
(2012) 10 CAL CK 0109

In the Calcutta High Court

Case No : A.P.O. No. 241 of 2012 and A.P. No. 435 of 2008

State of West Bengal and Another

APPELLANT

Vs

M/s. S.N. Bhakat and Co. and Another

RESPONDENT

Date of Decision : 09-10-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Contract Act, 1872 — Section 55

Citation : AIR 2013 Cal 45 : (2013) 2 ARBLR 386

Hon'ble Judges : Shukla Kabir (Sinha), J; Ashim Kumar Banerjee, J

Bench : Division Bench

Advocate : Samrat Sen and Mr. Paritosh Sinha, for the Appellant; Amitava Ghosh, Advocate, Mr. Navojit Mukherjee, Advocate and Mr. Sourav Chatterjee, for the Respondent

Final Decision : Allowed

Judgement

Ashim Kumar Banerjee, J.

BACKDROP

1. The subject matter of appeal would relate to an order passed by the learned Single Judge, declining to set aside and/or interfere with an award published under the old Arbitration Law being the Arbitration Act, 1940. His Lordship, by judgment and order dated March 28, 2012 appearing at page 299-307 of the paper book, upheld the award except the claim No. 2 that was found to be repeated in claim No. 4. In effect, the learned Judge affirmed the award to the extent of Rs. 7,19,038/- covering claim Nos. 3 and 4 that was allowed by the Arbitrator. Bringing the facts in a narrow campus, we would find, the appellant/ State entrusted a partnership firm M/S. S.N. Bhakat & Company to execute a work on behalf of the State represented by Public Works Department, (hereinafter referred to as P.W.D.), Kharagpur Division for construction of residential quarters for non-gazetted staff for Eastern Frontier Rifles. The tender value was Rs. 22,06,011/-. As per the contract, the work was scheduled to be

completed within eighteen months from the date of the work-order. Since the work-order was issued on April 13, 1983, the work was supposed to be completed by October 30, 1984 whereas the work was completed on December 31, 1985 as stated by the claimants' witness. However, records would depict, the work was completed on January 15, 1986. State accepted delayed handing over of possession. State from time to time extended the time-schedule as we find from the record. Contemporaneous correspondence would show, State duly paid seventh Running Account Bill (hereinafter referred to as R.A. Bill) that was paid on August 5, 1986. The claimants thereafter wrote to the authority to treat seventh R.A. Bill as the final bill and refund their security deposit that was withheld as per the contract. Claimants would contend, they were compelled to write such letter as State was unusually delaying the process in releasing the security. State would however, contend, such letter must be construed as an event of accord of satisfaction of the final payment that would give rise to the dispute. The claimants raised subsequent claims for escalation and idle labour charge because of delay in completing the construction. According to the claimants, delay was due to delayed handing over of site by the P.W.D. as also delay in supplying raw-materials. Significant to note, supply of principal raw-materials being cement and steel was the responsibility of the State. There had been delay in supply as found out by the Arbitrator. According to the State, there could not have been any further claim either on escalation or idle labour charges or otherwise that would be apparent from the claimants' letter dated November 11, 1986 wherein they had informed the P.W.D. that they had completed the work on January 15, 1986 and received final payment against seventh R.A. Bill that might be treated as final bill as there were no further work beyond the last measurement done on January 7, 1986. Once the claimants treated the seventh R.A. Bill as final and requested release of security deposit, there could not be any additional amount payable to them. Moreover, they did not reserve their right contemporaneously that would make the subsequent claim for the additional cost not sustainable. The claimants would contradict such stand of the State by referring to its letter dated February 27, 1987 appearing at page-242 of the paper book that would also rely upon communication made by the Assistant Engineer, P.W.D. appearing at page 240 and 241 wherein State admitted delay in delivery of the raw-materials. The claimants also relied upon their letters dated August 25, 1986 and February 15, 1987 appearing at page 51-52 of the paper book wherein they reserved their right to claim for damage because of delayed work.

