
(1998) 10 BOM CK 0027

In the Bombay High Court

Case No : Arbitration Petition No. 220 of 1998

Municipal Corporation of Greater Bombay

APPELLANT

Vs

M/s. Bharat Construction and Another

RESPONDENT

Date of Decision : 06-10-1998

Acts Referred:

Arbitration Act, 1940 — Section 11, 30, 33, 8
Civil Procedure Code, 1908 (CPC) — Section 9
Evidence Act, 1872 — Section 115

Citation : (1999) 1 BomCR 347 : (1999) 1 MhLj 696

Hon'ble Judges : F.I. Rebello, J

Bench : Single Bench

Advocate : D.R. Dhanuka, Ms. N.V. Sanglikar and A.H. Chedda, for the Appellant; M.M. Vashi and S.W. Vasudeo, for the Respondent

Judgement

F.I. Rebello, J.—The petitioners on 22nd September, 1990 invited tenders for spot repairs, improvement and widening of major corridors etc. in G-South and G-North Wards within the territorial limits of the petitioners. On 11th October, 1990 the respondent No. 1 submitted its tender at the rate 21.64% below the estimated rates. On 20th December, 1990 the Standing Committee of the petitioners approved the tender submitted by respondent No. 1 vide Resolution No. 1060. On 12th January, 1991 the petitioners issued work order. The rate of Item Mastic Asphalt was calculated at Rs. 737/- per sq. metre less rebate. A General work order was also issued directing the respondent No. 1 to commence work. The formal contract was signed on 11th January, 1993. Earlier to that on 30th September, 1992 the respondent No. 1 issued notice under Clause 96 of the General Conditions of Contract demanding payment for laying Mastic Asphalt at Rs. 737/- per sq. meter minus 21.64% towards rebate. After signing of the agreement on 11th January, 1993 incidentally at the rate of Rs. 737 / per sq. metre for Mastic Asphalt, the respondent No. 1 on 21st January, 1993 issued notice under clause 97 of the General Conditions of Contract for referring the dispute to arbitration. The disputes were referred to arbitration. The learned

arbitrator passed an award on 1st January, 1996 allowing the claim of the respondents in an amount of Rs. 48,72,756/ which included interest penalty and cost of arbitration proceedings. It is this Award which is impugned before this Court.

2. A few further facts may be necessary for deciding the issues raised in the present petition.

3. It was the stand of the petitioners that a general circular had been issued on 9th November, 1990 whereby the price of Mastic Asphalt was revised from Rs. 737/- to Rs. 370/- with effect from 2nd July, 1990. It is thereafter contended that on 3rd September, 1991 the respondent No. 1 submitted a programme for carrying out the work of Mastic Asphalt at the rate of Rs. 370/- per sq. metre. In December, 1991 the petitioner issued to the respondent No. 1 fractionated work order for Mastic Asphalt mentioning therein the rate at Rs. 370/- per Sq. metre. Between 10th March, 1992 and 16th December, 1992 running bills were prepared at the rate of Rs. 370/- per sq. metre. The said bills were signed on behalf of the respondent No. 1 by Mr. Abbas Nanji in measurement book bearing No. 65 at page Nos. 45 53, 68 and 76 unconditionally. At page 61 the measurement was signed by Mr. Raju Barot, Director of Respondent No. 1 unconditionally. The Accounts Department of the petitioners finalised the running bills and forwarded the same to the concerned section for issuing cheques for the amount as passed/finalised. Between February, 1992 to July, 1992 the respondent No. 1 accepted cheques without any demur at the rate of Rs. 370-per sq. metre for Mastic Asphalt. Mr. Abbas Nanji signed various receipts and vouchers accepting the said payment. Subsequent to the issuance of letter dated 21st January, 1993 invoking Clause 97 of the General Conditions of Contract the petitioner made enquiries and found that the letter given by the respondent No. 1 accepting the rate at Rs. 370/ per sq. metre had been fraudulently got removed by respondent No.. 1 from the files of the petitioners. It is alleged that the petitioners noted the fraudulent alterations in the measurement books and addition of the words "under protest" on some of the pages of the measurement book subsequently. The petitioner referred the disputed endorsement to the Forensic Science Laboratory of the State of Maharashtra for its report. In the opinion received it was pointed out that the endorsement at page 59, 68 and 76 and at page 45 to 61 were in different ink than the remaining endorsements. Thereafter the Registration Committee of the petitioner issued a show cause notice to the respondent No. 1 calling upon them to show cause as to why they should not be refused registration with effect from 1st August, 1993. After the respondent No. 1 showed cause the Registration Committee gave a finding that endorsements on the measurement books were made subsequently and the letter of confirmation had been removed subsequently at the instance of the respondent No. 1 and as such refused registration to respondent No. 1 for a period of 3 years with effect from 1st August, 1993. The respondent No 1 herein filed a petition being Writ Petition No. 220 of 1994. By order dated 3rd October, 1994 this Court reduced the period from 3 years to 16 months. There was a further direction that the

