
(2008) 07 J&K CK 0003
In the Jammu And Kashmir High Court
Case No : AA No. 188/1996

Techno India

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 23-07-2008

Acts Referred:

Jammu and Kashmir Arbitration and Conciliation Act, 2002 — Section 30, 33

Citation : (2009) 3 JKJ 591

Hon'ble Judges : Y.P.Nargotra, J

Bench : Single Bench

Advocate : Seema Shehkar, Sanjay Kakkar, Advocates appearing for the Parties

Judgement

1. The petitionercontractor was allotted the contract bearing No. CESZ29/8586 for provision of ancillaries for TRS Huts at Drugmulla by

respondentUnion of India. The petitioner executed and completed the work in the year 1988 and handed over the completed work to

respondentUnion of India on 15th June 1988. The petitionercontractor raised certain claims against the work allotted during the concurrence of the

contract, but the same were not settled. There being a arbitration clause in the contract agreement signed between the parties, petitioner

approached the respondentUnion of India by filing an application seeking appointment of the arbitrator in terms of Clause 70 of IAFW 2249,

general conditions of the contract. Accepting the request of the petitionercontractor, respondentUnion of India appointed Br. Y.W. Joshi as sole

arbitrator, he however, did not enter upon the reference and resigned from his appointment as an arbitrator on 4th January 1993, which resulted

into the appointment of Brig. S.S. Anand as new arbitrator vide order dated 30th July 1993. Mr. Anand learned arbitrator entered upon the

reference on 20th August 1993. Parties filed their respective claims before him. After adjudicating upon the disputes, learned arbitrator fixed 10th

and 11th August, 1994 as date of hearing and also intimated the parties. On the said date parties appeared before the arbitrator. Brief record of

hearing prepared by the arbitrator on 10th and 11th August 1994 at CE Zone HQ.31 Sub area c/o 56 APO is as follows:

1. Both the parties agreed their cases in respect of claims 1 to 5 of Union of India and 1 to 14 of the contractor.

2. Both parties agreed that they had been afforded full opportunity to present and argue their cases and that they have nothing further to add in this

matter. Accordingly it was decided that the Arbitration hearing be treated as completed, except for production of some documents/references to

be produced to sole arbitrator/other party on/by 15 Aug 94 at a place and time to be mutually agreeable.

3. Both party agreed to give their consent for enlargement of time up to and including 30th Sep. 94, for making and publication of the award.

2. The above record of the proceedings is signed by the representative of the Union of India, representative of Contractor as well as by the learned

Arbitrator.

3. In terms of the above record the next date for production of documents/was August 1994, at a place and time to be mutually agreed to by the

parties,

4. The case of the petitionercontractor is that no such place or venue was either agreed upon between the parties nor he was communicated about

the place or venue of the said proceedings either by the learned arbitrator or by the opposite party i.e. Union of India. Because of this the

petitionercontractor could not appear before the learned arbitrator on 15th August 1994. The learned arbitrator made and published his award on

15th August 1994, by virtue of which claims No. 9 of the petitionercontractor was allowed to the extent of Rs. 18,550/, whereas rest of the claims

were declined, likewise claims made by the Union of India were allowed to the extent of Rs. 71999.42, Rs.24,312.53, Rs.300/andRs. 10,000/.

5. Being aggrieved of the award only petitionercontractor has filed an application under Section 30/33 of the Arbitration Act. Union of India has

not challenged the award.

6. From the pleadings of the parties, vide order dated 4th April 2001, following issues have been framed for determination:

(i) Whether arbitrator has misconducted?

(ii) Relief.

7. Both the parties were called upon to lead their evidence in support and in rebuttal of the issues. The petitioner/contractor has filed his own

affidavit, whereas on behalf of the respondent Union of India has filed affidavit of Lt. Col. Rajeev Sinha Garrison Engineer.

8. I have heard the learned counsel for the parties and perused the record of the case thoroughly.

9. The first contention of Mr. Kakkar learned counsel for the petitioner/contractor is that arbitrator has misconducted the proceedings and has

passed the award without affording full opportunity of hearing to the petitioner/contractor. He submits that as per the record of the proceedings

conducted on 10th and 11th August 1994, the date of hearing stood fixed for 15th August 1994 and the hearing was to take place at a place and

time to be mutually agreed to by the parties. According to Mr. Kakkar, as the petitioner/contractor was not communicated about the place, venue

or time where the proceedings were to take place, therefore, he could not appear and project his claims before the 'learned arbitrator, which has

resulted into the denial of the opportunity of being heard which vitiates the award.

