
(2012) 03 CAL CK 0056
In the Calcutta High Court
Case No : AP No. 435 of 2008

State of West Bengal

APPELLANT

Vs

N. Bhakat and Co.

RESPONDENT

Date of Decision : 28-03-2012

Acts Referred:

Arbitration Act, 1940 — Section 30, 33
Contract Act, 1872 — Section 55, 56

Citation : (2013) 1 CHN 352

Hon'ble Judges : Sanjib Banerjee, J

Bench : Single Bench

Advocate : ;Samrat Sen, Paritosh Sinha, Amitava Ghosh and Navojit Mukherjee,
for the Respondent

Judgement

Sanjib Banerjee, J.—A seemingly irrelevant submission on behalf of the respondent contractor afforded the Court an opportunity for course correction and appreciate that the quality and quantity of the evidence that was before the arbitrator and that may have satisfied the arbitrator may ordinarily not be gone into by a Court in proceedings for annulment of an arbitral award. The primary ground urged by the petitioner in the present petition under sections 30 and 33 of the Arbitration Act, 1940 is that the claim could not have been carried to the reference since the contractor had no claim at all and, upon payment of the contractor's seventh RA and final bill on August 5, 1986, the obligation of the employer stood completely discharged. In support of such case of accord and satisfaction, the petitioner refers to the letters dated August 5, 1986, August 25, 1986, November 21, 1986, February 15, 1987, February 27, 1987 and March 21, 1988. The petitioner suggests that notwithstanding it being evident from one or more of the letters that a reservation was expressed by the contractor at a later stage after receiving the payment against the final bill, it is evident that there was no grievance expressed or recorded by the contractor within any reasonable time of receipt of the final payment that the contractor had to accept such payment under coercion or duress or any other compulsion. The petitioner

submits that parole evidence was essential for the claimant in the reference to establish that the employer was not discharged after the claimant received the payment without recording any immediate protest. The petitioner says that in the absence of oral evidence being adduced on behalf of the claimant in the reference, the arbitrator was bound to go by the contents of the letters that had been exchanged between the parties during the relevant period. The petitioner proceeds to add that nothing in those letters would suggest that there was anything that weighed on the contractor for the contractor to be constrained to accept the final payment without any protest.

2. It may have been relevant to go into the contents of the several letters referred to above and, in any event, to at least two of them which were issued several months after the final payment had been received on which a case of the contractor having received the final payment under protest may have been founded. But in the context of the assessment that is appropriate in this jurisdiction, which is supervisory and not appellate, it would be injudicious to refer to or re-appreciate matters of evidence before the arbitrator; whether to justify or criticise the award.

3. There is a line in one of the minutes which recorded that the contractor was not desirous of adducing oral evidence. The contractor did not proffer any reason for not calling any witness. The award does not record any reason as to why the contractor did not attempt to adduce oral evidence. Yet, it is submitted on behalf of the contractor, without any backing in support thereof in the pleadings, that the person in control of the contractor firm at the relevant time had expired prior to the reference being taken up, or, at any rate, prior to the time when the question of oral evidence came up. Since that was not a ground which was cited by the contractor for not adducing oral evidence and the reason is not recorded either in the award or in the affidavit filed on behalf of the contractor, such submission has to be regarded as utterly irrelevant and cannot be given any credence. What such submission highlights, however, is that there would be many considerations as to how the quality or the quantity of the evidence would weigh with one and how it would be seen by another. Once an arbitrator or arbitral tribunal, the consensual forum of the parties, is posted with the authority to adjudicate upon the disputes covered by the arbitration agreement, the tribunal is also accorded the jurisdiction to find the tools to make the assessment, subject to the award and the conduct of the reference being open to supervision by a Court of law and the award being open to scrutiny on the primary grounds of error of jurisdiction and serious irregularity.

4. The arbitrator reckoned, on the basis of the material before him including the letters referred to above, that the contractor was constrained to receive the final payment and issue a discharge accordingly even before a sum of Rs. 17,000/- on account of balance security deposit had been refunded to the contractor. The arbitrator did not find that the delay between August, 1986 and February, 1987, when the contractor protested for the first time, was of great significance. It is

not for the Court in its supervisory jurisdiction to assess such matters, revisit the facts, reappraise the evidence and arrive at a different conclusion once it is recognised that there was some basis to the arbitrator's conclusion. A view that may not appeal to the Court but may appear to be a plausible view cannot be upset or interfered with in this jurisdiction.