respondent may apply to the petitioners after November 1, 1994 for registration as per the relevant rules. The petitioners were to consider the said registration and to grant registration on complying with the requirements of the Rules of the Registration Committee. The application was to be decided within four weeks. This Court, however, made it clear that the order was without prejudice to the rights and contentions of the parties in the pending arbitration proceeding. It is further brought on record by the petitioners that some sister concerns of the respondent No. 1 had also submitted tender of Mastic Asphalt at the rate of Rs. 370/- per sq. metre. The respondent No. 1 itself on 17th January, 1991 had submitted a tender for laying Mastic Asphalt at Dr. A.B. Road Junction. Khan Abdul Gafarkhan Road at G/South Road and Round Temple in G-North Ward quoted rate of Rs. 370/-per sq. metre. Similarly, the sister concern of the respondent No. 1 had submitted their bids on 2nd June. 1997 at Dr. A.B. Road at the rate of Rs. 370/- per sq. metre of Mastic Asphalt. On 2nd August, 1992 the sister concern of the respondent No. 1 had completed the work at Atré Chowk containing the item Mastic Asphalt and accepted the rate at Rs. 370/- per sq. metre.

4. At the time of hearing of the petition on behalf of the petitioners it is contended as under:-

(a) The petitioners had raised a preliminary objection before the Arbitrator wherein they had called on the Arbitrator in view of the allegations of fraud, forgery, etc., to refer the matter to a Civil Court and not to decide the dispute.

(b) That before signing of the Award the petitioners had sought an opportunity to lead oral evidence. The Arbitrator without considering the said request proceeded to pass the Award thereby denying the opportunity to the petitioners and this itself must vitiate the Award.

(c) That the Arbitrator was biased on account of the act of the petitioners in moving this Court for his removal/setting aside his appointment. His conduct in the course of the proceedings did not inspire confidence and consequently the petitioners had a reasonable apprehension that justice would not be done to them.

(d) That at any rate the Arbitrator acted without jurisdiction in awarding interest of Rs. 2, 29,655/- at the rate of 15% per annum on the total amount of Rs. 49,93,101.65 which was inclusive of damages and interest. The award to that extent is liable to be set aside.

(e) That the contract signed on 11th January, 1993 was under a mistake and as such voidable. The respondent No. 1 having accepted the rate at Rs. 370/- per sq. metre could not take advantage of the contract signed as it was signed under mistake and hence the petitioners were entitled to avoid the contract at the rate of Rs. 737/-per sq. metre.

5. On behalf of the respondent No. 1 the contentions as raised on behalf of the

petitioners have been refuted on the ground that there is no merit in any of the challenges. It is very specifically pointed out, placing reliance on the judgment of the Apex Court in the case of Sri Tarsem Singh Vs. Sri Sukhminder Singh, , that a contract cannot be avoided unilaterally on the ground of mistake. It is contended that whatever may be the subsequent fixation of price the respondent No. 1 had submitted his tender at a specific rate. The same was approved by the Standing Committee of the Corporation in terms of the provisions of the B.M.C. Act and further the contract also was signed much later after the work had been completed at the same rate. It is, therefore, contended that there is a valid contract between the parties and unless the subsequent agreement, which the petitioner claim is the modified contract, was done in a like manner as required by the provisions of the Bombay Municipal Corporation Act, the subsequent agreement would not be a valid contract in law.

