

(2007) 12 BOM CK 0035
In the Bombay High Court
Case No : First Appeal No. 284 of 2007

Shree Ambika Construction Company	Vs	APPELLANT
Union of India (UOI)		RESPONDENT

Date of Decision : 20-12-2007

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 31(3), 34, 37, 73, 75

Citation : (2008) 2 BomCR 94 : (2008) 110 BOMLR 328 : (2008) 3 MhLj 214

Hon'ble Judges : C.L. Pangarkar, J

Bench : Single Bench

Advocate : R.R. Shrivastava, for the Appellant; R.G. Agrawal, for the Respondent

Final Decision : Allowed

Judgement

C.L. Pangarkar, J.—This first appeal is preferred by Ambika construction Company - a Contractor with Indian Railways. The appeal is preferred by the said appellant being aggrieved by the modification of award by the District Judge, which was passed by the Arbitrators.

2. The facts are as follows The appellant is a reputed contractor and it undertakes the Government contracts. In the past, the appellant had successfully completed the various civil construction works of the Indian Railways. The Indian Railways had floated a Tender for the work regarding recapping of bridge No. 52 at KM 1064/10-11 between Samnapur and Charegaon Stations on Gondia-Jabalpur Section. The value of the said contract was Rs. 5,08,878.95. The time stipulated for completion of work was of eight months commencing from 24/11/1987. There was, therefore, an agreement between the appellant and the South Eastern Railway with regard to this work. The contract consisted of reciprocal promise to be performed by each party. It is the contention of the appellant that in pursuance of the contract, the appellant made all necessary arrangements to see that the contract work is completed within time but the respondent-Railways failed and neglected to perform its part of the contract. The appellant was, in fact, required to mobilise all resources, labour, equipments,

machines, tools etc. The respondent-Railway, however, failed to issue the necessary work order immediately. Ultimately, it was issued on 15/3/1988 and the work orders were actually given on 11/4/1988, 6/5/1988 and 10/8/1988. The delay in issue of these orders resulted into infrastructure, men and machines lying idle. The Railways also failed, according to the appellant, to provide work drawings. During the course of the execution of work, substantial changes were made in the quantity of earth work and other work of which joint measurements were taken and recorded in the measurement books. The measurement taken, however, were arbitrarily reduced. The result was, the final bill pertaining to work order was grossly under-billed. Since the dispute arose with regard to the final bill, the matter was referred to the Arbitrators. The Arbitrators passed an award. Being aggrieved by that order passed by the Arbitrators, the Indian Railways i.e. the respondent preferred an application u/s 34 of the Arbitration and Conciliation Act, 1996 before the learned District Judge. The learned District judge modified the Award, in as much as, he disallowed the claim in respect of Claim No. 3.2 and he completely set aside the claim Nos. 4, 5 and 6 awarded by the Arbitrators. Being aggrieved by this order, the Ambika Construction Company . the appellant has preferred this appeal.

3. The respondent justifies order passed by the District Judge. The respondent denies that there was any delay on the part of the respondent in supplying the material, drawings etc. It is the contention of the respondent that in fact the appellant-contractor did not carry out the work in time.

4. I have heard the learned Counsel for the appellant and the respondent-Railways.

5. The learned District Judge has set aside the award of the Arbitrators in respect of claim No. 3.2, 4,5 and 6 and has confirmed the award in respect of other claims. Section 34 of the Arbitration and Conciliation Act gives out the ground upon which an Arbitrators award can be set aside. Without dilating more on this aspect, it would be worthwhile to mention here that this Court in the First Appeal No. 601 of 2005 (Union of India v. Ambika Construction) taking a stock of various decisions of the Supreme Court and other High Courts has laid down certain propositions upon which award could be set aside. They are as follows

15. The propositions that emerge from a survey of these decisions could be summarised as under

1) Arbitral award can be challenged before a court only on grounds specified in Section 34 of the Act and scope of enquiry in appeal u/s 37 cannot extend beyond those grounds.

2) Challenge to an award on the ground of being in conflict with public policy of India would be permissible if the award is:

a) contrary to fundamental policy of Indian law; or

b) contrary to the interest of India; or

c) contrary to justice or morality; or

d) if it is patently illegal, illegality not being trivial but going to the root of the matter;

e) if it is so unfair and unreasonable that it shocks the conscience of the court.

3. As regards item 2(a) to (c) above, there cannot be any timeless and static standard and what is contrary to fundamental policy, (policy being distinct from substantive provisions) or the interests of the nation or notions of justice and morality, may differ from time to time and may not be precedent bound.