5. The petitioner has referred to the judgments reported at Jiwani Engineering Works (P.) Ltd. Vs. Union of India (UOI), in such context which also find mention in the award. The first case lays down the proposition that as to whether there has been accord and satisfaction and a consequent discharge is also a dispute which would be arbitrable if the arbitration agreement is wide enough to accommodate it. The Supreme Court case recognized that notwithstanding the contractor having given the employer an apparent valid discharge, if a case was made out that other considerations impelled the contractor to give the discharge, it would be open for the contractor to prove the same in course of the arbitral reference.

6. The petitioner has also referred to other Supreme Court judgments on the similar lines reported at National Insurance Co. Ltd. Vs. Boghara Polyfab Pvt. Ltd., and (1995) Supp. 3 SCC 324. The petitioner emphasises that it is for a contractor to assert and establish that a valid discharge once given should be disregarded and the matter reopened. The petitioner's reference to the cases is in furtherance of its contention that the contractor in this case may have asserted a claim but the contractor could not establish that the contractor had received the final payment on August 5, 1986 under coercion or duress. Another judgment reported at Seth Thawardas Pherumal Vs. The Union of India (UOI), has also been referred to in the same vein. A judgment reported at M/s. Sikkim Subba Associates Vs. State of Sikkim, has been cited by the petitioner to establish what would amount to misconduct on the part of the arbitrator.

7. The contractor does not disagree that ordinarily when a discharge is given, the claimant would be precluded from seeking any further payment, but the contractor suggests that there may have been no formal discharge certificate issued in the present case. The contractor seeks to construe the initial letters issued by the contractor during the relevant period to not imply that the contractor had no further claim. The contractor has referred to the judgments reported at Jayesh Engineering Works v. New India Assurance Co. Ltd., for the proposition that there is no absolute bar that upon apparently receiving the final payment and issuing a discharge, a contractor cannot seek to explain away the ostensible discharge before the arbitrator.

8. The contractor has referred to a famous judgment reported at Sudarsan Trading Co. Vs. Government of Kerala and Another, and has relied on paragraphs 29 and 30 of the report that recorded that it was a non-speaking award that the Supreme Court had considered in that case. Indeed, it is evident from the passages referred to by the contractor, that upon reasons being furnished by the arbitrator, it is open for the Court presiding over a petition for setting aside the

award to go into the reasoning.

9. The arbitrator has discussed the matter as to accord and satisfaction at paragraph 31 of the award. According to the arbitrator, the claimant had to accept the payment upon the making of the final bill as full and final settlement as the refund of the contractor's security deposit would otherwise have been in jeopardy. The arbitrator has read the letters to imply that the contractor "was pressing all along for its claim." The arbitrator thought that the issuance of the contractor's letter of February 27, 1987 was within reasonable time of the contractor having received the final payment on August 5, 1986 (the word used is "immediate"). The arbitrator found that the contractor did not keep silent over the issue and that it was never the contention of the employer prior to the reference being taken up that there was no arbitrable dispute. As to whether what is recorded in the award in such connection would satisfy a Court or would meet the tests that would be set therefor by a Court is not as relevant as it is to appreciate that, to the arbitrator's mind, the contractor had kept the claim alive and had pursued it notwithstanding the issuance of the several letters referred to above. The arbitrator was alive to the objection, applied his mind thereto and arrived at a conclusion which, ordinarily, should not be interfered with in this jurisdiction unless found to be based on no evidence or it appears to be outlandish.

10. On the merits of the claim, the petitioner has seriously questioned the award under three heads: escalation, idle labour and idle establishment. The petitioner refers to the special conditions governing the contract between the parties which provides that the contractor would not be entitled to escalation of rate "within the period of execution of the work." The petitioner suggests that the expression "period of execution" in the relevant clause does not refer to the tenure of the contract as originally envisaged thereunder, but covers the entire duration of time during which the work is executed. On idle labour, the petitioner refers to a sentence in the last page of the bill of quantities that records that the contractor would not be entitled to claim on account of idle labour. On idle establishment, the petitioner relies on the additional conditions governing the contract and clause 7 thereof that provides that the contractor would not be entitled on account of idle establishment for delay on the part of the employer to supply materials to the contractor.

11. Though the matter as to the inadmissibility of the claims under the three heads does not figure in the several issues which were framed by the arbitrator, it appears that a specific objection had been taken by the petitioner herein, at least, as far as the claim on account of escalation was concerned. Even if one proceeds on the basis that a similar objection was taken in respect of the heads of claim relating to idle labour and idle establishment, it is to be seen whether the relevant clauses leaving out certain matters from the scope of the arbitrator's authority would be absolute or be circumscribed by any circumstances.

