
(2012) 10 CAL CK 0031
In the Calcutta High Court
Case No : A.P. No. 200 of 2012

The State of West Bengal

APPELLANT

Vs

K. Banerjee and Brothers

RESPONDENT

Date of Decision : 11-10-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 31(7)(b), 34

Citation : (2012) 4 CALLT 692 : (2013) 3 CHN 464 : (2013) 1 WBLR 778

Hon'ble Judges : Sanjib Banerjee, J

Bench : Single Bench

Advocate : Arindam Sinha, Mr. Paritosh Sinha and Mr. Amitabha Ghosh, for the Appellant;

Final Decision : Dismissed

Judgement

Sanjib Banerjee, J.—The State challenges an arbitral award of November 3, 2011 on the ground that some of the heads of claim allowed in favour of the contractor engaged for the purpose of construction of a road are in violation of the terms of the contract and otherwise at variance with the substantive law of the country. The State fashions the challenge on the basis of the dictum in the judgment reported at Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., of the report have been placed. At paragraph 13 of the report, the Court said that an arbitral award cannot be in derogation of the substantive law of the country; that it cannot be at variance with the terms of the contract and, it cannot be contrary to the usage in the trade. Paragraph 15 of the judgment cautioned, however, that for a Court to interfere with an award u/s 34 of the Arbitration and Conciliation Act, 1996, the errors should be patent. Paragraph 73 of the judgment reiterated that an arbitral award had to be in keeping with the matrix contract covered by the arbitration agreement.

2. The respondent herein claimed under several heads. The arbitrator disallowed the claim under two of the ten principal heads and scaled down the amounts claimed under the various others to ultimately award a principal sum of Rs.

23.01.026/- with interest at 12 per cent per annum from February 11, 2003 till April 15, 2004 and further interest at 10 per cent per annum from April 15, 2004 till the date of the award. The arbitrator also provided that if the awarded sum was not paid off within three months from the date of the award, the respondent herein would be entitled to further interest on the sum awarded in accordance with section 31(7)(b) of the 1996 Act.

3. Though the petition has challenged the award on every aspect, mercifully, counsel for the State has limited the challenge to the claims awarded under the first, fourth, fifth, eighth and ninth heads. The challenge to the extent of Rs. 4000/- under the fifth head of claim, for which a total amount of Rs. 35,150/- has been found due to the contractor by the arbitrator, has not been permitted to be urged since the value of the dispute is insignificant.

4. On the first head of claim, the State refers to paragraph 24.1 of the statement of claim and paragraph 29 of the counter-statement to suggest that the contract provided for prior permission to be obtained by the contractor from the appropriate officers of the State before embarking on any extra work not envisaged in the contract. The State refers to the reasoning in support of the amount awarded under such head of claim at page 10 of the award to say that the arbitrator completely glossed over the robust objection of the State. The further contention of the State is that if the contract required the additional work to be identified and agreed to between the parties prior to such work being undertaken, the arbitrator could not have taken any additional work alleged to have been performed into cognizance without there being any evidence of the parties' agreement to such additional work being carried out. Paragraph 29 of the counter-statement, that has been referred to on behalf of the State, does not clearly say that the contract required the additional work to be identified and agreed to by the parties before it could be undertaken by the contractor. Indeed, the word used in the relevant paragraph is "norms." It was not the State's assertion that the contract made a requirement of the kind that is now canvassed by the State. What was asserted in the counter-statement was that the additional work undertaken was contrary to the norms, without the State specifying how such alleged norms came to be established. In any event, the relevant contractual provision has not been referred to in course of the hearing. The challenge to the first head of claim is without basis even on the tests as laid down in the Saw Pipes case.

5. No submission has been made on the second head of claim relating to security deposit. The State has taken a fair stand at the hearing that the security deposit had to be refunded to the contractor. The arbitrator disregarded the entire third head of claim put forth by the contractor. As to the fourth head of claim on account of hire charges and excess wages of the operational staff, the State says that there was no basis for the arbitrator arriving at the amount that was awarded. The State refers to a document at page 89 of the affidavit-in opposition. The letter of May 17, 1993 issued by the contractor to the relevant

superintending engineer emphasized that the machines remained idle for twelve days and the daily cost therefor was Rs. 20,000/-. It is such daily amount of Rs. 20,000/- multiplied by the number of days that the arbitrator has awarded in arriving at the sum of Rs. 2.40 lakh under such head. In a challenge to an arbitral award, the Court is not called upon to assess the evidence on which the award is based unless it is demonstrated that the award in its entirety or part is completely perverse. There was sufficient basis in the relevant letter for the arbitrator to arrive at the figure of Rs. 2.40 lakh. That a part of the arbitrator's assessment on damages was subjective is of no relevance.

6. On the eighth head of claim pertaining to less output of the hot-mix plant and other equipment, the State says there has been an overlapping of the amounts awarded under the sixth and the eighth heads of claim. Under the sixth head of claim, the contractor claimed on account of idle labour during the break-down period of the machines. The State refers to pages 16 to 18 of the award to demonstrate that the arbitrator, in fact, declined the claim on account of idle labour since the contract prohibited it; but the arbitrator awarded the amount under the sixth head on account of the reduced use of the machines and equipment on certain days. The State says with reference to a letter dated December 31, 1993, that is referred to by the arbitrator in course of the discussion on the eighth head of claim, that the arbitrator merely accepted whatever was suggested by the contractor in the relevant letter to the appropriate executive engineer without applying the arbitrator's independent mind as to whether such amount was justified. In short, the State says that the arbitrator did not have sufficient evidence or material to quantify the damages awarded under such head of claim. It is of significance that the challenge to the eighth head of claim is not based on the award thereunder being in violation of the agreement or in violation of any substantive law. In awarding damages there is an element of subjectivity that is always involved, but to the extent that the subjectivity is based on certain objective criteria, the element of subjectivity cannot be singled out and challenged. The contractor's letter indicated the several heads of claim which the arbitrator found justified. Even if the arbitrator has committed any error on such count, it is an error within the bounds of the arbitrator's authority and does not make the award susceptible to interference in proceedings of the present kind.

7. The final challenge to the award is in respect of the ninth head of claim for the excess trial run of the hot-mix plant. The State refers to page 21 of the award and says that if the contractor humoured the employer by undertaking additional trial runs that the contractor was not required to, the contractor would not be entitled to the additional expenses therefor. Again, there is nothing in the contract which has been shown to detract from the basis or quantum of the sum allowed under such head. It was a matter within the authority of the arbitrator to consider the aspect and make an award and is not amenable to a challenge u/s 34 of the Act.

8. The challenge to the several heads of claim accepted by the arbitrator fails. As a consequence, no question arises of interfering with the interest awarded by the arbitrator or the rates of interest as indicated.

9. It is a matter of regret that arbitral awards are routinely challenged by governments or government authorities without anyone seeking to take responsibility for assessing the merits of a challenge. It has come to a pass that if an arbitral award were not challenged, it would be a stigma on the person responsible in the department. A challenge to an arbitral award takes up considerable court time and routine challenges to arbitral awards destroy the very fundamental ethos of the alternative dispute resolution mechanism.

10. In this case, the State has been kind to Court in not assailing every bit of the award that had been challenged in the petition, but the State will pay costs assessed at 6000 GM for this needless exercise. The award is upheld in its entirety. AP No. 200 of 2012 is dismissed.

Urgent certified photocopies of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.