to E/M Installations at Rakh Muthi, Jourian and Pallanwala was allotted by the respondents to the petitioner. During execution of the contract, certain disputes arose between the parties and as a result whereof, the respondent terminated the contract. The disputes having arisen between the parties, the competent authority i.e. Chief Engineer, Udhampur Zone vide his letter dated 23.06.2001 appointed K.Thiruvengadam ACE(Planning) CE, Udhampur zone as sole arbitrator to adjudicate upon the disputes pertaining to the contract. The arbitrator was requested to enter upon the reference and publish findings and award in respect

of disputes listed in appendix-A appended to the aforesaid letter of appointment. The appendix enumerates several claims put forth by the parties for adjudication of the Arbitrator. In compliance to the aforesaid letter of the Chief Engineer, Udhampur Zone, learned arbitrator entered upon the reference and made the impugned award on 18.09.2002.

3. As per the impugned award, the claim No.1 preferred by the respondent was allowed and on that account a sum of Rs.75,887.69 was awarded in favour of the respondents and against the petitioner. Claim No.2, which pertains to the cost of arbitration proceedings and other legal expenses amounting to Rs.20,000/- was also allowed and the amount was allowed to be paid to the respondents alongwith interest @18% per annum post pendente and future. However, the claims lodged by the petitioners were rejected. The petitioner is aggrieved and challenges the award inter alia on the following grounds:-

i) That the disputes referred to the arbitrator had arisen between the parties within the State of Jammu & Kashmir and, therefore, the award was required to be passed by the arbitrator as per the Act of 1997, which came into force w.e.f. 01 January, 1998. However, the arbitrator, as is apparent from the award, has made his award under the Arbitration and Conciliation Act, 1996, the Central Act, which had no application in the State of J&K.

ii) That the arbitrator while awarding a sum of Rs.75,887.69, as claim No.1, in favour of the respondents exceeded his jurisdiction, in that, the Union of India in claim No.1 had only claimed a sum of Rs.30,456.69. The impugned award insofar as claim No.1 is concerned is beyond the terms of reference and, therefore, is not sustainable in law.

4. The respondents have opposed the petition by filing objections. The respondents in their objections have sought to justify the award passed under the Act of 1996 on the ground that same is in pari materia to the Act of 1997, which came into force in the State of Jammu & Kashmir w.e.f. 01.01.1998.

5. With regard to the award of Rs.75,887.69 as against the claim of Rs.30456.69 in favour of Union of India, it is submitted that it is true that at the time of making reference of the disputes to the arbitrator the Union of India had raised a claim of Rs.30,456.69 but as is well known that both the parties to the disputes always have a right vested in them to amend, modify or delete their claim/claims and it is in the exercise of that right a modified claim was preferred before the arbitrator.

6. Having heard learned counsel for the parties and perused the record, it is necessary to first set out Section 34 of the Act of 1997 herein below:-

"34. Application for setting aside arbitral award.--(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only--

(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 proceeding 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 matters beyond the scope of the submission to arbitration : Provided that if the decision 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 the State. 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 the State if the making of the award was induced or affected by fraud or corruption or was in violation of section 58 or section 64.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal :

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) on receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the

arbitral award."

7. From a perusal of Section 34 of the Act of 1997, which is of course in pari materia with Section 34 of the Act of 1996, it is abundantly clear that award of the arbitral tribunal can only be set aside on the grounds enumerated in the Section.

8. Clause (iv) of Sub Section 2 clearly provides that if an arbitral award deals with a dispute which is not contemplated by or does not fall within the terms of submission to arbitration or it contains decisions on matters beyond the scope of the submission to arbitration, the same is bad in the eye of law and liable to be set aside under Section 34 of the Act of 1997.

9. In short, the decision of the arbitrator, which is beyond the terms of his reference is not sustainable in law and is liable to be set aside. It is in reference to this clause of Section 34, Mr. R.K.Gupta, learned Senior Counsel, appearing for the petitioner, has argued that the award on claim No.1 to the tune of Rs.75,887.69 by the arbitrator was beyond the terms of submission to the arbitration. He urges this Court to refer to the appendix-A of letter of appointment of the arbitrator, which has enlisted all the disputes raised by the parties and referred to the arbitrator for adjudication. He submits that claim No.1, which was referred to the arbitrator was with regard to the compensation towards completion of balance work at risk and cost of the contractor and the respondent-Union of India had quantified the said claim at Rs.30,456.69 without reserving any option to vary or amend the claim.

10. Per contra, it is argued by Mr. Ranjit Singh Jamwal appearing for the Union of India and others that right to modify, amend or even delete the claim(s) is always available to the parties and which right can be exercised at any time during the course of arbitration proceedings before the arbitral tribunal.