12. The contractor has referred to a judgment reported at General Manager Northern Railways and Another Vs. Sarvesh Chopra, and has relied on paragraphs 14 to 16 of the report. At paragraph 14, the Supreme Court referred to Hudson's Building and Engineering Contracts (11th Ed.) as to the origin of the "no damage" clauses in the United States of America and the development of the law in that country to find exceptions to the "no damage" clauses. The Supreme Court referred to sections 55 and 56 of the Contract Act in this country and enumerated the circumstances at paragraph 15 of the report where the exception clauses of such nature would not be a complete bar for either the claim to be made or the arbitrator to go into it. The third ground recognized by the Supreme Court was whether the contractor had made a claim on account of an excepted matter prior to the completion of the work and whether the employer had, by conduct or otherwise, accepted the same. Based on such dictum, the contractor refers to paragraphs 6, 10 and 12 of the award in the present case where the arbitrator recorded that the contractor had addressed a letter of May 14, 1984 to the petitioner herein that there was difficulty and delay in supply of the departmental materials. The arbitrator also noticed that there were "letters addressed to respondent asserted that for non supply of departmental materials required for the construction works for which progress of the work hampered and laborers were idle and entitled for compensation for the damages suffered." In the award the arbitrator recorded that there was delay in the site being handed over and there was subsequent delay. The arbitrator, therefore, assessed the basis of the claim put forth under the three several heads by the claimant and, though the arbitrator did not refer to the principle recognized in the aforesaid Supreme Court judgment of an exception to an excepted matter, since the law recognizes an exception clause to not be absolute, neither the award nor the arbitrator can be faulted for having taken up the three heads of claim and dealt therewith.

13. There is, however, some basis to the petitioner's suggestion that the claim on account of idle labour and idle establishment overlapped in the sense that the claim for idle labour included the months of November and December, 1984 and January, 1985 and the same three months were covered in the claim for idle establishment. There is also substantial basis to the petitioner's suggestion that the description of the nature of claim on account of idle establishment in the award would reveal that the claim on account of idle establishment was really one for idle labour. Indeed, the arbitrator has recorded under the claim for idle establishment, that the amount had been sought on account of several employees of the contractor remaining idle. It is, thus, evident that the claim on account of idle labour had perhaps been included in the claim on account of idle establishment. The lesser sum awarded on account of idle labour, in such circumstances, should be disregarded and should be deducted from the total amount awarded.

14. The petitioner has referred to a judgment reported at Associated Engineering Co. Vs. Government of Andhra Pradesh and another, for the proposition that an

arbitrator, being a creature of the contract between the parties, cannot travel beyond the contract. The Supreme Court held in that case that the award there flew in the face of the contract to the contrary as was evident from the agreement between the parties. However, in view of the more recent judgment relied upon by the contractor, that the exception clause in an agreement is not to be regarded as absolute in certain circumstances, the arbitrator here was well within his authority to consider the excepted matters in the light of the contractor having claimed the amount prior to the completion of the work.

15. The petitioner has also challenged the basis for the award of interest, including a possible error in the fifth head of claim in arriving at a figure which is at variance with the related claim under the first head. The petitioner says that though the principal amount awarded may not appear to be much in this day and age, such sum was, in fact, more than a third of the value of the contract which ought to be regarded as exceptional.

16. The 1940 Act permitted arbitrators to pass non-speaking awards. Though the arbitrator here has recorded reasons both as to how the contractor was entitled to make a claim and as to the justification for awarding amounts under several heads, the figures awarded under the heads have not been justified by the arbitrator. But since the law did not require the arbitrator to justify every rupee under each head of claim, the award cannot be faulted on such ground. It is also not the business of a Court in seisin of a petition for setting aside an arbitral award to go through the award with a toothcomb and find out the uncrossed T's and the undotted I's.

17. The award is, therefore, upheld save to the extent of Rs. 38,300/- granted under the second head of claim on account idle labour which appears to be a repeat of the fourth head of claim under idle establishment. AP No. 435 of 2008 is disposed of accordingly without any order as to costs.

18. As a consequence, there will be a judgment and decree in favour of N. Bhakat & Company for Rs. 7,19,038/- with interest thereon at 12 per cent per annum till date as awarded and with further interest at 6 per cent per annum herefrom on the principal sum of Rs. 7,19,038/- till payment. Urgent certified photocopies of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.