[AWARD :

2. The Arbitrator was a technical and non-legal person. Although the said Act of 1940 would not compel the Arbitrator to give a reasoned award unlike the new law being Act of 1996 the Arbitrator published a reasoned award as we find from page 135 and 186 of the paper book. We find, Arbitrator went deep into the matter and examined each and every claim minutely. The Arbitrator allowed claim No. 1 in full being the refund of security deposit. The Arbitrator awarded

Rs. 38,300/- instead of Rs. 75,000/- as claimed in claim No. 2 for idle labour charges. The claim No. 3 on account of compensation for delayed execution for Rs. 5 lacs was allowed to the extent of Rs. 4,71,834/-. The Arbitrator allowed claim No. 4 for Rs. 1,58,400/- instead of Rs. 1.92 lacs on account of compensation for prolonged establishment beyond the schedule time. The Arbitrator rejected claim Nos. 5 and 7 whereas allowed claim No. 6 to the extent for Rs. 17,374/- and claim No. 8 for Rs. 39,600/-. Claim Nos. 9 and 10 would relate to interest and cost respectively. The Arbitrator awarded 12% interest on the awarded sum and cost of Rs. 1,07,750/-.

JUDGMENT AND ORDER IMPUGNED

3. The learned Single Judge set aside the award for Rs. 38,300/- in respect of claim No. 2 on the ground that it was repetition of claim No. 4.

4. On the other claims, His Lordship observed, the Arbitrator in his wisdom dealt with the issue on the basis of the evidence led before him. The Arbitrator recorded reasons giving justification to the awarded sums although the law did not require justifying "every rupee under each head of claim". The award could not be faulted. His Lordship upheld the award. Hence, this appeal by the State.

RIVAL CONTENTIONS

5. Mr. Samrat Sen, learned counsel appearing for the State in his usual fairness restricted his challenge to claim Nos. 3 and 4 as also claim Nos. 9 and 10. Claim No. 3 would relate to escalation whereas claim No. 4 would relate to idle labour cost. Mr. Sen referred to the minutes of the arbitration dated August 11, 2006 and August 25, 2006 appearing at pages 71-73 to show, the seventh R.A. Bill was duly paid on August 5, 1986. The claimants subsequently requested to treat the same as the final bill and issued "No Claim Certificate" on August 25, 1986. Their first protest came through letter dated February 15, 1987 after about six months from the date of receipt of the final payments. Hence, there could be no case of duress that could be set as a shield to gain support to their additional claims. Mr. Sen further contended, the Arbitrator gave opportunity to the claimants to adduce evidence that the claimants declined as would appear from the minutes dated January 12, 2007 appearing at page-92. State produced their witness and proved their defence before the Arbitrator.

6. The contention of Mr. Sen if we could put down seriatim, it would be as follows:

(I) There was inordinate delay to make protest deserving additional claim.

(II) Final payment was duly received on August 5, 1986. Hence, there could be no compulsion upon the claimants to issue "No Claim Certificate".

(III) The claimants themselves contended, seventh R.A. Bill took all work into consideration and requested the State to consider the same as final payment having no further claim. Hence, additional claim was without any basis and not tenable.

(IV) The Arbitrator should have considered all the correspondence instead of only two letters that would be non-application of mind.

(V) Even in the statement of claim, no case of duress was made. No evidence was led on that score. The Arbitrator's finding to the said extent would thus be without any basis.

(VI) Assuming, the claimants were entitled to put forward their claim, avoiding "No Claim Certificate" they should have led oral evidence to prove the duress. Having denied to do so, they would not be entitled to put forward their claim.

(VII) The Arbitrator himself treated the seventh R.A. Bill as final bill as would appear from page-178. Hence, there could not be any further claim to be awarded in the award.

7. Mr. Sen relied on Section 55 of the Contract Act and contended, the law would not permit the claim to be put forward and awarded.

8. On interest and cost, Mr. Sen would contend, in case this Court would not find favour with his argument on the "No Claim Certificate" denying the right of the claimants to make any additional claim and consider the claims on merit the awarded sum should carry interest at the reasonable rate and not at 12% per annum as directed by the Arbitrator and affirmed by the learned Single Judge. Similarly, reasonable amount should be awarded as cost.

