

(1998) 11 CAL CK 0034
In the Calcutta High Court
Case No : A.P. No. 159 of 1996

Oil and Natural Gas Commission Ltd.	Vs	APPELLANT
Dilip Construction		RESPONDENT

Date of Decision : 20-11-1998

Acts Referred:

Arbitration Act, 1940 — Section 20, 30

Citation : AIR 2000 Cal 140 : (1999) 2 ILR (Cal) 500

Hon'ble Judges : Amitava Lala, J

Bench : Single Bench

Advocate : Ajoy K. Chatterjee and Srenik Singhvi, for the Appellant; P.K. Roy and Tapan Kumar Sengupta, for the Respondent

Final Decision : Dismissed

Judgement

Amitava Lala, J.—This application made by the petitioner under Sections 30 and 33 of the Arbitration Act, 1940 challenging the award dated 30th July, 1996 passed by an Arbitrator being chief Geologist, now Deputy General Manager (Geologist), West Bengal Project, ONGC Limited, the petitioner herein.

2. Upon perusing the award it appears that the award is reasoned award.

3. By making this application, the petitioner challenged the award on various grounds which are as follows :

- a) There was no material before the Arbitrator to come to a conclusion and pass an award in favour of the respondent;
- b) Principle of evidence was not followed by the Arbitrator;
- c) The Arbitrator had committed legal misconduct in getting the vital documents and materials which should have shown lights to adjudication;
- d) The award passed by the Arbitrator is outcome of non-application of mind;
- e) Interpretation of "Force majeure" Clause by the Arbitrator is unreasonable;

f) The claim is barred by law of limitation which the learned Arbitrator failed to appreciate.

4. Although several points, as above, agitated by the petitioner but the real contention of the appearing Counsel for the petitioner Mr. Ajay Chatterjee proceeded towards one goal i.e. two vital documents being (I) daily work programme & (II) daily job completion certificate were not produced by the respondent/claimant before the Arbitrator which have paramount importance in coming to the conclusion, therefore, the Arbitrator proceeded wrongly or erroneously and committed legal misconduct.

5. Mr. Chatterjee elaborately argued the above point in the following manner :

a) It is expected that the common documents will be produced by the parties asserted the claim;

b) Arbitrator would have called for such documents but had given no direction upon the respondent herein being claimant therein to produce such documents;

c) Arbitrator had failed to draw adverse inference as against the aforesaid respondent/claimant on account of failure of production of such documents.

6. Under the above circumstances, I have gone through the award and found following findings as quoted hereunder :

The other allegation of the respondent was that the claimant failed to produce any documentary evidence in support of its extra mobilisation of manpower/ machinery as was undertaken through the rejoinder. Considering reservation under paragraph No. 5 of the rejoinder, I have on 17-7-96, called upon the claimant giving them the last chance to produce documents to comply with the undertaking. Mr. Sengupta, learned counsel appearing for the claimant in compliance of his undertaking brought bags full of papers and documents on 24-7-96 but Mr. Som, learned counsel appearing for the respondent vehemently objected to compliance of my said direction, which however he did not oppose when I directed the claimant to produce the same during the sitting held on 17-7-96. The claimant, therefore, was prevented from producing further documents to comply with my direction. The aforesaid action shows that the respondent is aware of extra mobilisation of drilling sets. Therefore, I think the allegation of the respondent in this respect does not hold good. Moreover, I am convinced of extra deployment of drilling sets from the respondent's document annexed to the statement of fact."

7. With the above observation and also by saying that in considering then above after being confirmed by the parties that they have been given full and equal opportunity to represent their respective cases and they have no further submission to make, applying his mind, the Arbitrator has given this award in favour of the claimant/respondent herein for a sum of Rs. 3,75,510/- in respect of the claim No. 1 as against claim of Rs. 14,23, 100/-.