10. In support he relies upon the cases reported as Payyavula Vengamma v. Payyavula Kesanna and ors AIR 1953 SC 21, Bakhtawar Lal and ors

v. Ram Kumar and ors AIR 1986 Allahabad 160, Girdhari Lal Agarwal v. Kamleshwar Parasad Agarwal AIR 1989 Allahabad 210 and Wazir

Chand Karan Chand v. Union of India and another AIR 1989 Delhi 175.

11. Hon'ble Supreme Court in Payyavula Vengamma's case, (supra) held as follows:

There is thus no doubt that the arbitrator heard the defendant 1 in the absence of the plaintiff. No notice of this hearing was given by the arbitrator

to the plaintiff nor had she an opportunity of having the evidence of the defendant 1 taken in her presence so that she could suggest

cross-examination or herself cross-examine the defendant 1 and also be able to find evidence, if she could, that would meet and answer the evidence

given by the defendant 1.

12. As was observed by Lord Langdale M.R. in *Horvey vs. Shelton*, 7 Beav, 455 at page 462:

It is so ordinary a principle in the administration of justice that no party to a cause can be allowed to sue any means whatsoever to influence the

mind of the Judge, which means are not known to and capable of being met and resisted by the other party, that it is impossible, for a moment, not

to see, that this was an extremely indiscreet to every principle, to allow of such a thing, and I wholly deny the difference which is in alleged to exist

between mercantile arbitration and legal arbitration. The first principles of justice must be equally applied in every case. Except in the few cases

where exceptions are unavoidable, both sides must be heard, and in the presence of the other. In every case in which matters are litigated, you

must attend to the representations made on both sides and you must not, in the administration of justice, in whatever form, whether in the regularity

constituted Courts or in arbitration, whether before lawyers or merchants, permit one side to use means of influencing the conduct and the decisions

of the Judge, which are not known to the other side." Their Lordships further held:

This case of *Horvey v. Shelton* is the leading case on this point and it has been followed not only in England but in India. (See *Ganes Narayan*

Singh v. Malida Koer, (13 Cal. L.J 399 at PP. 401, 402). She had also no opportunity to have her say in the matter of the settlement of 1.5.1927.

The course of proceedings adopted by the arbitrator was obviously contrary to the principles of natural justice.

13. In AIR 1986 Allahabad 160 (supra) it was held as under:

It is settled that before the arbitrator also the principles of natural justice are applied. The requirement of the principle of natural justice, as laid

down by the Courts from time to time, is that one party should not be heard in absence of the other. To do so may affect the mind to the prejudice

of the absenting party which may not have any chance to wipe it off. It is for this reasons that there is requirement of hearing in a proceeding in the

presence of each other, this question has been considered by Jackson in his book on "Natural Justice" at pages 148 and 155, as below:

As arbitrator or quasi arbitrator, in the sense those terms seem to have been

used in *Sutcliffe v. Thackrah* and *Arenson v. Arenson*, must observe the rules of natural justice in reaching a decision.

Thus, if there is an oral hearing the parties must be heard together in each other's presence and the witnesses cannot be examined behind the

backs of the parties: *Drew v. Drew* (1855) 2 Macq, 1, 3 per Lord Cragworth LC, Nor can evidence be taken from one party in the absence of

the other, after the hearing has ended." It was further held

Learned counsel for the appellant urged that as the arbitrator had the power to hear one of the parties in the absence of the other, the award could

not be vitiated on that ground. We are unable to find substance in this submission. The relevant portion of the arbitration agreement has already

been extracted above. From the portion quoted above, it would be found that the power was that the arbitrator could decide the case on the basis

of his personal knowledge. This personal knowledge, however, did not include within its ambit the power to hear one of the two parties in the

absence of the other. The arbitration agreement did not confer the power which the learned counsel for the appellant tried to read in the agreement.

It appears to us, therefore, that by hearing the appellant in the absence of the respondents, the arbitrator committed violation of the principles of

natural justice and this violation would amount by misconduct.

In AIR 1989 Allahabad 210 (Supra) it has been observed:

In exercise of judicial or quasijudicial powers the rules of natural justice should be observed. According to Lord Merwart, CJ. in *R.v. Sussex (Ex*

Paree Mc. Carthy, (924) 1 KB 256 at Page 259) justice should not only be done but should manifestly and undoubtedly be seen to be done". In

the instant case elementary rule of natural justice was not followed as no opportunity was given to the appellant in respect of costing register and its

details or the opinion obtained from the architect, the expert. We, are accordingly of the considered opinion that the arbitrator has misconducted

the proceedings.