11. I have given my thoughtful consideration to the rival contentions on the issue. Clause (iv) of Sub Section 2 Section 34 of the Act of 1997 is clear and unequivocal. The Arbitral award or such part thereof, which contains a decision on matters not falling within the terms of submission is liable to be set aside. Terms of Reference contained in the communication of Chief Engineer, Udhampur dated 23.06.2001, whereby the arbitrator was appointed are clear in terms and do not admit of any exception. The relevant portion of the letter dated 23.06.2001 reads as under:-

"Now, therefore, in accordance with the condition 70 of IAFW-2249 I hereby appoint you as Sole Arbitrator to adjudicate upon the disputes pertaining to the above contract and request you to enter upon the reference and publish your findings and award in respect of the disputes listed in Appendix ?A? to this letter, so far as these are referable to arbitration in accordance with the said agreement."

12. The disputes are enlisted in Appendix ?A? and the claim No.1 raised by the

Union of India reads as under:-

"1. Towards completion of risk and cost = Rs.30,456.69 contract, compensation etc."

13. Neither in the letter of appointment nor in appendix any option or liberty was given to the parties to amend, add or modify the claim(s), which, in terms of letter dated 23.06.2001, had become the matters falling within the terms of submission for arbitration.

14. Viewed thus, I am in agreement with the learned Senior Counsel appearing for the petitioner that the arbitrator could not have awarded any sum beyond Rs.30456.69 on account of claim No.1 of the Union of India. In the view I have taken, I am fortified by a judgment of this Court rendered in AA No.74/1997 titled Union of India v. Balwant Singh and Sons and another (decided on 07.05.2016). Paragraph Nos.23 to 26 of the judgment are relevant and are reproduced hereunder:-

"23. Reliance was placed upon Natwar Lal Shamal Das and Company vs. Minerals and Metals Trading Corporation of India Limited, 1982 AIR (Del) 44 and Orissa Mining Corporation Ltd. vs. M/s Prannath Vishwanath Rawley, AIR 1977 SC 2014.

24. The apex Court in Orissa Mining Corporation's case (supra) held in paragraphs 10 and 11 as under:

"10. On a reading of the plaint, we are satisfied that the claim for transporting the iron ore for the extra distance is limited to Rs. 68,582/- and the whole claim after including the claim for construction of the road is confined only to Rs. 93,582/-. The petitioner having disallowed Rs. 52,000/- being the claim for construction of the road should have confined his award only to Rs. 68,582/-. The claim of additional Rs. 68,582/-before the arbitrator was clearly beyond the order of reference which incorporated the reliefs prayed for in the plaint by the respondent herein. It would have been different if the entire claim relating to transport of the iron ore for the extra distance was made without specifying the amount of claim. When the amount has been specified in the plaint and when the reference is confined to the claim made in the plaint, the arbitrator would have to restrict his award only to the claim. We are satisfied that in this case the arbitrator has exceeded his jurisdiction in embarking on the claim that was the first time put forward before him by the respondent. There is therefore an error apparent on the face of the award.

11. Section 20 (1) of the Arbitration Act, 10 of 1940, provides that where a difference has arisen and where any person have entered into an arbitration agreement they may apply to the court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in court. Sub-section (4) to section 20 provides that the court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties. When an agreement is filed in court and order of reference is made then the claim as a

result of the order of reference is limited to a particular relief and the arbitrator cannot enlarge the scope of the reference and entertain fresh claims without a further order of reference from the court....."

25. In view of the aforementioned settled position of law, it was impermissible for the arbitrator to have permitted the Union of India or the contractor to improve upon or revise their claims from the one, which were earlier referred to by the order of Chief Engineer, which formed Appendix A and B to the order of reference.

26. For the reasons mentioned above, the award dated 29.01.1997 is set aside. The matter is remitted back to the arbitrator for fresh determination of disputes between the parties. While doing so, the arbitrator shall not entertain any claims beyond what was referred by the Chief Engineer forming Appendix A and B to the order of reference dated 19.08.1994.

The arbitrator shall give reasons for the ultimate conclusion, which may be arrived at in regard to the disputes referred to him. This would be in consonance with clause 70 of the General Conditions of Contract. In case the arbitrator earlier nominated, is for any reasons, unable to take up the assignment for adjudication of the disputes, the respondent shall within four weeks from today, appoint a substitute arbitrator, who shall enter upon the reference and conclude the proceedings at the earliest."

15. Learned counsel, however, could not show any material to demonstrate that the arbitrator could not have even granted a sum of Rs.30,456.69, as was the original claim of Union of India and listed in Appendix ?A? to the letter of appointment of arbitrator. Accordingly, the award, insofar as it allows claim No.1 of Union of India to the extent of Rs75,887.69 is liable to be set aside and the amount to which the Union of India would be entitled to as against the claim No.1 would now be Rs.30,456.69.

16. There is, however, no specific challenge raised in the petition against claim No.2 wherein the arbitrator has awarded a sum of Rs.20,000/-as cost of reference/arbitration. There is also no specific challenge raised by the petitioner to the award of interest. This is so apparent from the objections filed by the petitioner under Section 34 of the Act of 1997. Learned Senior Counsel, appearing for the petitioner, though orally raised objection to the award of interest by the arbitrator and tried to persuade this Court to modify the award of interest in light of legal position enunciated by the Supreme Court.