4. As regards item 2(d) above, an award which is contrary to substantive provisions of law, enactment, or terms of the contract, would be patently⁸ illegal. Procedural inadequacies would have to be overcome by the Courts to ensure that a wrong must not be left unredeemed and right not left unenforced. An award which on its face discloses that it is based on an erroneous proposition of law could be assailed.

5. For assessing reasonableness, an award must disclose causation for the conclusions (except where parties agree to have no reasons u/s 31(3) of the Act). Such causation may however not be assailed in the court on the ground as to whether in drawing conclusions of fact the Arbitrators had enough evidence before him, or whether he had assessed/appreciated such evidence properly.

Bearing in mind these principles, I would now proceed to examine the challenge to the judgment of the learned District Judge.

6. It would however be necessary to refer to the provisions of Section 34 of the Arbitration and Conciliation Act, which reads thus

34. Application for setting aside arbitral award.

(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with Sub-section (2) and Sub-section (3).

(2) An arbitral award may be set aside by the Court only if

(a) the party making the application furnishes proof that

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an Arbitrators or of the arbitral proceedings nor was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling

within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this part; or

(b) the Court finds that

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation.-Without prejudice to the generality of Sub clause (ii) it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or Section 81.

The learned Counsel for the appellant submitted that the case falls under the clause of Public Policy.

7. This takes me to consider if the learned judge was right in modifying the Award. In the instant case, it was not disputed by other party that the case does not fall under Clause (2)(a) but it falls only under Clause (b)(ii) of Clause 2 of Section 34 of the Arbitration Act. This Clause b(ii) reads thus (ii) the arbitral award is in conflict with the public policy of India.

8. This Court in decision reported in 2000(2) RAJ 502 (Bom) (Union of India v. India Proofing and General Industries, Kankpur) has observed as follows

7. The aforesaid award is a subject matter of challenge in the present petition. It is urged by the learned Counsel appearing for the petitioner that the aforesaid award is liable to be quashed and set aside in exercise of power u/s 34 of the Arbitration and Conciliation Act, 1996 (for short 'Act.') being in conflict with the public policy in India. The learned Counsel submitted that rejection of the claim set up by the petitioner has resulted in loss to the public exchequer and, therefore, it would be in public interest to set aside the said award. I am afraid, this line of argument is not open on the facts and provisions of Section 34 of the Act. The learned Counsel for the petitioner also wanted to canvass a contention that the approach adopted by the Arbitrators while appreciating the evidence was not proper. It is now well settled that reappraisal of evidence by the court u/s 34 of the Act is not permissible. It is not open to the court to deduce reasons in the award and proceed to examine whether those reasons are right or erroneous. The Arbitrators are the sole Judge of the quality as well as quantity of the evidence

and it is not for the court to take upon itself the task of being a Judge of the evidence before the Arbitrators. The petitioner also contended that u/s 73 of the Contract Act actual purchase of goods is not at all necessary. The petitioner sought to place reliance on the decision of the Supreme Court in Murlidhar Chiranjilal Vs. Harishchandra Dwarkadas and Another, . However, in the instant case, a categorical finding has been recorded by the Arbitrators that even applying the ratio of decision of the Supreme Court in Murlidhar Chiranjilal v. Harishchandra Dwarkadas (supra) the claim has not been proved by the petitioner. No cogent evidence has been produced by the petitioner to prove the rate prevailing at Kanpur at the time of the breach committed by the respondent. It is thus not open to this Court to reassess the evidence or to decide the question of adequacy of evidence. The courts while exercising powers u/s 34 of the Act are expected to be very circumspect in respect of the award delivered by the Arbitrators. The award of the Arbitrators is binding between the parties since he is the tribunal selected by the parties. The power of the court to set aside an award is restricted to the grounds set out in Section 34 of the Act.

9. The basic principle that the courts have to follow therefore, is that the reappraisal of evidence is not permissible and the Arbitrators is the sole Judge of quality and quantity of the judgment. However, this would be subject to condition of Clause (b)(ii) of Section 34 of the Act. Bearing in mind the observations of this Court in First Appeal No. 601 of 2005 (Union of India v. Ambika Construction), I proceed further.

