
(1995) 03 SC CK 0027

In the Supreme Court Of India

Case No : Civil Appeal No. 3158 of 1995

The Hindustan Construction Co. Ltd.

APPELLANT

Vs

Governor of Orissa and others

RESPONDENT

Date of Decision : 02-03-1995

Acts Referred:

Arbitration Act, 1940 — Section 28(2), 30, 41A

Citation : AIR 1995 SC 2189 : (1995) 2 ARBLR 1 : (1996) 81 CLT 190 : (1995) 2 JT 561 : (1995) 2 SCALE 105 : (1995) 3 SCC 8 : (1995) 2 SCR 441

Hon'ble Judges : A. M. Ahmadii, C.J.;Sujata V. Manohar, J;N. P. Singh, J

Bench : Full Bench

Advocate : R.F. Nariman, S. Vajitdar, Y.P. Dandiwalla, D.M. Popal and Sunil Dogra, for the Appellant; G.L. Sanghi, Mona Chakraborty and Raj Kumar Metha, for the Respondent

Final Decision : Allowed

Judgement

N.P. Singh, J.—Leave granted.

2. The award given by the Special Arbitration Tribunal (hereinafter referred to as 'the Special Tribunal') has been set aside by the High Court and the proceeding has been remitted to the Arbitration Tribunal for fresh adjudication. That order is under challenge in the present appeal.

3. On 16.7.1979, tenders were invited by the respondents for construction work of concrete cum masonry dam of Upper Kolab, Multi Purpose River Project, in the State of Orissa. The tender of the appellant having been accepted, an agreement was executed between the appellant and the respondent-State for the execution of the said project. The work order was issued to the appellant on 2.1.1981. The work was to be completed by 30.9.1982. In terms of the agreement, escalation charges were to be paid to the contractor. The respondents granted extension for the completion of the project by end of the December, 1985. There is no dispute that work was completed before that date. However, escalation charges were paid by the Executive Engineer in the running bills only till 31.3.1985 after which

no payment in this respect was made. Some other amounts also remained to be paid including the refund of security deposits, which led to the reference of the dispute to the Arbitration Tribunal, constituted u/s 41A of the Arbitration Act, as introduced by Arbitration (Orissa Amendment) Act, 1982. A counter claim was also filed before the Arbitration Tribunal, on behalf of the State. The Arbitration Tribunal having found that the dispute involved a claim for more than Rs. one crore directed the State Government to exercise power under proviso to Section 41A (1) of the Arbitration Act (hereinafter referred to as 'the Act') as amended by the Arbitration (Orissa Amendment) Act, 1982 and to refer the dispute to the Special Tribunal. We do not express any view on the question whether the initial jurisdiction exercisable by the Arbitration Tribunal got lost on the opposite party laying a counter-claim exceeding Rs. one crore. That may have to be answered in an appropriate case. The State Government referred the dispute aforesaid by a Notification dated 6.5.1988 to the Special Tribunal, which had been constituted with a retired Judge of the High Court. The Special Tribunal issued notices to the parties on 14.5.1988 and had its first sitting on 28.5.1988. No party raised any dispute on the question whether or not the Special Tribunal had any jurisdiction. On 28.8.1988, the Special Tribunal extended the time for making the award by four months from the date of expiry of time i.e. from 27.9.1988, pursuant to a memorandum put in by both sides for such extension. On 27.9.1988, the four months statutory time calculated from 28.5.1988 expired. But in view of the aforesaid extension on 28.8.1988 on basis of the memorandum put in by both sides for such extension, the Special Tribunal proceeded with the dispute. However, the award could not be given. On 18.1.1988, another joint memorandum was filed on behalf of both the parties before the Special Tribunal for extension of time for submission of the award by four months from 27.1.1989. With the consent of both the parties, the period for making the award was extended. On 10.2.1989, the Special Tribunal made and signed its award. Objection was filed on behalf of the respondents to the award. On 26.9.1989 the Subordinate Judge rejected the said objection and made the award Rule of the Court granting 6% pendants lite interest and 4% future interest. An appeal was filed on behalf of the respondent-State before the High Court. That appeal has been allowed by the High Court and the award of the Special Tribunal has been set aside. A direction has been given to the Arbitration Tribunal to proceed with the adjudication of the disputes afresh.

