
(2014) 04 CAL CK 0070

In the Calcutta High Court

Case No : A.P.O. No. 48 of 2003 and A.C. No. 140 of 1985

P.C. Roy and Co. India Priavate Limited

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 29-04-2014

Acts Referred:

Citation : (2014) 04 CAL CK 0070

Hon'ble Judges : Arijit Banerjee, J;A.K. Banerjee, J

Bench : Division Bench

Advocate : Dipak Basu, Senior Advocate, Mr. Moloy Ghosh, Advocate, Ms. Smita Das De, Advocate and Mr. Rivu Dutta, Advocate for the Appellant; Rabin Bag, Advocate and Mr. Monoj Mondal, Advocate for the Respondent

Final Decision : Allowed

Judgement

Ashim Kumar Banerjee, J.

FACTS:

1. The subject matter of dispute would relate to a license for Timber Extraction from the forest of North Andaman. The issue would relate as far as back in 1950"s when the Central Government awarded a contract to the appellant for Timber Extraction from the forest of North Andaman. As per the contract, the appellant was to extract Timber from the forest in exchange of royalty to be paid to the Government. They would start with an initial extraction of 10000 metric ton per annum for about two years that would time to time increase up to 75000 metric tons which later on the Governmental agency admitted, was not possible. The dispute arose as the appellant could not extract required amount of Timber thereby causing loss of royalty to the Government. As per the agreement, the issue was to be resolved through Arbitration, the Government appointed a retired Judge of Allahabad High Court as Arbitrator. The parties filed their respective pleadings. The Arbitration concluded after six years on March 18, 1967. The arbitrator published his award in favour of the Government. The arbitrator held,

the appellant was obliged to pay royalty to the extent of Rs. 17.28 lacs approximately exclusive of interest. The appellant filed an application for setting aside, the learned Single Judge dismissed the said application. The appellant preferred an appeal. The Division Bench dismissed the appeal. The matter went up to the Apex Court. The Apex Court also dismissed the appeal and the matter reached finality. The Government would now contend, after realization of part decree a sum of Rs. 12 Lacs would still be payable as on March 31, 1974. Since, the appellant went in liquidation; the Government filed an affidavit of proof of debt before the Official Liquidator.

2. The parties also invoked the Arbitration Clause in respect of another transaction on account of shortfall royalty, damages to the extracted Timber, royalty on minor forest produce and another miscellaneous claim amounting to Rs. one crore approximately that the Union of India referred to Arbitration as second Arbitration. The appellant company denied the claim and made a counter claim of Rs. 89.44 lacs. The Government appointed a retired Judge of the Allahabad High Court whereas the company appointed an advocate of this Court as arbitrator. The joint arbitrators held 15 sittings till June 9, 1967 when the advocate nominee was elevated to the Bench. The arbitral Tribunal was reconstituted. The newly reconstituted Tribunal entered upon reference in 1970. There was change of personnel that resulted delay in arbitral proceeding. Ultimately, the arbitral Tribunal could not be ad idem that resulted in appointment of Hon'ble Mr. Justice G.K. Mitter (as His Lordship then was), a former Judge of the Apex Court who acted as Umpire. The Umpire entered upon reference on September 3, 1976.

3. The third arbitration would relate to a claim of the appellant to the extent of Rs. 39000 on account of damage suffered by them. The third arbitration also got delayed in view of change of personnel from time to time. Ultimately, the Tribunal referred the issue to Sri G.K. Mitter with a request to act as Umpire in view of difference of opinion.

4. The fourth arbitration would relate to a suit filed by the appellant for damages to the extent of Rs. 1.73 crore approximately for loss of profit in view of imposition of Defense of India Rule preventing the appellant from extracting Timber. In the fourth arbitration Sri G.K. Mitter acted as Umpire in view of difference of opinion between two arbitrators. The Umpire entered upon reference on September 3, 1976.

5. The fifth arbitration was a result of abandonment of contract by the appellant. The company filed a suit challenging the revocation of license. They also filed a writ petition for the same purpose. There was protracted litigation on that score. In the meantime, by an Order dated June 25, 1975 the appellant company was directed to be wound up by this Court and the Official Liquidator took charge of the appellant company with effect from July 21, 1975. There was protracted litigation on the revocation of authority of the Umpire. Ultimately, the Umpire published his award on June 22, 1984 that would relate to the fourth arbitration

being the subject matter of the present appeal. The Union of India filed an application challenging the award of the Umpire that dealt with the subject issue in detail. The Umpire by his sixty six page award ultimately came to conclusion, the appellant was entitled to Rs. 78.75 lacs. The learned Single Judge vide judgment and Order dated June 18, 1993 set aside the award. The appellant preferred an appeal. The Court of appeal set aside the judgment of the learned Single Judge and remanded the application for a de-novo hearing. The Union of India filed a SLP before the Apex Court. The Apex Court declined to interfere with the Order of the Division Bench except, the observation made by the Court of Appeal with regard validity of the Order under the Defense of India Act or competence of arbitrator to hold, the same was invalid and uncalled for, that was set aside.