In AIR 1989 Delhi 175 (supra) it was held:

Thus the consistent view of various Courts in India has from the very beginning been that arbitrator is bound by rules of natural justice including the

principle incorporated in the maxim *Audi Alteram partem*. It may be mentioned

here that action of arbitrator cannot be defended on the plea that the evidence was inconsequential or did not affect his mind or was of trifling nature. The arbitrator cannot take it upon himself that this evidence improperly admitted had no effect on his mind. The arbitrator must observe principles of natural justice under which both parties are entitled to make representations on their own case and the case of his opponent. The Courts will not permit slightest deviation from principles of natural justice even if such deviation relates to a trifling matter. In fact it is impossible to gauge the influence which ex parte statement/document had upon the mind of arbitrator. The case is brought within the general principle that he might have been influenced. This Court will not inquire whether or not the mind of the arbitrator has been effected. It was in fact held by the Supreme Court in *S.L. Kapoor v Jagmohan*, AIR 1981 SC 136 that the principle of natural justice known of non exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The nonobservance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It ill comes from a person who has denied justice that the person who has been denied justice is not prejudiced.

14. On the strength of the above quoted authorities. Mr. Kakkar submits that award of the arbitrator being in violation of the principle of natural justice is bad in the eye of law, and by not affording sufficient opportunity of being heard to the petitionercontractor, arbitrator has misconducted the arbitration proceedings.

15. Next contention of Mr. Kakkar learned counsel for the petitionercontractor is that the learned arbitrator has illegally exceeded the amount than the one claimed while granting the same to Union of India. He submits that while appointing the arbitrator, claims of the respondentUnion of India which were referred to the arbitrator were as follows:

(i)

Over payment in escalation claim on account of variation in labour wages

Rs. 56538.06

Actual over payment

Rs. 69489.87

Less amount available in final bill

Rs. 12951.81

Net over payment

Rs. 56538.06

(ii)

Non return of over issued Stores

Rs. 24,312.53

(iii)

Recovery on account of non return of classified documents

Rs. 300.00

(iv)

Non rectification of effects Pointed out with completion certificate/during defect liability period Cost

Rs. 8,100.00

Cost of reference to arbitration?

Rs. 10,000.00

16. According to Mr. Kakkar under claim No. 1 amount of Rs. 12951.91, being available with the respondent Union of India for final bill was

deducted while laying the claim only Rs. 56538.06. Learned arbitrator while dealing with the said claim instead of awarding Rs.56538.06 has

awarded Rs. 71,999.42, thus exceeding the amount from what was actually claimed by the respondent Union of India. This error also according to

Mr. Kakkar invalidates the award of the arbitrator.

17. In support of his contention he relies upon the case reported as J.C. Budhraj v. Chairman, Orissa Mining Corpn. Ltd. and anr., AIR 2008

SC 1363, in which their Lordships have held:

The Arbitrator has exceeded his jurisdiction in another respect. The total claim made by the contractor before the Arbitration was Rs. 95,96,616/

(excluding interest). But the amount awarded by the Arbitrator towards the said claim was Rs, 1,02,66,901/36 (excluding interest) Making an

award in excess of the claim itself by Rs. 6,70,285 is a clear act of exceeding the jurisdiction and amounts to a legal misconduct and to that extent

of Rs. 6,70,285/ the award is invalid.

18. Mr. Kakkar further argues that by awarding excess amount than the one claimed by the respondent Union of India, arbitrator has misconducted the proceedings.

19. On the aforesaid submissions, Mr. Kakkar has assailed the award.

20. The submission of Mrs. Shekhar, learned counsel for the respondent Union of India is that bare reading of the record of the hearing held on

10th and 11th August 1994, already reproduced would show that parties had agreed and accepted that they have been afforded full opportunity to

present and argue their cases and had nothing more to say in this matter, and accordingly, it was decided that arbitration proceedings be treated as

completed, except for the production of some documents. According to Mrs. Shekhar documents were to be produced on or before 15th August

1994, at a place and time to be mutually agreed to by the parties. She further submits that both the parties had verbally mutually agreed for the

place/venue HQ 133 Works Engineers Office for verification of documents. In this behalf she refers to the affidavit of Lt.Col. Rajeev Sinha

presently Garrison Engineer, who in Para 3 has deposed as follows:

That the hearing was held on 10/11th August 1994. The hearing was not adjourned but was declared as completed and an opportunity was given

by the learned arbitrator for producing certain documents/references which were referred during proceedings as is evident from the minutes of

proceedings. The petitioner was supposed to be present on 15.8.1994 fixed for production of some documents/references to be produced at a

place and time to be mutually agreeable by both the parties. The petitioner did not attend the verbally mutually agreed place i.e. HQ 133 Works

Engineers Office for verification of documents probably due to the reason that he did not want to file any further documents being satisfied with the

hearings concluded on 10/11 August 1994. Copy of the minutes duly signed by both the parties is annexed herewith as Annexure I.

