
(1990) 11 CAL CK 0050
In the Calcutta High Court
Case No : Matter No. 2675 of 1990

Sachinandan Das

APPELLANT

Vs

State of West Bengal and others

RESPONDENT

Date of Decision : 06-11-1990

Acts Referred:

Arbitration Act, 1940 — Section 11, 12, 20, 5, 8

Citation : AIR 1991 Cal 224

Hon'ble Judges : Monoranjan Mullick, J

Bench : Single Bench

Judgement

1. This is an application under Sections 5, 11 and 12 of the Arbitration Act, 1940. The facts are as follows:

In respect of the Contract entered into by the petitioner and the respondent State of West Bengal in connection with the work for "land development of 50 acres of land in Rehabilitation Colony" at Durgachak, Haldia, tender No. 6SE(A) of 1981-82 Group A, submitted by the petitioner has been duly accepted. The contract was subject to the general conditions of the contract in which there was an arbitration agreement being clause 25, as set out in paragraph 3 of the petition.

2. As disputes and differences arose between the parties, the petitioner asked the Chief Engineer to refer such disputes to arbitration. As that was not done, an application under S. 8 of the Arbitration Act was filed.

3. After hearing both the parties, Shyamal Kumar Sen, J., by his order dated 21st July, 1989 directed the Chief Engineer of the respondent No. 1 to nominate an arbitrator in terms of the arbitration agreement, within four weeks from the date of communication of the order. The Chief Engineer, by his order dated 21st July, 1989, communicated by the Memo dated 17th August, 1989, appointed the respondent No. 4 as the sole Arbitrator for settling the disputes as referred by the petitioner, arising out of the said contract. The said appointment was only for

the settlement of the claims raised and referred to by the petitioner and prior thereto there existed no assertion of claim by the respondent No. 1 on the petitioner. The petitioner submitted a statement of facts. As the claim which was made in the said statement of facts was slightly higher than the statement of claim which was referred to for adjudication by the Arbitrator, the Arbitrator directed the petitioner to conform his claim to the terms of reference.

4. Ultimately on 22nd January, 1990 the petitioner withdrew the excess claim and indicated that he would agitate the claim of Rs.8,15,140/-. On 9th February, 1990 the respondent No. 1 filed its counter-statement of facts denying each of the claim of the petitioner. That apart the respondent No. 1, in the said counter statement of facts raised and pleaded a counter-claim of Rs. 8,17,000/-against the petitioner and sought for an award against the petitioner as per the said counterclaim, although at no point of time the respondent No. 1 ever asserted any claim on the petitioner for which the respondent No. 1 was precluded from raising any counter-claim against the petitioner.

5. The petitioner protested but even then the Arbitrator entertained that counter statement of facts along with the counterclaim and did not reject the said counterclaim on the ground that it is beyond the reference. The respondent No. 4 was not drawing up the minutes of the sittings immediately after the respective sittings nor was the respondent No. 4 circulating the minutes of the respective sittings at least to the petitioner. However, in pursuance of the request of the petitioner by letter dated 6th May, 1990 the respondent No. 4 forwarded to the petitioner xerox copies of some documents alleging to be the minutes of the sittings held up to 2nd May, 1990. As the petitioner felt that the said minutes were incomplete, he by letter dated 5th June, 1990 asked the respondent No. 4 to forward the balance part of The minutes held on 2nd May, 1990. But as yet the respondent No. 4 has not replied to the petitioner's said letter. On the contrary along with his letter dated 16th June, 1990 the respondent No. 4 forwarded to the petitioner the xerox copy of both sides of a sheet of paper, alleging to be xerox copy of the two other sittings held on 28th May, 1990 and 14th June, 1990, whereas the time to make and publish the Award by the Arbitrator expired on 7th May, 1990. In the sitting held on 2nd May, 1990 no consent was given or recorded by the petitioner for extension of time to make and publish the Award by the Arbitrator beyond that date. In the sitting dated 2nd May, 1990 there did not crop up any discussion for extending the time to the respondent No. 4 to make and publish the Award in the reference, after the expiry of the original time, i.e., 7th May, 1990 nor did the petitioner record his consent to extend the time in favour of the respondent No. 4 to make and publish the Award up to 31st August, 1990 as purportedly recorded in the third order dated 2nd May, 1990.

6. The petitioner by the letter dated 29th June, 1990 protested against the said conduct of the respondent in extending the time to make and publish the Award up to 31st August, 1990, whereas, in fact the petitioner did not give his consent

to that effect and also declined to attend subsequent sitting as notified in the said Memo dated 16th June, 1990. Even though the said letter dated 29th June, 1990 has been sent by registered post, the Arbitrator did not acknowledge the same, nor did he make any communication to the petitioner and as such the petitioner became apprehensive that ignoring the protest made by the petitioner, the respondent No. 4 might proceed with and pass an ex parte Award against the petitioner.

7. The petitioner further states and contends that the respondent No. 4 has already sufficiently indicated his inclination and bias against the petitioner and in favour of the respondent No. 1 in the reference and bent upon to proceed with the reference on his assumption that really there exists an extension in his favour up to 31st August, 1990, whereas in fact there was no extension and the time to publish the Award by the respondent No. 4 expired on 7th May, 1990, as stated above.

8. In the circumstances, the petitioner prays that leave may be given to the petitioner to revoke the authority of the respondent No. 4 to act as Arbitrator and a fit and proper person may be appointed in place and stead of Sri P. N. Guha, the respondent No. 4 to act as sole Arbitrator with similar power to adjudicate the disputes, differences and claims, being the subject-matter of reference before Sri P. N. Guha, as this Court may deem fit and proper with a direction to make and publish the Award within such time as may be fixed by this Court.