6. In terms of the Order of the Court of Appeal so merged with the Order of the Apex Court, the learned Single Judge heard the application afresh and set aside the award vide judgment and Order dated August 28, 2002. Being aggrieved, Official Liquidator filed the instant appeal.

CONTENTIONS:

7. Mr. Dipak Basu learned senior Counsel appearing for the Official Liquidator representing the appellant advanced his argument to support the appeal. He placed the chronological events as well as the award of the Umpire and submitted, the award was reasonable and would foreclose a long standing dispute between the parties through adjudication and the learned Judge erred in upsetting the same. He would rely upon three Apex Court decisions to support his contention, in an application for setting aside the power of Court was too limited and the learned Judge while considering the application for setting aside was not entitled to re-appraise the facts and substitute his own opinion in the matter. The decisions are as follows:

1. U.P. Hotels and Others Vs. U.P. State Electricity Board, .
2. Indu Engineering and Textiles Ltd. Vs. Delhi Development Authority, .
3. Shyama Charan Agarwala and Sons Vs. Union of India (UOI), .

8. He would also rely upon another Apex Court decision in the case of The President, Union of India and another Vs. Kalinga Construction Company Private Limited reported in All India Reporter 1971 SC 1646 explaining the scope of reference. Distinguishing the decision of the Apex Court relied upon by the learned Single Judge in the case of M/s. Sikkim Subba Associates Vs. State of Sikkim, . Mr. Basu would rely upon paragraphs 12, 14, 15 and 16 to contend, learned Judge should have followed the precedent and in case of difference of opinion he should have referred it to a Larger Bench. Mr. Basu would support the award and pray for setting aside of the judgment and Order of the learned Single Judge impugned herein.

9. Per contra, Mr. Robin Bag learned Counsel appearing for Union of India placed

the judgment and Order of the learned Single Judge in detail. According to him, the arbitrator erred in dealing with the action of the Union of India under Defense of India Act. According to him, the arbitrator had no power to deal with such action that would be beyond the scope of reference. Mr. Bag would also contend, the finding of the arbitrator on issue No. 4 was inconsistent, once the company was held to be defunct the arbitrator's direction on the wages was wrong. In this regard, he would rely upon two Apex Court decisions:

1. K.P. Poulse Vs. State of Kerala and Another, .
2. Associated Engineering Company Vs. Government of Andhra Pradesh and another reported in All India Reporter 1992 SC 232.

10. Mr. Bag would contend, an utter disregard to the established law of the land and acting de hors the contract would be sufficient to vitiate an award that would warrant the award to be set aside. On the issue No. 7 Mr. Bag would contend, the arbitrator did not consider whether the company at all made any profit, deciding on the loss and profit. The arbitrator's findings were merely speculative and without any reference to any evidence. His calculation of profit was totally wrong. He would strenuously rely upon the decision in the case of Sikkim Subba Associates (supra).

11. Replying to the argument of Mr. Bag, Mr. Basu would reiterate what he had stated in course of his argument earlier. Mr. Basu would contend, the learned Single Judge accepted the finding of the arbitrator as to the coercive measure taken by the Government. After coming to such a finding, the learned Single Judge should not have set aside the award. According to Mr. Basu, in an adversarial proceeding, the learned Judge should have based his judgment considering the rival pleadings and contentions. He was not entitled to make out a new case to support setting aside of the award.

OUR VIEW:

12. We have carefully gone through the judgment and Order impugned as well as the award. The sixty six page award published by the arbitrator was explicit; it would deal with all the issues that arose before him. The scope of the arbitration Court was limited. The arbitration Court was not the Court of Appeal. The Court cannot reappraise the evidence and substitute its own opinion on the issue for nullifying the award. The scope of the arbitration Court is limited to the extent when interference is called for in case of perverse finding.

