
(2002) 07 CAL CK 0042
In the Calcutta High Court
Case No : A.P. No. 393 of 1998

Sanjeev Killa

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 11-07-2002

Acts Referred:

Arbitration Act, 1940 — Section 28, 30, 31(4), 33

Citation : (2003) 1 CALLT 253

Hon'ble Judges : Asit Kumar Bisi, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Asit Kumar Bisi, J.—The petitioner/claimant has filed the instant application under Sections 30 and 33 of the Arbitration Act, 1944 (hereinafter referred to as "the Act") being A.P. No. 393 of 1998 praying for setting aside the award dated 28th February, 1998 passed by Sri A.K. Mukhopadhyay, sole Arbitrator in the matter of arbitration between Supply Emporium v. Union of India.

2. The award in question has been challenged by the petitioner/claimant principally on the ground that the learned Arbitrator misconducted himself by not following the price of the goods as agreed upon between the parties as recorded in the contract and thereby erred in law in passing the award. The petitioner/claimant alleges inter alia that either in the counter-statement of claim or at the time of hearing before the Arbitrator the respondent did not dispute about genuineness of the purchase orders or about the inspection certificate or about the delivery challan or about the quality or quantity of the goods delivered by the petitioner and the respondents all through admitted the liability towards the petitioner for the price of the goods sold and delivered. It was only the contention of the respondents that such payment would not be made according to the contractual rate but at the alleged marked rate. It is the grievance of the petitioner/claimant that although it is an admitted position that a contract has been admittedly entered into by and between the parties and there is no dispute

with regard to the issuance of the purchase orders containing several terms therein, nevertheless, the learned Arbitrator misconducted himself by holding that it was the intention of the parties in the contract to purchase the goods at a very high rate. It is the contention of the petitioner/claimant that the learned Arbitrator had no jurisdiction to travel beyond the scope of the contract between the parties to assess the alleged market rate of the goods which was admittedly sold and delivered by the petitioner to the respondents in accordance with the agreed terms as contained in the said purchase orders. In the above circumstances the petitioner/claimant has assailed the award in question averring inter alia that the said award dated 28th February, 1998 is bad, perverse and against the settled principles of law governing the contract and the same is liable to be set aside.

3. In the affidavit-in-opposition filed on behalf of the respondents it has been alleged inter alia that the rates quoted in the tender are higher than the market rates or the reasonable price prevailing in the market. Certain special circumstances had arisen in the present case to verify the rates of the contractor and after verification of the rates it was found that the rates of the petitioner were not in accordance with the normal market rates or reasonable rates prevalent at that time. It has been further averred by the respondents in their affidavit-in-opposition that in their counter-claim the respondents have duly disclosed the circumstances under which payment of the bill has been kept in abeyance and the investigation reveals that the rates quoted in the purchase orders were abnormally high rates and that was done due to collusion between the contractor and the officials for which necessary actions have already been initiated.

4. In his affidavit-in-reply the petitioner/claimant has denied the material allegations contained in the affidavit-in-opposition filed on behalf of the respondents.

5. Mr. Pradip Kumar Dutta the learned advocate for the petitioner/ claimant has drawn my attention to he schedule containing the particulars of all the eighteen purchase orders marked annexure "A", copies of the said purchase orders collectively marked annexure "B" and copies of the bills together with inspection certificates and delivery challans collectively marked annexure "C" to the application under Sections 30 and 33 of the Act. Relying on the aforesaid documents Mr. Dutta has argued that the contract was a conducted one and since the goods were already delivered in terms of the agreement, the respondents are liable to pay the price at the agreed rate and not at any other rate. He has pointed out that the Arbitrator has clearly stated in the award that the said eighteen purchase orders were issued in favour of the claimant and after inspection of the materials by the respondents those were supplied by the claimant and received by the respondents. The Arbitrator has also clearly indicated in his award that the materials were consumed by the respondents later on. It, however, appears from the award of the Arbitrator that on receipt of

a complaint regarding irregularities in placement of the purchase orders- a committee of three junior Administrative Grade Officers had been appointed by the authority concerned to make an enquiry and vigilance cases were registered to investigate into the irregularities and disciplinary actions were taken by the Railway Authority against the erring officials. Be that as it may, it has been specifically observed by the Arbitrator in the award that the person who actually supplies goods or renders some services, not intending to do so gratuitously, has every right to claim compensation from the person who enjoys the benefit of the supply or services rendered. It has been clearly mentioned by the Arbitrator in the award itself that the respondents had riot corresponded with the claimant at any time as to the reason for nonpayment of dues. The award passed by the Arbitrator makes it abundantly clear that the Arbitrator disregarded the price agreed to by and between the parties in view of the alleged irregularities subsequently reported to be detected in the placement of the purchase orders for which disciplinary proceedings are reported to be pending against the erring officials. While making the award the Arbitrator has relied on the market rates collected during 1995-96 by the Committee concerned in respect of the items. Following is the observation made by the Arbitrator at page 7 of copy of the award which along with the forwarding letter dated 28.2.98 of the Arbitrator has been marked annexure "H" to the application:

