

(1997) 05 PAT CK 0061

In the Patna High Court

Case No : Appeal from Original Order No. 601 of 1993 (R)

State of Bihar and Another

APPELLANT

Vs

G.S. Atwal and Company (Engineering) Private Limited

RESPONDENT

Date of Decision : 23-05-1997

Acts Referred:

Arbitration Act, 1940 — Section 30, 33

Citation : (1997) 2 PLJR 531

Hon'ble Judges : P.K. Deb, J

Bench : Single Bench

Advocate : V. Shivnath and P.K. appu, for the Appellant; S.M. Ismail and Sunil Kumar Sinha, for the Respondent

Final Decision : Dismissed

Judgement

Prasun Kumar Deb, J.—This appeal has been preferred against the judgment dated 20.8.1993 and the decree signed on 4.9.1993 in Miscellaneous Case No. 10 of 1992 within Title Suit No. 13 of 1992 passed by the then Subordinate Judge-I, Seraikella. Singhbhum West, whereby and whereunder the objection filed by the Appellants u/s 30 of the Arbitration Act (hereinafter referred to as "the Act") has been rejected and the award had been made a rule of the Court.

2. The Respondent-claimant is a Contractor and he obtained a contract from the Appellants for earth work and lining of Icha left main canal from K.M. 17.835 to K.M. 19.755 and Seraikella distributory from K.M. 10.20 to K.M. 36.592. When the tender was floated by the Appellants for construction of the above work, the claimant-Respondent M/s G.S. Atwal and Company submitted their tender for a sum of Rs. 5,84,74,835/- and after proper scrutiny, the tender of the Respondent was accepted by the objector. State of Bihar and Ors. and on the basis of such acceptance Agreement No. LCB-1/1988-89 was executed between the parties. During the course of works, disputes and differences arose between the Appellants and the Respondent for which several correspondences were made between the parties. The Respondent-Company filed their claim before the

Engineer-in-Charge and thereafter the same was submitted to the Superintending Engineer in terms of the provisions of the agreement but no response was there from the side of the Engineer-in-Charge and the Superintending Engineer. Then finding no other alternative, the Respondent-claimant invoked the jurisdiction of arbitration as per Clause No. 52 of the General Clause 20 of the said agreement.

3. As per the terms of the arbitration agreement. Sri A.K. Basu, retired Engineer-in-Chief of the Irrigation Department, Bihar, was appointed as sole arbitrator. The terms of reference before the arbitrator were:

- (i) Idle period of machineries and man power.
- (ii) Extra disposal of earth beyond agreement.
- (iii) Carriage of earth for filling beyond agreement.
- (iv) Soft rock with blasting beyond agreement.
- (v) Wastage and damage of materials in Canal during rainy season and Kharif irrigation.
- (vi) Non-payment of bills in time as per contract agreement, economical loss and time resulting in huge burden.

4. Before the arbitrator both the parties filed their statement of claims and counter claims and also in respect of claims and objection thereto, documents were annexed and proved by the parties. The documents which were filed by the parties were exhibited before the arbitrator on admission. The then Engineer-in-Chief and his successor were examined as witnesses on behalf of the State of Bihar as Witness Nos. 1 and 2. The Respondent claimant was represented by their constituted Agent and Attorney Shri S.M. Quiser and their Advocates and the State of Bihar was also represented by the State Lawyer and the concerned officers. After adjudication, the arbitrator filed the award in the Court on 19.6.1992 and the notices of filing of the award were issued from the Court of the Subordinate Judge and were duly received by the parties. The Appellants-objectors filed objection u/s 30 of the Act on 3.8.1992 for setting aside the award while the claimant-Respondent filed rejoinder on 24.2.1993 praying for making the award a rule of the Court.

5. Various objections were raised in the petition u/s 30 of the Act. The main grounds of objections were.

- (i) There were errors apparent on the face of the award as there were non-consistent findings by the arbitrator.
- (ii) The working season is generally from October to May of the year i.e. for a period of 8 months but the arbitrator under Claim No. (I) had allowed losses for the period of claim from 15.9.1988 to 25.10 1988 although the claim was from July to October.

(iii) Working hours regarding the machineries for each working day was held by the arbitrator as eight hours whereas in the report submitted by the Gazetted Valuer, the calculation of working hour was shown as 5 (five) hours per day and as such the arbitrator committed error on the face of it in construing eight hours working of the machineries instead of five hours per day.

(iv) Similarly the wrong was committed by the subsequent period as contained in claim item No. (v).

(v) The next objection was with regard to loss due to man power. The salary of the persons were calculated by the arbitrator whimsically without any basis although documentary evidence was against it.