21. Thus according to the affidavit filed by Lt.Col. Rajeev Sinha, the parties verbally mutually agreed for the place/venue HQ 133 Works

Engineers Office for verification of documents on 15.8.1994.

22. The contention of Mr. Kakkar is that affidavit filed by Mr. Sinha cannot be relied upon for the reason that it was filed on 18th August 2005,

and on that date on his own showing Mr. Sinha was working as Garrison Engineer. According to him there is nothing on record to show that Mr.

Sinha was present before the arbitrator on 15th August 1994 or 10th and 11th August 1994, meaning thereby he cannot be said to have any

personal knowledge about the fixation of the place/venue which was to be mutually agreed to by the parties.

23. I am in agreement with Mr. Kakkar. The fact that parties had agreed for the place/venue HQ 133 Works Engineers Office, where the

proceedings were to be held on 15th August 1994, cannot be said to have been established on the evidence of Lt. Col. Rajeev Sinha. In the

absence of proof that Lt.Col. Rajeev Sinha had the personal knowledge and was present before the learned arbitrator on 10th and 11th August

1994 or 15th August 1994, as such cannot be relied upon.

24. In this view of the matter, Mr. Kakkar learned counsel for the petitionercontractor is right in saying that petitionercontractor was not intimated

the place/venue for proceedings to be held on 15th August 1994, though it was for the parties to agree mutually for the place/venue of hearing to

be held on 15th August 1994. Therefore, this is also to be accepted that due to the noncommunication of the place/venue of the proceedings to be

held on 15th August 1994, the petitioner was deprived the opportunity of production of documents or to know the documents which were to be

produced or which were produced by the opposite party.

25. Now the question is that whether nonaffording of opportunity to produce documents or to know the nature of the documents, if filed by the

opposite party amounts to the violation of the principle of natural justice. Mr. Kakkar submits that denial of the opportunity for production of the

documents or to know the nature of the documents filed by the other party thus vitiates the award.

26. Undisputedly as per the record of hearing of 10th/11th August 1994, the hearing of the case from both the sides of the parties stood

concluded. It is also an admitted fact that on or by the date 15th August 1994, documents/references were to be filed before the arbitrator. It is

also not denied that the place/venue where the documents/references before the arbitrator were to be filed was to be fixed by the parties mutually.

It has not been established where the arbitrator would be available on or by 15th

August 1994, as had been mutually agreed upon by the parties.

The petitioner/contractor being not communicated the time and place where the documents/references were to be produced by the parties before

the arbitrator was thus disabled to produce documents/references. Would this per se establish violation of principles of natural justice?

27. Principles of natural justice are not of universal application in every fact situation. For their application it is incumbent upon the party which

alleges their violation to establish firmly that his right of hearing or of producing evidence in his support or in rebuttal has actually been impaired by

denial of the opportunity by the authority acting judicially or quasi judicially. It is to be necessarily shown by such party as to which material

evidence could not be produced by him or which material has been allowed to be brought on record in his absence or without notice to him by the

opposite party to his prejudice.

28. In the instant case neither the petitioner/contractor has shown/indicated as to which document or reference he intended to produce before the

arbitrator nor the record reveals the filing of any document or reference by the opposite party. The record of the proceedings of 10th/11th August

1994 shows and it is also not denied that both the parties had advanced their arguments in support of their respective cases and hearing stood

completed. In such a situation in my considered view the petitioner/contractor cannot successfully urge that his right of hearing or producing

documents/references was impaired.

29. As regards the second contention of Mr. Kakkar the same is equally untenable. The reference letter to the arbitrator in which claims of Union

of India have been identified clearly and explicitly shows that Union of India had stated its claim in approximation. If during the hearing the Union of

India specified/quantified its claim it was within its right. If learned arbitrator after appreciation of the evidence available granted that claim, this

Court is not empowered to reappraise the evidence and to judge the correctness thereof like a court of appeal. Therefore, the granting of the

claims of Union of India at the amount awarded cannot be legally faulted with on the ground that such amount is in excess of what was actually

claimed by Union of India.

30. For the above reasons, I do not find any merit in the case of the petitioner/

contractor and decide issue No.1 against the petitioner/contractor by holding that the arbitrator is not guilty of any misconduct.

31. Therefore, application of the petitioner/contractor filed under Section 30/33 of the Arbitration Act is dismissed and arbitral award of the

learned arbitrator is made rule of the Court Office shall draw the decree sheet as per the award.

32. Arbitration application along with all connected CMP's shall stand disposed of.