10. It is in that background the things have to be dealt with and ought to have been dealt with. As said earlier, the learned District Judge has rejected the claims No. 4,5 and 6 which were allowed by the Arbitrators. While rejecting the claim No. 4, the learned District Judge observed that in every month the contractor had tried to show presence of 19 labours and the documents to that effect are not certified by any Railway Officer. He also observes in the order that to come out of clutches of Contract Labour Act, 1970, every month 19 labours are said to be engaged and this is again doubtful. He further finds the vouchers to be of doubtful authenticity. It is an established law that the evidence cannot be reappraised unless it was perverse. It appears from the reasons given by the Arbitrators that they had considered all the documents Exh.C-4, C-6, C-9, C-10 of CD-1 and vouchers C-58, C-71 of CD-2. It also appears from the award that the Arbitrators even considered the submissions of Railways that the payment made i.e. vouchers are not witnessed by the officers of the Railways. The Arbitrators, in fact, observed that simply because the payments are not witnessed by the officer, the record maintained by the Contractor is not genuine. It is, therefore, clear that the Arbitrators had considered the submission and objection on behalf of the Railways and had rejected it. It is not shown by the Railways that there is any condition that all payments and vouchers must be witnessed by the Officer and if they are not, they are to be ignored. In view of this, if the Arbitrators found that the documents, acknowledgment receipt and muster were genuine, the District Judge could not have held otherwise and

substituted his own opinion. The copies of the record before the Arbitrators were placed for the perusal of this Court. There are receipt on which there are signatures as well thumb impressions. There appears nothing suspicious in it. The names of all labours are mentioned in the muster and their thumb impressions are also taken. I do not see any reason to doubt the genuineness of this document. The Arbitrators are high ranking officers of the Railways and they can be said to be conversant with such type of documents which are produced generally before them at the time of the submission of the bills. The learned District Judge has, therefore, unnecessarily raised a doubt that to come out of the clutches of the Contract Labour Act, only 19 labours were shown to be engaged and this is a suspicious circumstance. In fact, it is the case of the appellant that the necessary format was not provided by the railways in that regard and therefore, there was no compliance. Further every contractor naturally would see that he does not engage 20 or more persons so that he is not required to follow the provisions of that Act. There is nothing wrong in it, if the Contractor restricts the number of employees to 19.

11. The Arbitrators have therefore rightly observed that skilled and semi-skilled labours are not available in the mid Section and yet they are required to be kept ready in the mid section throughout the period. It cannot be disputed that at every place and village a skilled or semi skilled workman would always be available readily. In fact, it has to be said that said workers are available at very few places and such workers are in fact not available at small places like village etc. It would in fact be more difficult for every contractor to find out the skilled or semi skilled worker in every section and that too at eleventh hour. There is, therefore, nothing wrong when he keeps engaged such workers throughout the period of contract. The learned District Judge ought not to have disturbed this finding of the Arbitrators.

12. Claim No. 5 is in respect of under utilization of overheads. This claim has been laid by the contractor because of the fact that the Railways failed to provide the material in time to the Contractor and there was, therefore, a delay. The learned District Judge finds in the letter dated 23/11/1988 that the contractor does not inform the dates on which the material was to be supplied and when it was supplied and that his work force was lying idle and that he was suffering loss. It is apparent that the Contractor had made a complaint that the material is not supplied. How does it matter if dates are not given ?. They are also within the knowledge of the Railways. They could have also produced the record showing the dates of supply of the material. In fact, the responsibility of supply of the material and drawing was that of the Railways. It could have, therefore, shown that the material and the drawing were supplied in time and that the contention of the contractor was false. The Railways have suppressed this evidence available with it. If the material is not supplied, naturally the work would be held up and the Contractor is bound to suffer the loss since he has engaged the Labours, machinery etc. The Arbitrators have in fact, upon consideration of the evidence found that the Railway had failed to fulfill the

obligations to supply the material in time. It is also a fact that girders lying on the railway track were not removed by the railways and that caused the delay. Thus, the evidence in fact shows that due to inaction on the part of railway there was delay. The reasoning of the District judge that the Contractor could have given dates and he could have mentioned in letter that he was suffering loss cannot be accepted and amounts to unnecessarily interfering with the findings of the Arbitrators by ignoring the law that the court is not ordinarily to repudiate the evidence and to interfere with the findings. The claim No. 5, therefore, was rightly allowed by the Arbitrators. The order of the district judge, therefore, in that regard needs to be set aside.