9. An affidavit in opposition has been filed by the respondent No. 3 for himself as well as for respondent Nos. 1 and 2. In the affidavit in opposition it has been denied that the respondent No. 4 had shown any bias and that any such apprehension of bias is genuine. It is, however, reiterated that the respondent Nos. 1 to 3 had the right to submit a counterclaim and the Arbitrator had the jurisdiction to consider it in the reference.

10. A copy of the minutes of the meeting dated 5-8-90 held by the Arbitrator has been annexed before this Court. An affidavit in reply has also been filed by the petitioner contesting all the above allegations.

11. The only point which needs decision in this case is as to whether there is any genuine apprehension of the petitioner of the bias of the Arbitrator so that the authority of the Arbitrator can be revoked by this Court by invoking the jurisdiction under S. 5 of the Arbitration Act.

12. The Supreme Court, in the decision reported in International Airports Authority of India Vs. K.D. Bali and Anr, as well as in the case of Secretary to Government, Transport Deptt., Madras Vs. Munuswamy Mudaliar and Another, has held that purity of administration required that the party to the proceedings should not have apprehension that the Authority is biased and is likely to decide against the party. The Supreme Court has, however, cautioned that it is not every suspicion felt by a party that must lead to the conclusion that the Authority hearing the proceedings is biased; that the apprehension must be judged from a

healthy, reasonable and average point of view and not a mere apprehension of any whimsical person.

13. It appears that the petitioner attended the arbitration proceedings up to 2nd May, 1990. When the xerox copy of the minutes of 2nd May, 1990 was produced before the petitioner, it was disclosed that the Arbitrator extended the time to make and publish the Award up to 31st August, 1990 on the ground that both the parties had given their consent to such extension. The petitioner submits that there was neither any occasion for the petitioner to give any consent to such extension nor that was mooted. There is also nothing to show that a written consent was given by the petitioner. The Arbitrator in his minute dated 5-8-90 indicated that time was enlarged on 2-5-90 on verbal submissions of both the parties. But written consent must be signified at least by the signature of the parties in the minutes. It is also submitted by the petitioner that on 2nd May, 1990 none of the respondents appeared personally but their Advocate appeared. The xerox copy of the minutes dated 2-5-90 shows that there is only the signature of the advocate of the respondents Nos. 1 to 3 signifying the consent to the extension but no such signature of the petitioner or his Advocate appears on the minutes of the Arbitrator dated 2-5-90. Therefore, the Arbitrator cannot, without the consent of both the parties, extend the time to make and publish the award up to 31-8-90 and it was the duty of the Arbitrator to direct any of the parties to obtain the order of the Court by filing an application under S. 20 of the Arbitration Act. It is surprising that even after that the Arbitrator was proceeding with the arbitration, even though the petitioner was not appearing. The minute dated 28-5-90 would indicate that. Moreover the minute dated 5-8-90 clearly shows that the petitioner's apprehension of bias appears to be very genuine. When the copy of this application filed by the petitioner was served upon the Arbitrator along with the order passed by this Court staying all further proceedings in the matter, I find that in spite of that order passed by this Court the Arbitrator was proceeding with the arbitration. Not only that, he was commenting on the allegations made in the petition before this Court and in the minutes clearly recorded that the allegations are all untrue and that he was not guilty of misconduct. Moreover on that date he directed the matter to come up on 20-8-90 and threatened to make and publish the Award ex parte, if the petitioner did not appear.

14. When this Court has, in the meantime, intervened in the matter and issued an interim order, the Arbitrator should not have proceeded with the arbitration which would render him liable for committing contempt of Court, for wilfully disobeying the order of the Court.

15. In view of the above, I am firmly convinced that the apprehension of the petitioner that he would not get proper justice from the Arbitrator and that the Arbitrator has shown his bias against the petitioner, does not appear to be unfounded. It is also to be noted that when the claim of the petitioner was enhanced to a little extent than that of the claim in the reference, the Arbitrator

became very much touchy and directed the petitioner to amend the same. But even though the counter-claim of the respondent No. 1 was not referred to him, he decided to consider the same along with the statement of claim and other things, which would appear from the minutes dated 5-8-90. It may be that ultimately he would have dismissed the counterclaim of the respondent No. 1 on the ground that the same is beyond the reference, but the way the Arbitrator was trying to deal with the counter-claim, which was not referred to him, would reasonably raise an apprehension in the mind of the petitioner that he is biased in favour of the respondent No. 1.

16. In that view of the matter, the application filed by the petitioner is allowed. The authority of the respondent No. 4, the Arbitrator is revoked.

17. Shri K. C. Mukherjee, Registrar, Appellate Side, High Court, Retired of 28, Pratapaditya Road, Calcutta-26 is appointed as Arbitrator in place and stead of the respondent No. 4. He shall enter into reference within a fortnight from the date of communication of the signed copy of the operative portion of this order. The Arbitrator shall enter into the reference strictly in terms of the original reference which was made by the Chief Engineer to the respondent No. 4, the outgoing Arbitrator. The Arbitrator shall make and publish the Award within four months from the date of entering into the reference.

18. The remuneration of the incoming Arbitrator shall be Rs. 500/- per sitting. He shall also be permitted to appoint a Stenographer and a Clerk, if necessary. The remuneration of the Arbitrator as well as the costs of the Clerk and the Stenographer shall be borne equally by the petitioner and the respondent No. 1.

19. The outgoing Arbitrator, shall within a fortnight from this date send over all the papers and documents to Shri K. C. Mukherjee, the incoming Arbitrator.

20. All parties including the outgoing Arbitrator and the incoming Arbitrator shall act upon the Xeroxed copy of the operative portion of this order, counter-signed by the Assistant Registrar of this Court.

21. Application allowed.