4. From the Order of the High Court, it appears that the award aforesaid has been set-aside primarily on the grounds; (1) The Constitution of the Special Tribunal u/s 41A of the Act and the reference of the dispute by the State Government which was already pending before the Arbitration Tribunal for adjudication was without jurisdiction; (2) The Special Tribunal had no jurisdiction to enlarge the time for making of the award; and (3) The award was otherwise invalid due to non-consideration of relevant materials available on the record in respect of a question which was at issue.

5. The relevant part of Section 41A, which was introduced by the Arbitration

(Orissa Amendment) Act 1982 aforesaid is as follows : -

41A. Constitution of and reference to the Arbitration Tribunal-

(1) Notwithstanding anything contained in the Act or in any contract or any other instrument, but without prejudice to the provisions contained in Section 47, in all cases where the State Government, a local or other authority controlled by the State Government, a statutory corporation or a Government company is a party to the dispute, all references to arbitration shall be made to the Arbitration Tribunal:

Provided that reference to arbitration of the disputes specified in Sub-section (1) involving claims of rupees one crore or above may be made by the State Government to a Special Arbitration Tribunal comprising of one or more retired High Court Judges, as may be constituted by the State Government from time to time.

(2) to (6) xxx xxx xxx (7) All arbitration proceedings relating to a dispute of the nature specified in Sub-section (1) which are pending before any arbitrator on the date of commencement of the Arbitration (Orissa Amendment) Act, 1982, and in which no award has been made by the said date, shall stand transferred to and disposed of by the Arbitration Tribunal.

Provided that the State Government may by order in writing direct that the arbitration proceedings relating to disputes and claims involving rupees one crore or above, pending before any Arbitrator or Board of Arbitrators on the date of the commencement of the Arbitration (Orissa Amendment) Act, 1982, (Orissa Act 3 of 1983) shall be transferred to any special arbitration tribunal constituted under the proviso to Sub-section (1) for disposal in accordance with law.

In view of Sub-section (1) of Section 41A, in all cases where the State Government, a local or other authority controlled by the State Government, a statutory corporation or a Government company is a party to the dispute, references shall be made for arbitration to the Arbitration Tribunal. Proviso to the said Sub-section says that where the dispute involves a claim of Rs. one crore or above, the reference for arbitration shall be made by the State Government to the Special Tribunal comprising of one or more retired judges of the High Court as may be constituted by the State Government from time to time. Because of Sub-section (7) of Section 41A, any arbitration proceeding pending before any Arbitrator on the date of the commencement of the Arbitration (Orissa Amendment) Act, 1982, in which no award has been made by the said date, shall stand transferred, to be disposed of by the Arbitration Tribunal. Proviso to the said Sub-section (7) says that if in the dispute so pending, the claim is in respect of Rs. one crore or above, it shall be transferred to any Special Tribunal constituted under the proviso to Sub-section (1) for disposal in accordance with law. It appears that the aforesaid Arbitration (Orissa Amendment) Act, 1982 (Orissa Act 3 of 1983) received the assent of the President on 21.3.1983 and was published in the extra-ordinary issue of the Orissa Gazette on 26.3.1983.

According to the High Court, as the dispute in question arose in the year 1985-86, there was no question of exercise of power by the State Government under Sub-section (7) of Section 41A aforesaid, which was applicable only to such disputes which were pending on 26.3.1983, when the Arbitration (Orissa Amendment) Act, 1982 came in force. The High Court was of the view that even proviso to Sub-section (7) of Section 41A shall be applicable to only such disputes which were pending when the Arbitration (Orissa Amendment) Act, 1982 came in force and the State Government could have transferred only such disputes to the Special Tribunal.