"And whereas I have no reason to disbelieve the rates collected during 1995 & 1996 by the committee of three (3) responsible senior officers of JA Grade for the items. Since the items of 3 gallons capacity is not available in the marked I have assessed the value by increasing the price of 10 litre capacity proportionately. The supplied items are very common items easily available in the market and there is no reason as to why the supplied items should cost more than the market rate. Since market rates of the year 92 have not been furnished by the respondent, during the estimation of the award I am allowing the privilege of 95-96 rates for the rates of 92 to the claimant."

6. Mr. Dutta on behalf of the petitioner/claimant has contended that there was no direction for formation of any committee either by the Court or by the Arbitrators for collecting the market rates of the items nor any such committee was formed to the knowledge of the petitioner. He has further contended that no such report of the committee was given to the petitioner at any point of time nor any officer who allegedly assessed the market rates gave any evidence before the Arbitrator. It is his further contention that the report, if any, prepared by the officers of the Railway was not binding on the petitioner or the Arbitrator and the same was unilateral action of the Railway authority. As contended by Mr. Dutta, from 1992 to 1995 nothing was mentioned about the alleged assessment and the Arbitrator has misconducted himself by travelling beyond the bounds of the contract and exceeded his jurisdiction. He has cited the decision of the Supreme Court made in the case of Associated Engineering Co. Vs. Government of Andhra Pradesh and another, the Supreme Court made the following observation:-

"An umpire or Arbitrator cannot widen his jurisdiction by deciding a question not referred to him by the parties or by deciding a question otherwise than in accordance with the contract. He cannot say that he does not care what the contract says. He is bound by it. It must bear his decision. He cannot travel outside its bounds. If he exceeded his jurisdiction by so doing, his award would be liable to be set aside."

7. Mr. Dutta has contended that in the instant matter the Arbitrator has not decided the dispute in terms of the contract between the parties. He has cited the case of Ganes Narayan Singh and Ors. v. Malida Koer and Ors., reported in XIII CL 399. In the said case the award recited on the face of it that the Arbitrator held, partly on evidence taken before him, and partly on private enquiry, that the Will executed by a certain person was genuine. It was held by the Division Bench in the said case that it was not competent for the Arbitrator to do so and on that ground alone the award must be taken to have been vitiated. It is settled law that if the Arbitrator decides the dispute on his personal knowledge when the agreement between the parties does not empower him to do so, the award is vitiated. Reference can be made in this context to the case of Dewan Singh Vs. Champat Singh and Others, .

8. Mr. R.K. Chowdhury the learned advocate for the respondents on the other hand has contended that there is no error of law apparent on the face of the award in question and the finding of fact arrived at by the Arbitrator cannot be a ground for setting aside the award. He has cited the case of Hindustan Tea Co. Vs. K. Sashikant Co. and Another, the Supreme Court observed that under the law, the Arbitrator was made the final arbiter of the dispute between the parties and the award was not open to challenge on the ground that the Arbitrator had reached a wrong conclusion or had failed to appreciate facts.

9. On going through the materials on record and considering the rival contentions raised by Mr. Dutta for the petitioner/claimant and Mr. Chowdhury for the respondents respectively I am of the view that the decision of the Supreme Court in the case of M/s. Hindustan Tea Co. (supra) as cited by Mr. Chowdhury has got no manner of application to the facts and circumstance of the case I am seized of. In the instant case the particular award has not been challenged by the petitioner/claimant on the ground that the Arbitrator has reached a wrong conclusion or has failed to appreciate facts. The present award has been challenged by the petitioner/ claimant on the ground that the Arbitrator misdirected himself by going beyond the scope of the contract and thereby exceeded his jurisdiction in making the award. It is settled principle of law that when the Arbitrator travels outside the permissible territory and exceeds his jurisdiction in making the award which is not in terms of the contract, such error committed by the Arbitrator goes to the root of his jurisdiction.