6. Before dealing with the various contentions the first contention on behalf of the petitioners which was in the nature of a preliminary objection will have to be dealt with. The objection as raised in the written statement filed on behalf of the respondents before the Arbitrator in para 2 was that as there were incidents of fraud, malpractices and tampering of records by respondent No. 1 the Arbitrator was called upon to direct the respondent No 1 to refer the dispute for adjudication before the Civil Court. Reliance was sought to be placed on some judgments of the Apex Court for that purpose. The judgments of the Apex Court are in cases where in proceedings before the Civil Court the Arbitration Clause was sought to be invoked. It is in these circumstances that the Apex Court has said that where there are serious allegations of fraud. etc. the Civil Court itself should decide the issue and not refer the matter for arbitration. In the instant case it is the petitioners who made the reference of the dispute for arbitration. The jurisdiction of the Arbitrator is limited to decide the points referred to him and incidental issues arising from the said reference. There is no provision under the Arbitration Act, 1940 which confers a power on the arbitrator to stop the arbitration proceedings and direct the parties to refer the dispute or issue to the Civil Court to decide the same. The Arbitrator has to proceed to decide the dispute as referred to him. In these circumstances, therefore; the question of Arbitrator calling on the parties to refer the dispute or issue to the Civil Court is without substance as the arbitrator had no such jurisdiction and consequently, the said contention is rejected.

7. Before dealing with the second contention, the 3rd contention as to bias is to be dealt with first. The allegations of bias as raised is that the Arbitrator was aggrieved by the action of the petitioners in moving this Court for his removal and certain events during the proceedings. The petitioners participated in the proceedings. It was always open to the petitioner to move this Court to remove the Arbitrator in the event the petitioners had a grievance that the Arbitrator was misconducting himself. In the present case not only did the petitioners not move this Court u/s 11 of the Arbitration Act, 1940 but they participated in the proceedings without demur or protest except placing some objections on record.

In the light of that, the plea of bias has to be rejected. It is now well settled that parties once they chose to proceed with the Arbitration cannot thereafter turn around in the event the Award is against them and contend that the Arbitrator was biased. It is also settled law that bias can be waived. In the present case the petitioners having not invoked the remedy available to them in law and having participated in the proceedings without demur or protest it must be held that they had waived the plea of bias consequently the 3rd contention must be rejected.

8. It is the second contention which has been argued at length. It is contended on behalf of the petitioners that they were not given opportunity of leading evidence. It is pointed out that they had made various averments in the petition which would point out to the fact that in fact the respondent No. 1 had accepted the rates at Rs. 370/- per sq. metre for Mastic Asphalt and the respondent No. 1 therefore, proceeded to do the work at the same rate. Not only that, the bills were prepared at the rate of Rs. 370/- per sq. metre, cheques for payment were issued and calculated at the same rate.

It is however, contended on behalf of the respondent No. 1 that all these allegations could be tested only if the petitioners are able to contend that there was a novation of contract and that a new contract had been entered into in the like manner as the contract signed between the parties and after fulfilling the statutory requirements of the Act. It is contended as pointed out earlier that there cannot be unilateral act on the part of the petitioners in contending that the contract was signed under mistake. There has to be mutual understanding between the parties. In the instant case the unilateral act on the part of the petitioners cannot amount to novation of contract and as such the submission has to be rejected.

It is, however, the contention of the petitioners that once they have pleaded fraud and had sought permission to lead evidence the proceedings could not be closed without giving them an opportunity. The Arbitrator having not given such an opportunity the Award is liable to be set aside. It is pointed out that the objections raised by them wherein they had sought opportunity was received by the Arbitrator on 26th December, 1996. The Award of the Arbitrator is subsequent to the said objections and/or opportunity sought and consequently there has been a denial of opportunity to the respondents though the Arbitrator in the meeting held on 12th December, 1995 before the proceedings were closed had permitted the petitioners to file their reply to the contentions raised by the respondent No. 1 in their submissions. It is submitted that the reply would include an opportunity to lead evidence before closure of proceedings and this has been denied to them.

9. It would, therefore, be necessary to consider the proceedings that took place before the Arbitrator. At the meeting held on 21st September, 1995 in terms of the minutes as recorded both the parties were directed to file the list of witnesses by 26th October, 1995 and witnesses were to be kept ready on 2nd

November, 1995. Next are the Minutes of 24th November, 1995. In these Minutes the objections of the petitioners regarding preliminary objections on the allegations of fraud, forgery and fabrication has been considered. The Minutes disclose that the Arbitrator decided to decide the issue while finalising the Award. Immediately after this on 11th December, 1995 the petitioners have written to the Arbitrator setting out certain grievance they had in the matter of conduct of the Arbitrator. It is mentioned therein that the facts are being placed on record as the same were not recorded in the minutes, The next Minutes are of 12th December, 1995. In these Minutes of 12th December, 1995 the learned Arbitrator has recorded that on behalf of the petitioners arguments were advanced in detail in respect of each item. It is, however, recorded that copies of various judgments of the Courts were read, explained and taken on record. It is then recorded that Counsel for respondent No. 1 argued and gave detailed explanation in respect of each claim. The reply filed by respondent No. 1 in response to the letter of 11th December, 1995 was taken on record. It is then recorded that the hearing was completed in all respect with the consent of both the learned Counsel and their respective clients. It is thereafter recorded that the petitioners herein so as to submit their reply dated 12th December, 1995 with point wise submissions within a period of one week. As pointed out earlier, the reply filed by the petitioners was received by the respondent No. 1 on 26th December, 1996 by their forwarding letter. The petitioners filed their written submissions and additional written submissions based on the arguments advanced at the time of oral arguments. In para 7 of the reply to the letter dated 12th December, 1995 the petitioners contended as under:-