6. The learned Counsel appearing for the appellant, pointed out that from a bare reference to the Notification dated 6.5.1988 issued by the State Government, it shall appear that the State Government had not transferred the dispute pending before Arbitration Tribunal to Special Tribunal in exercise of power under proviso to Sub-section (7) of Section 41A but the dispute was referred to the Special Tribunal in exercise of power under proviso to Sub-section (1) of Section 41A of the Act. The High Court was in error in proceeding on the assumption that the State Government had exercised the power of transfer from the Arbitration Tribunal to the Special Tribunal in exercise of the power under proviso to Sub-section (7) of Section 41A of the Act. In the Notification dated 6.5.1988, it has been clearly stated that a dispute had arisen between the appellant and the State Government involving rupees more than one crore and the Arbitration Tribunal has also given a direction to appoint Special Tribunal; because of which "in exercise of the powers conferred by the proviso to Sub-section (1) of Section 41A of the Arbitration Act, 1948 (X of 1948) as amended by the Arbitration (Orissa Amendment) Act, 1984, (Orissa Act 17 of 1984) the State Government do hereby constitute a Special Arbitration Tribunal comprising Mr. Justice B. Behra, retired Justice Orissa High Court to settle the said disputes ...". It may be mentioned that the Arbitration Act was further amended by Arbitration (Orissa Amendment) Act, 1984 (Orissa Act 17 of 1984) which has been referred to in the aforesaid Notification of the State Government. But we are not concerned in the present appeal in respect of the said amendment and as such details thereof need not be mentioned.

7. According to us, the Notification dated 6.5.1988 constituting the Special Tribunal and referring the dispute to such Special Tribunal cannot be held to be one in exercise of power under proviso to Sub-section (7) of Section 41A. The said notification of reference to Special Tribunal is within the scope of proviso to Sub-section (1) of Section 41A. The State Government exercised the said power taking into consideration all the facts and circumstances of the case including the direction of the Arbitration Tribunal because it involved a claim of Rs. one crore and above. It is an admitted position that the State Government had not at any stage questioned before the Special Tribunal the jurisdiction thereof to adjudicate the said dispute. The State Government itself by a statutory notification having constituted the Special Tribunal and referred the dispute to said Special Tribunal, we fail to appreciate as to how for the first time this stand was taken before the

High Court by the State Government that the Special Tribunal had no jurisdiction to adjudicate the dispute or to make the award. According to us, in the facts and circumstances of the case, the High Court ought not to have permitted the State Government to raise such a contention after it had submitted to the jurisdiction of the Special Tribunal merely because the award went against it. It hardly behoves the State Government to question the jurisdiction of the Special Tribunal at such a belated stage merely because the award was not to its liking. The State Government cannot be permitted to behave like an ordinary dishonest litigant who takes an off chance hoping to succeed and if the outcome is not to his liking to turn back and question the Special Tribunal's jurisdiction. The High Court should not have permitted such a somersault. We, therefore, set-aside the High Court's finding on this issue for the above reasons.

8. So far the question of extension of time for making the award is concerned, it is an admitted position that a memorandum was filed on behalf of both the parties including the State Government on 28.8.1988 for extension of the period for making the award by four months from the date of the expiry of the time on 27.9.1988. In the order dated 28.8.1988 the Special Tribunal said :

While receiving the notification, the Irrigation and Power Department, Orissa, has given a direction for submission of the Award within 120 days from the date of first sitting. The first sitting of the Special Arbitration Tribunal had taken place on 28th May, 1988. The learned Counsel for both the sides have put in a memorandum stating that time for submission of the Award may be enlarged by a period of four months from the date of expiry of time. Time is enlarged as submitted by learned Counsel for both the sides.

Again on 18.1.1989, a joint memorandum signed by the Advocates for the appellant and the respondent-State was filed, saying that both parties agree for extension of time for submission of the Award by a period of four months with effect from the due date i.e. 27.1.1989. On the said joint memorandum, the Special Tribunal passed an order the same day saying that the learned Counsel for both the sides on behalf of the parties had filed a joint memorandum for extension of time for submission of the award by a period of four months, 'with the consent of both the parties, time is extended for submission of the Award by a period of four months with effect from 27.1.1989 keeping in mind the legal principle laid down by the Supreme Court in Hindustan Steelworks Construction Ltd. Vs. C. Rajasekhar Rao, ' Within the extended period as already mentioned above the award was made on 10.2.1989.