(vi) The next point was raised that the interest calculated by the learned arbitrator is wrong on the face of it as damages and losses had been caused and calculated over and above there was no scope of levying interest and even if such interest was levied, there was no provision of awarding interest at the rate of 13 per cent per annum.

6. All the objections raised from the side of the Appellants had been countered by the claimant-Respondent in their rejoinder petition. The work order was issued admittedly on 10.6.1988 which was marked as Ext. A/2 and the claimant Respondent was to start work immediately and as such the claimant-Respondent had brought their staff and machineries at the site to start the work and they communicated the same by the letter which was marked as Ext. A/3. They had also given their work programme vide Ext. A/4 and requested the Engineer-in-Charge by several letters vide. Exts. A/5 to A/12 to make the site available to them and to give block level so that the Respondent-claimant should start the work. According to the Respondent-claimant, they made their preliminary work like construction of pillars etc., vide Ext. A/9 and requested the Engineer to jointly inspect the pillars but the same was not done and ultimately the work could start only from 26.10.1988. As the claimant-Respondent had already set up their working programme, brought their machineries and man power which were kept idle till 26.10.1988, the arbitrator found that the loss was there and as such the same was calculated from 15.9.1988 onwards upto 26.10.1988.

7. During the working period also, there was stoppage of work due to flow of water which was also calculated under Claim No. (v). Regarding the working hours of machineries, it was the claim of the Respondent that the report on which the Appellant was basing was in respect of the valuation of the machineries calculating it to be workable for five hours per day but actually it was eight hours per day beyond the working and actually the arbitrator has not committed any error in calculating the loss of machineries and man power. The two excavators were engaged but the learned Arbitrator had given in the award the value regarding one excavator only. Most of the claims of the claimant-Respondent had been rejected by the arbitrator who happened to be the most experienced person belonging to the own department of the State of Bihar and,

as such, there was no scope of raising any objection when the arbitrator had after consideration of the claims and objections passed the award by giving reasons under each and every item.

8. The learned Subordinate Judge after consideration of the submissions of both the parties and on going through the arbitration proceeding came to the finding that there was no error apparent on the face of it and the errors which are submitted from the side of the Appellant had no bearing in view of the fact that these objections had been considered by the arbitrator while passing the award. He has also held that when both the parties had submitted to the jurisdiction of the arbitrator and had consented that they would abide by the judgment of the arbitrator, there is no scope to challenge(sic) on flimsy grounds until and unless there is grave error on the face of it. The learned Court below has also rightly held that the Court while hearing objection under Sections 30 and 33 of the Act does not sit as an appellate Court and always should take a positive attitude to uphold arbitration award unless the same is lacking due to jurisdictional error or the error apparent on the face of it. The objection raised was thus rejected and the award was made a rule of the Court.

9. Mr. V. Shivnath learned Counsel appearing for and on behalf of the Appellants has submitted that under Claim No. (I), the loss was calculated for 37 days although claim was for greater period, but while calculating the loss, the arbitrator did not consider as to the actual expenditure being incurred by the Respondent-claimant during that period. No evidence was adduced from the side of the Respondent-claimant as to the payment of its staff by deducting provident fund etc. Regarding machineries also, the Respondent-claimant did not produce any document to prove as to how much amount they had to pay regarding the hire charges of the machineries and as such the calculation made by the arbitrator is devoid of any reasonings required for a man of prudence. Regarding payment of his staff, Mr. Shivnath's submission is that as per the documents proved from the side of the Respondent-claimant, the salary was higher but the same has been lowered down by the arbitrator without giving any reasons for it. For the purpose of calculation of loss due to idleness depends on various factors. The whole salary given to the staff may not be considered as loss due to idleness because some works those man power had to do by setting up of pillars etc., for the purpose of preliminary programming, as such, the learned arbitrator has rightly deducted the considerable amount from the salary for the purpose of calculation on idleness of the man power. So this submission of Mr. Shivnath with respect to Claim Nos. (I) and (V) has got no proper footing to stand.

10. Regarding machineries, no where it was the claim of the Respondent that the machineries did not belong to them and those were brought on hire, so the question of hiring charge does not arise at all. Thus, this submission of Mr. V. Shivnath has also got no grounds to stand. Machines belonged to the Respondent-claimant and those were brought to the site and kept idle and as such by taking the loss towards calculating eight hours working power on each

working day, the loss due to idleness was determined by the arbitrator. The arbitrator has given reasonings as to how he calculated the loss due to idleness of the man power and machineries and why the period has been shortened. There is no scope of holding that the arbitrator has determined the claims arbitrarily rather when reasons have been given and the reasonings are proper and justified, then there is no scope to infer anything regarding misconducting of the proceedings. If the award would have been a non-speaking one there could have been scope of inference of arbitrariness, but, in the present case, there is no scope as such. Moreover, the arbitrator himself is a most experienced technical person and he retired from the service of the State Government of the same department and his authority in determining the proper loss cannot practically be questioned on flimsy grounds.