13. In case of The President, Union of India (supra), the Apex Court observed, in proceeding to set aside award Court of appeal cannot sit in appeal over the conclusion of the arbitrator by re-examining and re-appraising the evidence considered by the arbitrator and hold that the conclusion reached by the arbitrator is wrong. Similar view was taken in the case of U.P. Hotels and others (supra), Indu Engineering & Textiles Limited (supra) and Shyama Charan Agarwala & Sons (supra). In the case of U.P. Hotels and others (supra), the

Umpire based his award on his own interpretation of a statutory provision. The Apex Court held, if such view was possible the award could not be faulted. In the case of Shyama Charan Agarwala & Sons (supra), the Apex Court once again cautioned, the arbitrator's award could not be faulted so long he traveled within the scope of reference. However, when he goes beyond jurisdiction ignoring the relevant Clauses of the arbitration agreement that would be without jurisdiction and the award could be set aside. In the case of Indu Engineering & Textiles Limited (supra), the Apex Court held, conclusion of the arbitrator on facts, even if erroneous in the opinion of the Court could not be interfered with. In the case of Sikkim Subba Associates (supra), the Apex Court considered its earlier precedents and held, the arbitrator was not entitled to ignore the law or disobey the same. He was not entitled to act arbitrarily, irrationally, capriciously or independently of the contract. His award could be challenged if it is unsound or findings recorded which are absurd or so unreasonable or irrational that no rational or right thinking person or authority could have reasonably come to such a conclusion on the basis of the materials on record or the governing position of law to interfere. Such is not the case here. In the instant case, the award could not be said to be so irrational or the appreciation of the statute law was so perverse the Court's interference would be called for.

14. In the case of K.P. Poullose (supra), the Apex court held, the relevant provision under the arbitration law have defined "misconduct" that has not a connotation of moral lapse. It comprises legal misconduct when the arbitrator arrives at an inconsistent conclusion even based on his own finding, the award could also be faulted if he ignores any material document. In the case of Associated Engineering Company (supra) the Apex Court observed, the error apparent on the face of the record or that the conclusion reached without interpretation of the matrix contract or without appraisal of the evidence would call for interference. In the present case, we find, the present award is not as such that would have resemblance or have the identical situation contemplated in Associated Engineering Company (supra) and K.P. Poullose (supra).

15. This award was rendered under the old law where a non-speaking award was also valid in law. In case of any legal or factual issue if more than one view is possible, the arbitrator's view must be upheld, otherwise the entire process would be nugatory. The parties in their wisdom decided to resolve the controversy before the domestic forum outside the Court hence, the verdict of the domestic forum must be preserved unless it would offend the basic concept of law of the land or is so perverse or de hors the scope of reference.

16. The learned Single Judge in his painstaking judgment running into forty one pages considered each and every issue and ultimately came to conclusion; the award was not liable to be sustained. It was an attempt to re-appraise the issue by the learned Judge himself. Even in some of the arenas, he had given his own view that none of the parties did suggest. It is true, Supreme Court set aside the observation of the arbitrator on the Defense of India Act however, the coercive

measure taken by the Union of India so recognized by the arbitrator was rightly upheld by His Lordship. Once, it was done, the award could not be faulted. The learned Judge observed, the decision of the Umpire on the direction of payment of wages was erroneous. His Lordship observed, the arbitrators held that the company was defunct. Hence, the Order passed for payment of wages was wrongful as inconsistent. We have examined the said part of the award. We do not find any inconsistency, at least the appellant also did not claim so, at least not before us. The company became defunct as there was no scope for extraction in view of the dispute however, the wages due to the workers on their past act or on account of idle labour charges could not be inconsistent. Similarly, in internal page-26 of the judgment the learned Judge observed, the conclusion of the Umpire that the licensee was making profit at the rate of Rs. 35 per metric ton was perverse because it was not based on any evidence. Mr. Basu would draw our attention to page-209 of the paper book wherein we find, Umpire did not hold so. On calculation of estimated profit on the basis of the data available to him the Umpire observed, calculated at the rate of Rs. 35 per metric ton the profit of the year would be Rs. 26.25 lacs. Such estimation was on the basis of the available records and data that came out in evidence.

17. From the award we find, the learned Umpire did not award any interest considering the facts involved that would show how serious he was in dealing with the issue.

18. We heard the appeal at a stage when the company was in liquidation. The creditors would be benefited if the award is sustained. The Union of India was also a creditor in respect of one of the arbitrations that reached finality at the Apex Court stage as discussed hereinbefore. Unless and until the workers are paid off and the statutory creditors are paid off the money would not flow to the shareholders. If the award is sustained, it would benefit firstly, the workers and then the statutory creditors that would include Union of India.

19. In our view, the judgment and Order of the learned Single Judge is not liable to be sustained.

20. The appeal thus succeeds and is allowed. The judgment and Order of the learned Single Judge is set aside. There would be no order as to costs.

Arijit Banerjee, J.

21. I agree.