9. Mr. Sen cited the following decisions to support his contention:

1. Jiwani Engineering Works (P.) Ltd. Vs. Union of India (UOI),
2. Chairman and M.D., N.T.P.C. Ltd. Vs. Reshmi Constructions, Builders and Contractors,
3. Thawardas Pherumal & Anr. Vs. Union of India reported in AIR 1955 1 SC 468.
4. Jayesh Engineering Works v. New India Assurance Co. Ltd.,
5. K.P. Poulose Vs. State of Kerala and Another,
6. Alva Aluminium Ltd., Bangkok Vs. Gabriel India Limited,)
7. State of Kerala and Another Vs. M.A. Mathai,
8. Union of India (UOI) and Others Vs. Master Construction Co.,
- 9 National Insurance Co. Ltd. Vs. Boghara Polyfab Pvt. Ltd.,
10. Union of India (UOI) Vs. Ajabul Biswas,
11. Batliboi & Company Ltd. Vs. Board of Trustees for the Port of Calcutta reported in 2010 7 R.A.J. Cal. 171.
12. Associated Engineering Co. Vs. Government of Andhra Pradesh and another,
13. Oil and Natural Gas Corporation Vs. Wig Brothers Builders and Engineers Pvt.

Ltd.,

14. Food Corporation of India Vs. Chandu Construction and Another,

15. Rajasthan State Mines and Minerals Limited Vs. Eastern Engineering Enterprises and Another, 283.

16. Rajasthan State Road Transport Corpn. Vs. Indag Rubber Ltd., .

10. Mr. Amitava Ghosh, learned counsel appearing for the claimants-respondents contended that the Arbitrator having the technical expertise reasoned his award. The reasonableness of the reasons was not available for judicial review. The learned Judge rightly declined to do so. Explaining the "No Claim Certificate", Mr. Ghosh contended, the claimant was a listed contractor under P.W.D. Security deposits were withheld for a long time. To get the security deposit, the claimant issued the "No Claim Certificate" that would have no bearing on the additional cost. He further contended that his letter addressed to P.W.D. asking to treat seventh R.A. Bill as final bill should be construed to mean, no further claim was pending in terms of the contract. The additional cost in the nature of damage for the delayed execution of the work due to the fault of the State could not be avoided by the State on the strength of the "No Claim Certificate". He referred to pages 137, 138 and 156 to say, there had been admitted delay in supply of cement and steel that was considered by the Arbitrator. Mr. Ghosh also relied upon contemporaneous correspondence appearing at pages 51, 52, 149, 241 and 242 to support his contention.

11. Mr. Ghosh distinguished the cases cited by Mr. Sen to contend that most of the cited decisions would relate to the new law being the Act of 1996. Moreover, those were rendered at the initial stage before the Arbitrator could be appointed and entered upon reference. The facts involved in the case would squarely differ from the eventuality, considered by the Apex Court in those decisions. Moreover, the stringent clauses involved therein, would make the present case distinctive from the other one and make the ratio outside the scope of application.

12. To support his contentions, Mr. Ghosh cited the following decisions :

1. Union of India (UOI) and Another Vs. L.K. Ahuja and Co.,

2. Jayesh Engineering Works Vs. New India Assurance Co. Ltd. reported in 2000 (Suppl.) ALR SC 458.

3. General Manager Northern Railways and Another Vs. Sarvesh Chopra,

4. K.R. Raveendranathan Vs. State of Kerala reported in 1998 (Suppl.) ALR 220.

5. Afsar Sheikh and Another Vs. Soleman Bibi and Others,

6. Municipal Corporation of Delhi Vs. Jagan Nath Ashok Kumar and Another,

7. B.V. Radha Krishna Vs. Sponge Iron India Ltd.,

8. State of Rajasthan Vs. Puri Construction Co. Ltd. and Another,
9. K.N. Sathyapalan (Dead) By Lrs. Vs. State of Kerala & Anr. reported in 2007 2 S 626.
10. McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others, .
11. P.M. Paul Vs. Union of India (UOI),
12. Ambica Construction Vs. Union of India reported in 2006 13 SCC 475.
13. Mr. Sen while giving reply, distinguished the cases cited by Mr. Ghosh. He contended, the decision in the case of Associated Engineering Co. (supra) would relate to a speaking award whereas the decision in the case of Sudarsan Trading Co. Vs. Government of Kerala and Another, was on a non-speaking award, hence, not applicable in the instant case. He also contended that the case of Afsar Shaikh and Anr. (supra) would relate to Section 100 of the CPC that would not be applicable in the present case. Relying on Section 55 of the Contract Act, Mr. Sen would contend, the third proviso to the Section would be applicable and not the second one as contended by Mr. Ghosh. He lastly contended that the decision in the case of Mc Dermott International Inc. (supra) was rendered under the new law and would have no bearing in the instant case.