8. Mr. Chatterjee contended that deriving upon a conclusion by the Arbitrator on the basis of production of the bag full of papers as aforesaid by the claimant/respondent is surmise. Although the claim No. 1 is covering majority of the claim but other claims have chain reaction. Therefore Arbitrator had not performed his legal duty. Arbitrator should have drawn an adverse presumption as against the claimant/respondent herein for non-production of documents. The aforesaid documents, according to him, are not only basic documents but are best documents to come to conclusion. Moreover no oral evidence were adduced by the parties in respect of such documents, therefore, material documents are not produced before the Arbitrator nor an Arbitrator called for such documents to come to a conclusion which is an incumbent duty upon him. Moreover coming to a conclusion by an Arbitrator in absence of such documents is, in fact, violation of principles of natural justice.

9. He relied upon *Mehta Teja Singh and Co. Vs. Union of India and Another*, on its paragraphs 24-26 which has been subsequently followed by *Union of India Vs. Mehta Teja Singh and Co.*, wherein the earlier judgment was affirmed. From perusing the two Judgments it appears that the Court held that the Arbitrator allowing claim without looking into the report of the technical examiner this amount to misconduct and award is liable to be set aside. He also relied upon *K.P. Poulse Vs. State of Kerala and Another*, in its paragraphs 4, 5 & 6 to establish the Arbitrator ignoring the material documents in coming to conclusion is legal misconduct because such material documents may throw abundant light on the controversy to help a just and fair decision. He also cited *Union of India (UOI) Vs. Jain Associates and Another*, and relying upon paragraph 7 therein again contended that misconduct does not necessarily mean moral lapse but it include actions on the part of the Arbitrator if it is opposed to all rational and reasonable principles resulting to non-application of mind. But it is to be remembered that in above case the award in non-speaking award. He also relied upon *Bijoy Singh Vs. Bilasroy and Co.*, and stated that Arbitrator can decide any technical matter if he is expert in the trade but he cannot decide whether two parties have extended the time of delivery except on evidence as it is not within his expert knowledge, therefore, if the Arbitrator come to a finding without such evidence It must be held that he has misconducted the proceedings.

10. Next judgment cited by Mr. Chatterjee is reported in *Union of India (UOI) Vs. D. Bose and Others*, which is a very common judgment as very often the learned counsels are citing before this Court which relates to applicability of principles of evidence in the proceedings of arbitration irrespective of non-application of strict rule of evidence under the Indian Evidence Act, 1872. Thereafter Mr. Chatterjee cited a judgment reported in *Hooghly River Bridge Commissioners Vs. Bhagirathi Bridge Construction Co. Ltd.*, and relying upon paragraph 108 therein contended that principles of natural justice and fair play in action require some basic evidence either oral or documentary before the Arbitrators which would enable them to arrive at a just and fair conclusion. Mr. Chatterjee also cited AIR 1929 PC 95 (*Rameshwar Singh v. Bajit Lal Pathak*) to show the consequences when best

documentary evidence presumably available and probably decisive if one way or another was not produced. Next he relied upon Food Corporation of India Vs. M/s. Veshno Rice Millers, to establish that it is difficult to give an exhaustive definition as to what may amount to a misconduct on the part of the Arbitrator. Prima facie, I am not satisfied with regard to citing of this judgment by the petitioner since, in all, it goes against the petitioner's contention and strengthening the case of the respondent as apparent from the other parts of the judgment.

11. Although Mr. Chatterjee contended mainly on the question of evidence as above but also touched the following points :

a) Interpretation of "Force majeure" Clause;

b) Applicability of the limitation; and other one is a new point i.e. :--

c) Status of the claimant/respondent herein as to whether the firm is registered partnership firm or not and to the question of their right to refer the dispute for arbitration.

12. So far the "Force majeure" Clause is concerned the same is available in running page 73 of the application which is as follows :

"Neither party shall be held responsible for any loss or damage or delay in or failure of performance of the contract if any to the extent, that such loss or damage or such delay in or failure of performance is caused by FORCE MAJEURE including but not limited to acts of God, restraint of State/Central Government, devastating fires, major accidents, declared or undeclared hostilities, riots, rebellion, explosion, strikes, epidemic, severe inclement weather like cyclone, gale etc. compliance with any request, ruling orders or decree or local or any Indian Government authorities and any other similar cause or causes which cannot with reasonable diligence be controlled or provided against by the parties hereto. There shall be no liability whatsoever of either party for the first seven consecutive days of FORCE MAJEURE. If, however, the period of FORCE MAJEURE shall extend beyond seven consecutive days, each party shall have the right to terminate this contract on the eighth day by sending a registered without any liability to either party due to termination of contract."