10. As stated hereinbefore, in the instant case there was a contract admittedly entered into by an between the parties and there is no dispute with regard to issuance of the purchase orders containing several terms therein. Yet the

Arbitrator out stepped the confines of the contract and wandered outside the permissible area. He disregarded the contractual price as agreed upon between the parties and adopted a different rate stated to be the market rate collected by the committee concerned. Applying the ratio of the case of Associated Engineering Co. (supra) to the facts and circumstances of the instant case, it can safely be held that the Arbitrator acted independently of the contract although his sole function was to arbitrate in terms of the contract. His error arose by acting in excess of what was agreed upon between the parties and such error goes to the root of his jurisdiction because he disregarded the terms of the contract and passed the award in excess of his authority. Such jurisdictional error on the part of the Arbitrator vitiates the award in question.

11. Mr. Chowdhury the learned advocate for the respondents has challenged the jurisdiction of this Court to entertain the application for setting aside the award. He has contended that this Court has no jurisdiction to entertain the matter inasmuch as the execution of the contract had taken place outside the original jurisdiction of this Court. Mr. Dutta the learned advocate for the petitioner/claimant has refuted such contention raised by Mr. Chowdhury by pointing out that the reference had been made pursuant to the order passed by this Court and extension of time for making and publishing the award was granted by this Court. He has further pointed out that in another set of arbitration matters initiated in terms of the selfsame order of this Court passed on 24.11.95 the present respondents took the identical point and filed an application for setting aside an ex parte decree which made the award rule of the Court. The said application was dismissed by the single Bench of this Court whereupon the appeals preferred by the present respondents before the Division Bench were dismissed and ultimately the appeals preferred by the present respondents before the Supreme Court were also dismissed. Mr. Dutta has drawn my attention to copy of the order dated 24.11.95 passed by this Court pursuant to which the reference for arbitration was made which has been marked annexure "E" to the instant application for setting aside the award. He has cited the decision of the Supreme Court in *Union of India and Ors. v. Aradhana Trading Co. and Ors.*, reported in 2002 (1) ALR 691 (SC) wherefrom it appears that the Supreme Court held that the appellant itself had submitted to the jurisdiction of the High Court while moving the application for extension of time u/s 28 of the Arbitration Act and as such the Supreme Court did not find any fault in the finding of the High Court negating the pleas raised by the appellant that the Arbitrators should have filed the award in the Asansol Court and not in the High Court. Section 31(4) of the Arbitration Act, 1940 clearly lays down that notwithstanding anything contained elsewhere in this Act or in any other law for the time being in force, where in any reference any application under this Act has been made in a Court competent to entertain it, that Court alone shall have jurisdiction over the arbitration proceedings and all subsequent applications arising out of that reference and the arbitration proceedings shall be made in that Court and in no other Court.

12. As already referred to, by the order dated 24.11.95 passed by this Court the Appointing Authority had been asked to appoint an Arbitrator and the disputes had been referred to such Arbitrator. It further appears from the materials on record that by consent of the parties to the reference time was extended by this Court for making and publishing the award. So there can hardly be any room for scepticism that the parties themselves had submitted to the jurisdiction of this Court and on their consent extension of time for making and publishing the award was granted by this Court. There is no material on record to indicate that any other Court except this Court had ever issued any notice on any application for appointment of Arbitrator or passed any direction to the Arbitrator. So the contention raised by Mr. Chowdhury the learned advocate for the respondents challenging jurisdiction of this Court to entertain the matter has got no force at all. Furthermore, it is to be pointed out that the question of jurisdiction raised in the case in hand is no longer *res integra* since it has been conclusively decided by the Supreme Court in the case of *Union of India and Ors. v. Aradhana Trading Co. and Ors.* (*supra*).

13. For the foregoing reasons I find sufficient ground for allowing the application u/s 30 and 33 of the Arbitration Act, 1940 filed by the petitioner/claimant for setting the award in question. The award dated 28th February 1998 passed by Sri A.K. Mukhopadhyay, Sole Arbitrator in the matter of Arbitration between Supply Emporium v. Union of India be set aside. The application under Sections 30 and 33 of the Arbitration Act, 1940 filed by the petitioner/claimant is accordingly allowed. The appointing Authority shall in terms of the Arbitration clause incorporated in the subject contract appoint another Arbitrator from their panel within a fortnight from the date of communication of this order. The Arbitrator so appointed shall enter upon the reference within seven days from the date of his appointment and adjudicate upon the disputes covered under the order dated 24th November 1995 of this Court copy of which is annexure "E" to the application on consideration of the claim and counter-claim already filed by the respective parties after giving opportunity of hearing to both the parties and make and publish the award within three months from the date of his entering upon the reference.

There will be no order as to costs.

The parties are to act on xerox signed copy of this dictated order on usual undertaking.