OUR VIEW :

14. Host of decisions were cited at the Bar. If we go by the dictum, we would unhesitatingly say, the parties chose their forum being a domestic forum. The parties consciously kept the Court of law outside the purview. Unless one would successfully contend, the award was perverse being based on no evidence, it was absurd, shocking the conscience of the Court, it would run contrary to the well settled principles of law of the land, the Court must not interfere. Under the old law, Arbitrator was not supposed to assign reasons even then the Arbitrator assigned reason. His understanding of the controversy might be on a different perception than what we could infer on an independent consideration of the factual matrix and the available records. We are not competent to question the Award, be it under the old law or be it under the new law. Arbitrator is the Master of his own procedure. The procedural law that was binding upon the regular Courts established under laws of the land would have no application in arbitration. The Arbitrator being a technical person was selected by the parties to arbitrate by using his special knowledge on the subject. The Arbitrator did so. We do not have competence to question.

15. On a close examination of the award, we find the basic answers are in the negative that would keep us at bay to interfere with the award.

? Have we find it absurd? - No.

? Did the award shocking our conscience? - No.

? Did the award based on no evidence? - No.

? Did the reasons assigned by the Arbitrator would have a direct conflict with the laws of the land? - No.

16. Since the answers of all the above questions are in the negative, we do not have competence to interfere.

17. The letters so discussed above, would really show that there had been delay in supply of raw-materials. The Arbitrator came to a definite finding, there had been five months delay in handing over of site. The State faulted that was proved in the arbitration. The consequence must follow. Mr. Sen with his eloquence, discussed the controversy, with his legal acumen and profound knowledge on the subject took us to the law as of date so settled by the Apex Court. With deepest regard, we have for him, he was however not able to show any stringent clause from the contract that would specifically debar the Arbitrator from proceeding with the claim of the claimants.

18. Mr. Sen relied on two clauses which are set out below :

(I) No claim for idle labour will be entertained under any circumstances.

42. No escalation of rate within the period of execution of the work is admissible".

Clause-7.

.....It should be clearly understood that no claim whatsoever shall be entertained by the Government on account of delay in supplying materials.

19. These clauses were duly considered by the Apex Court in the precedents cited above. The Apex Court observed, those clauses would not absolve the State from their liability to pay damage due to their fault in delaying the process of work. In this regard we may refer to the decision in the case of P.M. Paul (supra) and General Manager, Northern Railways (supra). In the former case the Apex Court observed, "escalation is a normal incident arising out of gap of time in this inflationary age in performing any contract. The Arbitrator has held that there was delay. The Arbitrator found that it was evident that there was escalation and, therefore, he came to the conclusion that it was reasonable to allow 20% of the compensation under claim No. 1, he accordingly allowed the same". This was a matter, which was within the jurisdiction of the Arbitrator. Hence, the Arbitrator had not misconducted in awarding the said amount as he has done. The Apex Court rejected the contention of the authority that in absence of any escalation clause such amount could not be awarded.

20. In the case of General Manager, Northern Railways (supra), more stringent clause being clause-63 of the general conditions of contract in Railway came up for consideration.

21. The Apex Court observed, "thus it appears that under the Indian law, in spite of there being a contract between the parties, whereunder the contractor has undertaken not to make any claim for delay in performance of the contract occasioned by an act of the employer, still a claim would be entertainable in one

of the following situations; (i) if the contractor repudiates the contract exercising his right to do so u/s 55 of the Contract Act, (ii) the employer gives an extension of time either by entering into supplemental agreement or by making it clear that escalation of rates or compensation for delay would be permissible, (iii) if the contractor makes it clear that escalation of rates or compensation for delay shall have to be made by the employer and the employer accepts performance by the contractor in spite of delay and such notice by the contractor putting the employer on terms".

22. Even if we give full credence what Mr. Sen would say on "No Claim Certificate", we would not be in a position to overlook the observation of the Apex Court in the case of Union of India Vs. Ajabul Biswas (supra), "it is also true that on settlement of the final bill, the right to get further payment gets weakened but the claim subsists and whether it does subsist, is a matter which is arbitrable". The Apex Court also observed that the claim was made within three years, hence, it was live and the Arbitrator was entitled to decide.