11. The next point raised by Mr. V. Shivnath that there was grant of loss due to blasting as per Claim No. (VI). On the face of it according to Mr. V. Shivnath, such claim and grant of award is bad as the question of blasting does not arise at all when rock was admittedly a soft one. According to Mr. Shivnath, when soft rock was there and unless there was specific evidence regarding blasting being done, there cannot be any grant of compensation to that effect.

12. Mr. Ismail, appearing for and on behalf of the claimant-Respondent has submitted that reasons have been given by the learned arbitrator as to why the award was made for that purpose of blasting. Rock even if it is soft one then also blasting is necessary. Horse power of such blasting might be of much lower nature but because rock was soft, it cannot be said that blasting was not done. There was enquiry by the arbitrator and there was even inspection of the site. There was no denial from the side of the department in that aspect and in the objection filed u/s 30 of the Act, there was no specific plea being taken, in the appellate Court, such submission has no bearing as per Mr. Ismail. I do agree with the reasonings of Mr. Ismail Regarding 8 hours duty. Mr. Ismail has rightly referred to the provision of the Motor Transport Workers' Act and Factory Act.

13. The last point has been submitted by Mr. V. Shivnath that interest has been granted at the rate of 13% per annum both during the period pendente lite and future. According to Mr. Shivnath, interest is legally maintainable as per the recent judgment of the Apex Court in the case of State of Orissa Vs. B.N. Agarwalla, etc., . But what should be the quantum of interest, that should be Dependent upon the facts and circumstances of each case. In the present case, it has not been clarified from the side of the claimant-Respondent as to taking of loan from the bank or from the monetary agency and the rate of interest therein. In that view of the matter, fixing of interest at the rate of 13% per annum has got no basis as is submitted by Mr. V. Shivnath. The learned Arbitrator in the nature and circumstances of the case has fixed the quantum of interest. Such quantum on the face of it cannot be said to be arbitrary.

14. There is little scope of going into the merits of the award that too in a reasoned award when both the parties have selected their arbitrator and on legal

implication, they are bound by the determination being made by the arbitrator. If there is any error or wrong in the process of determination unless the same is apparent on the face of it. the same cannot be interfered with by the Court. The Court has got no power or jurisdiction to sit as an appellate Court or criticise mental power and process of the arbitrator in determining the reference. Unless there is misconduct in the process there is no scope to set aside the award. In the present case, as I have stated above, the Appellant did not take specific pleas in their objection u/s 30 of the Act. Usual and general pleas as coming within the purview of three grounds as contemplated under the Section of the Act had been reiterated in the objection petition. It further appears that specific pleas were not even taken before the Trial Judge and now in the appellate Court. Mr. V. Shivnath very ably and artistically is going to challenge the different findings and determination of the arbitrator which is not permitted according to law Mr. Shivnath has referred to a recent judgment of the Calcutta High Court in the case of Hooghly River Bridge Commissioners Vs. Bhagirathi Bridge Construction Co. Ltd., wherein the learned Single Judge (S.B. Sinha, J.) had practically taken into consideration all the judgments of the Apex Court and of the different High Courts regarding objections u/s 30/33 of the Act. Some judgments were relevant and some were not for the purpose of arriving at the decision of the case in hand before the learned Single Judge but very ably all the judgments have been elaborately discussed and can be a helpful dictionary for the purpose of deciding a case of such nature or getting reference of all the judgments of High Courts and Supreme Court in respect of the point regarding the objection u/s 30/33 of the Act. In the case, two vital documents were not considered by the arbitrator and as such there was wrong determination on the face of it and hence the matter was sent back to the arbitrator for taking into consideration of those documents for coming into the just decision. In the present case, there is no such allegation of non-consideration of any document or any evidence adduced by the parties. When after consideration of documents and evidence of both the parties, the arbitrator had reached to a conclusion and determined compensation on some claims rejecting maximum claims of the claimant-Respondent and when there is total application of mind of the arbitrator, there is no scope to entertain vague objection being raised from the side of the objectors-Appellants. The learned Court below has rightly rejected the objection and made the award a rule of the Court.

15. As discussed above, there is no force in this appeal and hence the same is rejected but in the facts and circumstances of the ease, no order as to costs.