9. The first schedule to the Arbitration Act specifies the implied conditions of the arbitration agreements. Because of condition No. 3, the arbitrator has to make award within four months of his entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the Court may allow. In other words, the power to extend the time of four months has been vested in the Court, otherwise the award after expiry may become invalid. But that condition has to

be read along with Section 28 of the Act.

28. Power to Court only to enlarge time for making award. - (1) Court may, if it thinks fit, whether the time for making the award has expired or not and whether the award has been made or not, enlarge from time to time the time for making the award.

(2) any provisions in an arbitration agreement whereby the arbitrators or umpire may, except with the consent of all the parties to the agreement, enlarge the time for making the award, shall be void and of no effect.

Sub-section (1) of Section 28 vests power in the Court to enlarge the time for making the award from time to time. Sub-section (2) of Section 28 says in clear and unambiguous terms that any provision in an arbitration agreement whereby the arbitrators or umpire can enlarge the time for making the award shall be void and of no effect 'except with the consent of all the parties to the agreement'. Sub-section (2) of Section 28 has been the subject matter of controversy, as to whether even if the time is extended with the consent of both the parties, the restrictions prescribed in Sub-section (1) of Section 28 and under condition No. 3 of the first schedule are contravened. In the case of Hari Krishna Wattal Vs. Vaikunth Nath Pandya (Dead) by Lrs. and Another, , it was pointed out that under Clause (3) of the Schedule to the Arbitration Act, the Arbitrator is expected to make his award within four months from his entering on the reference or on his being called upon to act or within such extended time as the court may allow. But then it was said :-

Sub-section 2 of Section 28, however, indicates one exception to the above rule that the Arbitrator cannot enlarge the time, and that is when the parties agree to such an enlargement. The occasion for the Arbitrator to enlarge the time occurs only after he is called upon to proceed with the arbitration or he enters upon the reference. Hence, it is clear that if the parties agree to the enlargement of time after the Arbitrator has entered on the reference, the Arbitrator has the power to enlarge it in accordance with the mutual agreement or consent of the parties. That such a consent must be a post- reference consent, is also clear from Section 28(2) which renders null and void a provision in the original agreement to that effect. In a sense where a provision is made in the original agreement that the Arbitrator may enlarge the time, such a provision always implies mutual consent for enlargement but such mutual consent initially expressed in the original agreement does not save the provision from being void. It is, therefore clear that the Arbitrator gets the jurisdiction to enlarge the time for making the award only in a case where after entering on the arbitration the parties to the arbitration agreement consent to such enlargement of time.

Again in the case of State of Punjab Vs. Hardyal, , it was said:

Sub-section (1) of Section 28 is very wide and confers full discretion on the court to enlarge time for making the award at any time. The direction under Sub-section(1) of Section 28 should, however, be exercised judiciously. Sub-section

(2) of Section 28 also makes it evident that the court alone has the power to extend time. It further provides that a clause in the arbitration agreement giving the arbitrator power to enlarge time shall be void and of no effect except when all the parties consent to such enlargement. It is not open to arbitrators at their own pleasure without consent of the parties to the agreement to enlarge time for making the award.

In the case of Hindustan Steelworks Construction Ltd. Vs. C. Rajasekhar Rao, , this Court said:

In this connection reference may be made to H.K. Wattal v. V.N. Pandya, where this Court reiterated that Sub-section (2) of Section 28 indicated one exception to the above rule that the arbitrator could not enlarge the time, and that was when the parties agreed to such an enlargement. It is clear this Court reiterated that the arbitrator gets the jurisdiction to enlarge the time for making the award only in a case where after entering on the arbitration the parties to the arbitration agreement consent to such enlargement of time. In this case precisely it so happened.

According to us, the High Court over-looked the provision of Sub-section (2) of Section 28. After the Special Tribunal had entered into reference, by consent of the parties, the time for making the award could have been extended. In the present case it is not in dispute that the appellant and the respondent-State both had agreed for extension of the period for making the award after the Special Tribunal had entered into reference. As such the award cannot be held to be invalid on that ground.