23. In the present case, the parties accepted the position that there had been a dispute. State did not deny their liability. They submitted to the jurisdiction of the Arbitrator being a nominee of the State, hence, it would be too late in the day to contend, there could be no claim at all. The Arbitrator was invited by the parties to decide on their claim and/or counter-claim if any. The Arbitrator, being a technical person having technical knowledge on the subject, considered the issue minutely and adjudicated the same and awarded partial amount justifying the same with reasons that would hardly be available for judicial review.

24. Section 55 of the Contract Act 1872 would provide three eventualities and the solution. In first paragraph of the Section it was provided, when a party under the contract promises to do a thing within a specified time and fails to do so within the time stipulated the contract becomes voidable at the option of the promisee.

25. In case the contract of the parties would show time was not the essence of the contract, the contract does not become voidable on such failure however, the promisee would be entitled to compensation from the promisor for any loss occasioned to him by such failure.

26. The third eventuality would suggest, in case of the first eventuality when contract becomes voidable on failure of one party to perform certain things within the time stipulated and the promisee accepts such performance beyond time in such case he would not be entitled to any compensation for any loss unless he would put the other party on contemporaneous notice about his intention to claim compensation.

27. In the instant case, Mr. Ghosh would contend, the case would fall under second eventuality whereas Mr. Sen would depend upon the third eventuality.

28. In the case of Municipal Corporation in Delhi (Supra), the arbitrator acted on

his personal knowledge and experience that the Apex Court observed, not available for judicial scrutiny. In case of B.V. Radha Krishna (Supra), the Apex Court held, "it would be evident that the High Court has substituted its own view in place of the arbitrator's view as if it was dealing with an appeal. That is exactly what is forbidden by the decision of this Court"

29. In the case of Ambica Construction (supra), the Apex Court held, issue of "no claim" certificate was not an absolute bar for considering a claim. The Apex Court considered a railway contract, particularly Clause 43(2) of the general conditions that would debar a contractor to make any additional claim after signing of "no claim" certificate. The Apex Court observed, such a Clause in the contract could no longer be said to be an absolute bar to a contractor raising a further claim.

30. The contract would stand concluded on preparation of the final bill simultaneously with handing over of possession. In the instant case, final bill was not prepared. The contractor volunteered to treat the seventh R.A. Bill as final bill and thereafter made their claim on account of damage due to delayed handing over of possession and delayed supply of materials. The dispute arose, parties agreed to have it resolved through Arbitrator. Arbitral Tribunal, being a domestic forum, entered upon reference. The parties submitted to its jurisdiction. The award would bind them. In absence of the award falling under the exceptional category being amenable to judicial review, would be outside the scope of scrutiny. This is our view on the principal issue.

31. There were two small issues that might have been overlooked. We would find, on account of compensation for executing work in the extended time, there was a total over run period of fourteen months instead of nineteen months as claimed by the claimant. Arbitrator thus reduced the amount of claim. However, in respect of claim No. 4 where the Arbitrator reduced the claim and awarded a sum of Rs. 1,58,400/- for additional fourteen months. The learned Arbitrator possibly overlooked the fact that there had been five months delay in handing over of site, so during first five months there could be no question to engage any work force. Hence, the amount should be reduced to the extent of nine months instead of fourteen months. At our request, both Mr. Sen and Mr. Ghosh re-calculated claim No. 4 on the basis of nine 9 (nine) months ($14-5=9$) and informed us that a sum of Rs. 1,01,828/- would be the actual amount. The award may be modified accordingly.

32. On the interest issue, we are of the view that the Arbitrator should have considered the Nationalized Bank rate prevalent as on the date of the award 12% being on the higher side, we reduce it to 9%.

33. The award is modified by reducing the claim No. 4 to the extent of Rs. 1,01,828/-. The entire awarded sum would carry interest at the rate of 9% per annum instead of 12% per annum as awarded by the Arbitrator.

34. The appeal succeeds in part and is allowed without any order as to costs. Urgent certified copy of this judgment, if applied for, be given to the parties on

their usual undertaking.

Shukla Kabir (Sinha), J.

I agree.