13. According to Mr. Chatterjee the interpretation of the Arbitrator as to the "Force measure" Clause is unreasonable. Prima facie, I am of the view that this Court is not sitting in appeal to adjudicate upon reason of the reasonableness of the Arbitrator. Therefore, I am of the view that I have to check up the award to the extent as to whether any reason has been given by the Arbitrator or Arbitrator committed any error from the face of it. From the award I found the Arbitrator has given a careful consideration of the "Force majeure" Clause of the agreement and also stated that neither party to the contract shall be held responsible for any loss or damages or delay in or failure of performance of the contract, if any, to the extent that such loss or damage or delay in or failure of

performance is caused by Force Majeure, or causes which cannot with reasonable diligence be controlled or provided against by the parties to the contract. He further contended that "generator break down cannot be considered as covered under the force majeure clause which clearly stated that any cause or causes which cannot with reasonable diligence be controlled or provided against by the parties to the contract shall be considered covered under Force majeure clause. In my opinion, the respondent could diligently control the situation by providing stand by generator sets to avoid production loss for said two days as such cannot avoid its liability to compensate the loss the claimant suffered due to lack of diligence on the part of the respondent."

14. As and when reason has been given by the Arbitrator Court has no occasion to interfere with it by substituting its own view.

15. So far the question of limitation is concerned, Mr. Chatterjee contended that the agreement was terminated sometime in middle of June, 1991 but the demand notice was served by end of 28th April, 1994, therefore, the claim of the petitioner is barred by law of limitation. He further contended that the performance bond was returned and no pending bill is there so that it can be construed that claim is not barred by law of limitation.

16. I have carefully checked up the award from which it appears that Arbitrator has also taken note of question of limitation.

17. I find, prima facie, there is no question of limitation. Upon analysing the situation I hold if the middle of June, 1991 is the time of termination of the contract in that case three years have to be calculated from the date of termination, if any, which upon plain reading appears to be June, 1994. In this case, admittedly the demand was made on 28th April, 1994 and the application u/s 20 was made in July, 1994, therefore, there is no question of claim being barred by law of limitation. Moreover, in an application u/s 20 of the Arbitration Act, 1940 Court will only look into whether such application was made in time or not but not to the question as to whether the claim of either of the party is barred by law of limitation or not, being the domain of the Arbitrator. Therefore, the learned Arbitrator rightly disallowed the plea of limitation of the respondent/petitioner herein.

18. Another important question was agitated by the petitioner as to whether the respondent is competent to raise the dispute before the Arbitrator being unregistered firm or not. It appears that the Arbitrator has also considered about impact of claim of a firm as well as nature of the partnership firm.

19. Mr. Chatterjee contended that the respondent is an unregistered partnership firm and has no locus standi to participate in the arbitration proceedings. In support of his contention he relied upon Jagdish Chander Gupta Vs. Kajaria Traders (India) Ltd., which has been followed by Chandulal Hathibhai Shah Vs. Champaklal Ambalal Parikh, But I find that judgment applies in between the parties to the partnership but there is no whisper as to the applicability of the

section to third party, therefore, I cannot accept the proposition at the threshold.

20. Further Mr. Chatterjee cited judgment being Sunil Mukherjee Vs. Union of India (UOI), to establish the fact that the Arbitrator was not properly appointed.

21. Such argument is contrary to the order of appointment itself. In the reported Judgment Court appointed Arbitrator u/s 8 of the Arbitration Act ignoring the law wherein in this case application u/s 20 of the Act was proceeded wherein the Court was pleased to direct the petitioner itself to appoint Arbitrator. Moreover such appointee is the officer of the petitioner.