13. This takes me to the claim No. 6. This claim relates to under utilization of machines, tools and plants. The Arbitrators have allowed this claim partly. The Arbitrators found that the work was prolonged beyond the control of the Contractor and in such circumstances, the Contractor was required to keep the machinery idle since the work was to be done in mid Section. It is not expected that the Contractor can at the eleventh hour hire the machinery, and carry it to the spot every day. It also cannot be lost sight of, that for carrying such machinery every now and then would involve much more expenditure than let the machinery lie idle and pay for the hire charges of the day. Transportation every now and then would involve not only transportation charges but for those days even hire charges in part would be required to be paid. Besides this, there is no guarantee that such tools machinery and plants would be available at nearby place of work. The learned district judge has rejected this claim for the reason for which claim for overhead charges was rejected. Since, I have given the reasons why Arbitrators were right in allowing the claim of overhead charges, I need not repeat those reasons once again here. The District Judge seems to be swayed by the fact that the idle charges are unnecessarily claimed. For the reasons as stated above by me, it cannot in any case be said that the idle charges are unnecessarily be claimed. Further, if the delay was caused on the part of Railways to fulfill its own obligation, the delay in completion of work could be the only result.

14. This takes me to consider claim No. 3.2. It is in respect of work order dated 15/3/1988 of Contract No. 52/2. The Arbitrators after considering the documents allowed the claim to the extent of Rs. 13337.85. It appears from the observations of the District Judge that he found that the Arbitrators had deducted Rs. 470.69 after making the total of three bills and adding in it sum equal to 799% of tender increase. He, therefore, finds that the Arbitrators did not consider the documents on record properly. On the record of the lower court at page nos.78-79 the calculation is made by Contractor of this item. It appears that the total amount that is worked out is in respect of three items i.e. Rs. 982.80, Rs. 470.69 and Rs. 82.50 total Rs. 1535.99. The contractor in this calculation has added 799% tender increase which comes to Rs. 12272.56, and total of Rs. 1535.99 and Rs. 12272.56 comes to Rs. 13,808.35. It appears that the Arbitrators have disallowed the claim of Rs. 470.69. Accordingly, the learned

District Judge observes that sum of Rs. 470.69 should have been deducted from the sum total of three items Rs. 1535.99 and on the balance tender increase to Rs. 799/ should have been granted. The Arbitrators have however deducted Rs. 470.69 from 13,808.55. The learned District Judge was certainly right in holding that this amount of Rs. 470.69 should have been deducted from Rs. 1535.99. The Contractor was entitled to an increase in tender on the sum due of the bills. If bill of Rs. 470.69 itself was not payable, according to the Arbitrators, they should have first deducted the amount of Rs. 470.99 and then awarded increase on the balance. Thus, therefore, the Contractor was at the most entitled to 799% increase on 1065.30 which comes to Rs. 9577/-. The Arbitrators certainly fell in error in this respect.

15. In fact, the entire item No. 3 is in respect of work done yet payment not made. The learned District Judge has, however, concurred with the Arbitrators in respect of item No. 3/1 and 3/3. Shri Shrivastava, learned Counsel for the appellant, submitted that the learned District Judge has not considered the submissions properly. He contended that the applicant-railways had not raised any specific plea in the argument before the Arbitrators that Contractor had not placed before the Arbitrators any documents of additional work done. He had not submitted the monthly statement of claim to the Railways every month and he had not notified the extra item to the engineer. In this regard, he submits that since these grounds were not raised before the Arbitrators they could not be raised before the District Judge. The argument has much force. Had those grounds been raised before the Arbitrators, the Contractor would have got an opportunity to meet them and Arbitrators would have considered that.

16. One thing that cannot be lost sight of here while dealing with the Arbitrators report is that the Arbitrators in this case are the ex-high officers of the railways. It is, therefore, very clear that they know how the work is to be carried out and where the contractor is likely to make a wrong claim. They also know the manner and method with which the work is required to be carried out at the mid Section. They also know how the bills are prepared and what are the general conditions of contract. They can, therefore, in fact be said to be the experts in the field. It is in this background also that the Arbitrators award has to be looked into. Had the learned District Judge considered these aspects, he would not have come to such conclusion. In the circumstances, I find that the learned District Judge should not have negated the claim No. 3.2 and should have allowed it to the extent as is found by him. There was also no reason for the District Judge to reject the claim nos.4,5 and 6. In the result the appeal is allowed.

The respondent-Railway do pay the claim in respect of Claim Nos. 4,5 and 6 and as far as claim No. 3.2 is concerned, the respondent do pay sum of Rs. 9577/-. With these orders, the appeal stands disposed of. No order as to costs.