10. The third ground for declaring the award invalid by the High Court is that the Special Tribunal had not considered important documents which were on the record of the arbitration proceeding. In this connection our attention was drawn to a letter dated 28.8.1982 addressed by the appellant company to the Executive Engineer saying that they were applying for extension of time for completion of works upto 30.6.1984 because of valid reasons given in the prescribed proforma. In that letter, it was also mentioned that during the discussion between the Dy. General Manager of the company with the Government Officials at Bhubaneswar on 20.2.1982, it had been agreed to consider the extension of time upto 30.6.1984. In the proforma attached to the said letter, again the same thing was reiterated. It was said in the said proforma on behalf of the appellant company that they had undertaken that they shall not claim any compensation or extra rate for executing the work beyond the stipulated date except whatever was permissible as per the contract. It was urged that the letter and the proforma aforesaid was not considered by the Special Tribunal while making order in respect of escalations. According to the respondent State as the extension was given at the request of the appellant, they were not entitled for any escalation charges. Reference was also made on behalf of the respondents to the supplementary agreement, especially Clauses VI and VII thereof. In Clause VI, it has been stated that any extra arrangement if required to be made by the

company to complete the work as per the above agreed schedule "shall be done by them without liability to the Government of Orissa". In Clause VII of the said supplementary agreement, it has been said that Government of Orissa shall consider to extend the date of completion of the work upto 30.6.1984 "without liability to the both contracting parties". On basis of the aforesaid clauses, it was urged on behalf of the respondents, which has been accepted by the High Court, that the State Government was not bound to pay any charges under the head 'escalation'. On behalf of the appellant, it was demonstrated that the aforesaid no liability clause in the supplementary agreement related to Clause 13 of the original agreement under the heading 'Compensation for delay in works'. It says that the contractor's rate are based on the assumption that the contract will be completed by 30th September, 1982 and the contractor shall not claim " any compensation or revision of rates if the works gets delayed upto 6 months beyond the contract completion time i.e. 30.9.1982". It further says that if the contract completion date gets delayed beyond 31.3.1983 for the reasons not attributable to the contractor, the rates shall be revised for the unfinished work as on 31.3.1983 by Engineer-in-charge in consultation with the contractor, subject to the approval of the Government. When in the supplementary agreement in clauses VI and VII it was said that extra arrangement for completion of the work as per the agreed schedule shall be done by the Contractor without liability to the Government of Orissa or without liability to both contracting parties, it was with reference to the aforesaid Clause (13) which stipulated compensation for delay in works. According to the appellant, the Special Tribunal has awarded extra amount in respect of escalations of labour charges which had been stipulated in para 12.1 of the agreement saying that for the increase in the cost of labour the Contractor shall be paid extra as per the formula given in the said clause. In other words, the escalation charges allowed to the appellant by the Special Tribunal is in respect of escalation of the labour charges and that was not regulated by Clauses VI and VII of the supplementary agreement. The learned Counsel for the appellant pointed out from the award that the Special Tribunal was conscious of Clause (13) relating to 'compensation for delay in works' and 'labour escalations' under Clause 12.1 of the agreement. It has been said in the award that the competent authority by a letter dated 16.10.1984, addressed to the appellant, had categorically assured that the appellant shall be paid the escalation charges under Clauses 12.1, 12.2 and 12.3 of the special conditions. The Tribunal has also held that the said authority was competent to give such assurance on behalf of the State apart from the fact that under Clauses 12.1, 12.2 and 12.3 of the special conditions, the appellant was entitled to the escalation charges. In this background, it cannot be said that there is any error apparent on the face of the award which required an interference by the High Court. It is well known that the Court while considering the question whether the award should be set aside, does not examine that question as an Appellate Court. While exercising the said power, the Court cannot reappreciate all the materials on the record for the purpose of recording a finding whether in the facts and circumstances of a particular case the award in question

could have been made. Such award can be set-aside on any of the grounds specified in Section 30 of the Act. According to us, no ground has been made out on behalf of respondents to set aside the award holding it to be invalid.

11. In the result, the appeal is allowed and the order of the High Court is set aside. The order making the award the Rule of the Court, by the learned Subordinate Judge is upheld. However, in the facts and circumstances of the case, there shall be no order as to costs.