22. Lastly, he cited another reported judgment reported Executive Engineer (Irrigation), Balimela and Others Vs. Abhaduta Jena and Others, to establish that Court can go behind the award to see whether award is made in accordance with law. But Mr. Roy joined issue therein by saying that such judgment is not good law at the present moment.

23. Mr. P. K. Roy, learned senior counsel appearing for the respondent, prima facie, contended that the Arbitrator is not an Investigator. It is the duty incumbent upon the petitioner herein to produce work programme and job completion certificate. In other words, burden of proof on the documents lies upon the petitioner herein. In absence of discharge of owners an adverse inference can be drawn in favour of the respondent herein. Moreover the award is based on materials on record and not at all vitiated by the misconduct. Therefore, this case is far from error apparent from the face of it.

24. As usual I have gone through the award again and again before taking into consideration other materials before me. There is no occasion to take any contrast stand to the observation of the learned Arbitrator that the action on the part of the petitioner in restraining the respondent from producing the documents in connection with the extra mobilisation of drilling sets itself shows such documents were there and the petitioner herein were all aware about it.

25. Therefore, the aforesaid case is not the case of no materials but might have been the case of insufficient materials.

26. Under these circumstances, this Court, by not sitting in appeal, cannot interfere with the reason of the reasonableness of the Arbitrator.

27. In any event Mr. P. K. Roy, learned counsel has distinguished the cases by showing other relevant part of the judgment apart from the judgments he cited and are dealt with by this Court serially hereunder. By citing a judgment reported in Gopal Krishnaji Ketkar Vs. Mahomed Haji Latif and Others, he contended that even if the burden of proof does not lie on a party the Court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts at issue. It is not, a sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon obstruct doctrine of onus of proof. A practice has

grown up in Indian Procedure of those in possession of important documents or information lying by, trusting to the obstruct doctrine of the onus of proof, and failing, accordingly to furnish to the Courts the best material for his decision. With regard to third parties, this may be right enough -- they have no responsibility for the conduct of the suit, but with regard to parties to the suit it is, an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the written evidence in their possession which would throw light upon the proposition. He also cited a judgment reported in Peter Alan Basil and Another Vs. East India Pharmaceutical Works Ltd., that when one deliberately not producing material documents in his possession, adversing inference can be drawn against him though onus of proof was on the opposite party in this judgment the High Court followed the principle laid down by the Supreme Court in the earlier judgment. He has further cited the judgment reported in U.P. Hotels and Others Vs. U.P. State Electricity Board, to establish that award is not open to Court's interference on ground of the view of the Arbitrator being wrong. He also cited the judgment of the same value at Puri Construction Pvt. Ltd. Vs. Union of India (UOI), that Court has no scope to re-appreciate the evidence before the Arbitrator. He also cited another judgment reported in Municipal Corporation of Delhi Vs. Jagan Nath Ashok Kumar and Another, there also it appears that the reasonableness of reasons given by an Arbitrator in making his award cannot be challenged in Special Leave Petition. Thereafter I have perused citing judgment reported in Hindustan Construction Co. Ltd. Vs. State of Jammu and Kashmir, where I found that even if in a case of non-speaking award when Arbitrator not shown to have exceeded his jurisdiction or travelled beyond the contract, setting aside award on ground of error apparent on face of award not proper. In Sadasukh Kabra and Co. Vs. Calcutta Stock Exchange Association Ltd., and others, as cited by Mr. Roy I found that this Court held on a question about validity of the award and held wrong application of contract of facts in issue when there is no error of jurisdiction award cannot be interfered with.

28. Under these circumstances, the award cannot be set aside, therefore, the application fails.

29. Therefore, the application is dismissed but no order is passed as to costs.

30. As a consequential effect of dismissal of the application for setting aside the award, let there will be a decree in terms of the award. The decree will carry interest at the rate of 12% per annum from the date of the decree till realisation. Cost assessed at Rs. 5,000/-

31. Decree will be drawn up expeditiously. Prayer for stay is made, considered and refused.

32. All parties are to act on a signed copy minute of the operative part of the order.