17. Although, as noticed above, no specific challenge has been laid by the petitioner in the petition to assail the grant of interest @ 18% per annum pre-award and post award, yet I am of the opinion that this Court cannot remain mute spectator to the exorbitant and shockingly unreasonable rate of interest, if awarded by the arbitral tribunal. Under Section 34(2)(b) of the Act of 1997, the Court of its own, if finds that the arbitral award is in conflict with the public policy of the State may set aside the arbitral award. In the case of ONGC Ltd. v.

Western Geco International Ltd., (2014) 9 SCC 263, the Supreme Court has elaborately discussed and laid down what is against public policy. It is held that an award would be against public policy of the State, if it is contrary to-----

i) Fundamental Policy of Indian Law; or

ii) The interest of India; or

iii) Justice or morality; or

iv) In addition, if it is patently illegal.

18. Absent contract to the contrary, it would be patently illegal for the arbitral tribunal to grant interest, which is shockingly exorbitant and ex facie unreasonable. It is in the light of this legal position when this Court examines the award of interest @ 18% per annum awarded by the arbitrator, it does not find the same shockingly exorbitant or utterly irrational.

19. Section 31(7)(a) and 31(7)(b) of the Act of 1997, as it stood prior to the amendment effected by Section of the Act No.VI of 2010, the award of interest by the arbitrator was to be in two compartments i.e. pre-award interest and post award interest. So far as pre-award interest is concerned, the same was regulated by Section 31(7)(a) and it provided that unless otherwise agreed by the parties and where the arbitral award is for payment of money, the arbitral tribunal may award interest on the principal sum at such rate as it may deem reasonable. So far as post award interest is concerned, the same was regulated by Section 31(7)(b), which provided that unless the award otherwise directs the sum directed to be paid by the arbitral tribunal would carry interest @ 18% per annum from the date of award to the date of payment.

20. In the instant case, the arbitrator has awarded 18% interest both for pre-award and post award periods. So far as post award period is concerned, 18% is a statutory interest and, therefore, cannot be said to be shockingly arbitrary or irrational or against the public policy of the State.

21. In that view of the matter, once Statute recognizes grant of 18% interest per annum on the sum directed to be paid by the arbitral tribunal for the post award period, there could be no justification to hold that grant of interest by the arbitrator at the same rate for the pre-award period is shockingly exorbitant or suffers from patent illegality. However, the award of interest on the claim of cost for the pre-award period is not sustainable and is to be set aside, however, the same shall be payable for the post award period. [see Hyder Consulting (UK) Ltd. v. Governor, State of Orissa, (2015) 2 SCC 189].

22. Accordingly, award of interest by the arbitrator on the post award period is upheld. However, for the pre-award interest only the principal sum shall carry interest @ 18% per annum.

23. Before I close, I deem it fit to deal with the first contention raised by Mr. R.K.Gupta, learned Senior Counsel, in the last that the award having been

passed under the Act of 1996 is vitiated as the contract containing the arbitration clause was executed in the then State of Jammu & Kashmir and, therefore, the parties were governed by the Act of 1997 and not the Central Act of 1996. He has placed reliance upon the judgment of this Court dated 14.08.2014 rendered in AA No.9/2009, Rallies India Ltd. v. Associated Cylinder Industries Pvt. Ltd. The judgment relied upon is distinguishable. In the aforesaid case the parties had specifically agreed to the application of laws, which would govern the arbitration agreement i.e. Arbitration and Conciliation Act, 1996 and, therefore, application under Section 11(6) of the Arbitration and Conciliation Act, 1997 before the Chief Justice or his nominee was held not maintainable. In the instant case the arbitrator has not been appointed under Section 11 of the Act of 1997 nor while referring the disputes to the arbitrator there is any mention that proceedings are to be conducted by the arbitrator either under the Act of 1996 or under the Act of 1997. Admittedly, the parties as also the contract between them, is governed by the Act of 1997. Therefore, the arbitration proceedings should have been conducted under the said Act. Simply because in the heading of award or on one or two places the arbitrator has mentioned the 'Act of 1996', it does not make the proceedings under the aforesaid Act, more so, when the petitioner has not been able to demonstrate that had the arbitrator instead referred to Act of 1997, his award would have been different. Provisions in both the Acts are in pari materia and in the instant case mere reference of one in place of other does not vitiate the arbitration proceedings or the consequent arbitral award passed by the arbitrator.

24. As a matter of fact, if the argument of Mr. Gupta, learned Senior Counsel is to be accepted, his application for setting aside the award before this Court would have to be held non-maintainable and is required to be dismissed, in that, this Court under the Act of 1996 under which the award is purported to have been passed, would have no jurisdiction to entertain any application for setting aside the award. The petitioner, too, has invoked Section 34 of the Act of 1997 to challenge the award.

25. In that view of the matter, I am of the view that the petitioner has not been able to make out a case for setting aside the award in toto.

26. For the foregoing reasons, the award passed by the Arbitrator is modified in the following manner:-

i) Claim No.1 = Rs.30,456.69.

ii) Claim No.3 = Interest @ 18% per annum on a sum of Rs.30,456.69 for the pre-award period and Interest @ 18% per annum on the sum directed to be paid under the award i.e. principal sum + pre award interest + cost.

27. The petition stands disposed of in the above terms.