"It is also pertinent to note that if Your Honour comes to the conclusion that if the request of these Respondents to refer the issue of fraud, forgery and manipulation to the Honourable Civil Court for adjudication and is tried by Your Honour, these respondents will lead necessary evidence to prove the said allegations or take appropriate proceedings if advised to challenge the said award."

A perusal of the Award of the Arbitrator does not show that the aforesaid contentions raised on behalf of the petitioners has been dealt with.

10. It is true that the Arbitrator at the second hearing wherein a preliminary objection has been raised had given notice to the parties that the said preliminary objection will be decided at the stage of making Award. It is also clear from the Minutes of the first meeting that the parties were called upon to give their list of witnesses and keep the witnesses ready on 2nd November, 1995. In that light of the matter the parties were noticed that the preliminary objection regarding fraud, etc., would be dealt with finally and that the parties were also called upon to lead oral evidence if they so desire. In the light of all these circumstances can it be said that the Arbitrator misconducted himself in failing to give an opportunity to the petitioners in terms of their submissions as received by him on 26th December, 1995. The entire case of the petitioners

before the Arbitrator was that though the tender had been accepted at Rs. 737/- less the rebate at which the respondent No. 1 had tendered, nevertheless by subsequent acts and conduct the respondent No. 1 had agreed to the rate of Rs. 370/ per sq. metre. They had in their written submissions pleaded various facts to point out that the respondent No. 1 himself had agreed to the new rates pursuant to the Circular issued by the petitioner and which the respondent No. 1 had agreed to. They had further alleged that the respondent No. 1 had tampered with their records by making alterations in their measurement books and also by removing the letters from the records. This letter, it is pointed out, had clearly accepted the new rate of Rs. 370/- per sq. metre. In the light of these averments and in the light of the opportunity sought by the petitioners to lead evidence in the event the preliminary objections had been rejected, can it be said that the Arbitrator acted fairly in denying the said opportunity. The allegations made by the petitioners if proved would prima facie result in considering whether the contract was mutually rescinded or the act of the respondent in contending that the contract subsists is fraudulent or the subsequent act of signing the contract was under a mistake. The decision on the said point would go to the very root of the matter. It is now well settled law that the Arbitrator before closing the proceedings must give an opportunity to the parties intimating to them that the proceedings would be closed. In the instant case after hearing the arguments notice of closing the proceedings can be said to have been given and further opportunity was given to the petitioners to file their reply to the contentions raised by the respondent No. 1. Even at this stage the petitioners could have availed of the opportunity if earlier they had not led evidence before the Arbitrator to permit them to lead evidence. It is another matter if the arbitrator had rejected such a request. In the instant case the Arbitrator has refused to decide the said request as sought for by the petitioners as there is no mention whatsoever in the Award to that effect. To my mind this must result in denial of a fair opportunity to the petitioners to lead evidence. Denial of an opportunity when sought for must vitiate the Award. In that light of the matter I have no hesitation in coming to the conclusion that though the petitioners had sought an opportunity the same has not been dealt with by the Arbitrator and failing to deal with the said contention the Arbitrator has misconducted himself and as such the Award is liable to be set aside

11. Various judgments as to whether the contract is under a mistake, what constitutes a mistake, the requirements that have to be fulfilled in signing a contract between the parties under the provisions of the various statutes like the Bombay Municipal Corporation Act were referred to. In view of the view that I have taken I do not propose to consider the said judgments at this stage as they are not required to be dealt with.

For the aforesaid reasons, the other contentions raised are not necessary to be decided or dealt with.

The award dated 1st January, 1996 is quashed and set aside. In the

circumstances there shall be no order as to costs. The matter is remanded back to the Arbitrator to decide the reference according to law within four months of the communication of the order to him.

12. Matter remanded back.