
(2001) 07 PAT CK 0083

In the Patna High Court

Case No : Miscellaneous Appeal No. 329 of 1995

The Union of India (UOI) and Others

APPELLANT

Vs

Sandeep Construction

RESPONDENT

Date of Decision : 17-07-2001

Acts Referred:

Arbitration Act, 1940 — Section 5, 8
Civil Procedure Code, 1908 (CPC) — Section 151

Citation : (2001) 4 PLJR 185

Hon'ble Judges : S.N. Pathak, J

Bench : Single Bench

Advocate : Gautam Bose, for the Appellant; S.S. Dwivedi and Ramashish, for the Respondent

Final Decision : Allowed

Judgement

S.N. Pathak, J.—This Miscellaneous appeal is directed against the order dated 29th August 1995, passed by the Subordinate Judge-II, Aurangabad, in Title Suit No. 30 of 1993/89 of 1994 (Arbitration Suit). By the impugned order, the learned Subordinate Judge rejected the prayer of the Appellant to set aside the award passed by the Arbitrator and the award recorded by the Arbitrator was made Rule of the Court.

2. The Appellant before this Court (Union of India) challenged the very validity of the award and the very reference to the Arbitrator. The Respondent's lawyer submitted that the objection to the award was preferred after, six months and odd of the filing of the award in court for which the Appellant's lawyer and the Appellant itself, had very much notice. So the objection was hopelessly time barred and, therefore, the impugned order is justified and it does not deserve any interference by this Court.

3. Before I refer to the Respondent's objection regarding limitation, I would like to mention and refer to certain facts which emerge from the records of the concerned title suit on the basis of which the Appellant has challenged the

legality of the reference to the concerned Arbitrators and the subsequent award rendered by them.

4. In this connection, firstly, it was pointed out that the agreement between the Plaintiff-Respondent and the Railways in its Clause 1(b) joined upon the contractor (Plaintiff) to abide by the agreement. Clause 1(b) runs as follows:

1(b) Provisions, instructions, terms & conditions as contained in the Eastern Railway "Engineering Department" General Condition of contract and standard specification, 1969, with all upto date correction slips & copy of which is hereby admitted and acknowledged by the Contractor to be in his possession, provided always that where any of the provisions, instruction, terms & conditions in the standard conditions and specifications cannot be reconciled to or is repugnant to any of the provisions, instructions, terms or conditions in the tender documents, the latter shall prevail.

So it has been submitted that the very agreement enjoined upon the contractor to abide by the Rules and conditions etc. issued by the Eastern Railways Engineering Department. Clause 63(3)(a)(i) under Chapter "Settlement of Disputes" of the General conditions of contract shows that dispute and differences, arising out of agreement shall be referred to the General Manager or a person nominated by him in that behalf in cases where the claim in question is below Rupees three lacs and in cases where the issues involved are not of complicated nature. The General Manager shall be the sole judge to decide whether or not the issues involved are of complicated nature. I need not refer to other clauses of the main Clause-63 because those are not relevant for this case. So according to the agreement itself, the General Manager of the Railways was to be the sole Arbitrator in case of dispute between the parties to the agreement although the agreement itself did not in any of its provisions or clauses authorizes the Arbitrator. But the fact remains that the contractor (Plaintiff) had agreed to abide by the terms and conditions as laid down by the "Eastern Railways Engineering Department General Conditions of Contract & Standard Specifications". Admittedly, the plaint of the relevant suit indicated that the claim of the Plaintiff was for Rupees two lacs and, in such a circumstance, the General Manager of the Railways was the sole Arbitrator. The order-sheet of the lower court dated 3rd June, 1994 shows that the court noted the fact that the General Manager, Eastern Railways was the sole Arbitrator; but by the very next order dated 27th June 1994, the court accepted the list of Arbitrators filed by the Plaintiff and stated in this order that from the agreement it did not transpire as to who was to be the Arbitrator. This order-sheet does not show that the Plaintiff had served notice upon the Plaintiff-Defendant regarding his list of Arbitrators and the court also did not state whether the Defendant-Appellant had agreed or consented to the appointment of Arbitrator as submitted by the Plaintiff in his list. In this connection, Section 5 of the Arbitration Act is worth reference. This section has laid down:

The authority of an appointed Arbitrator or Umpire shall not be revocable, except

with the leave of the court, unless a contrary intention is expressed in the Arbitration Agreement.

From the two order-sheets of the trial court (dated 3.6.1994 & 27.6.1994), it does not transpire that the Plaintiff had prayed for revoking the authority of the Arbitrator appointed by the agreement itself. So it is not understandable under what circumstances the court appointed Arbitrator, other than the General Manager of the Railways. Section 8(i)(b) of the Arbitration Act has provided that:

In case, the appointed Arbitrator or Umpire neglects or refused to act or is incapable of acting or dies any party may serve the other party or the Arbitrator, as the case may be, with a written notice to concur in the appointment or appointments or in supplying the vacancy.

In the instant case, it does not appear from the order sheet that the reference was made to the agreed Arbitrator who was the General Manager and, he refused to act or he was incapable of acting. The order-sheets of the lower court also do not suggest that the Defendant-Appellant had agreed to the Arbitrators, the list of which was submitted by the Plaintiff and accepted by the court. The order-sheet dated 7.10.1994 rather shows that a petition was filed by the Union of India u/s 151 Code of Civil Procedure. It appears that this petition was filed, perhaps, making objection to the appointment of Arbitrators by the court, without any concurrence from the Union of India which was one of the Defendants of the suit. This petition was directed to be kept on the record. None of the order-sheets thereafter shows that this petition was disposed of by any order. The next order sheet dated 11th November 1994, rather shows that the Arbitrator submitted his award and the Defendant pressed its application dated 7th October, 1994. This order-sheet does not show that the court disposed of the petition dated 7th October 1994; rather it shows that the Defendant's lawyer refused to take notice of the submission of award. Thereafter there are certain order-sheets dated 12th December 1994, 20th March 1995 and 24th May 1995 which indicated that the Defendants wanted the Plaintiff to supply the copy of the award and once the court directed the Plaintiff to serve copy of this award to the Defendants. Subsequently, it was pointed out by the Plaintiff that the award was already submitted in court and so the Defendant was free to take certified copy from the court itself.

5. From the aforesaid order-sheets of the trial court, it transpires that the court did not consider the fact that as per the agreement itself, the Arbitrator was appointed and he was the General Manager of the Railways. So unless the General Manager refused to act and the court revoked his authority by any order and unless the Defendant had been served with 15 days notice to consent to appointment of Arbitrator or Arbitrators to be appointed beyond the agreement, the Court should not normally have appointed Arbitrator named by the Plaintiff. None of the order-sheets of the lower court shows that the Defendant-Appellant had consented to the Arbitrators, list of which was submitted by the Plaintiff-Respondent. In such circumstances, the appointment of Arbitrators by the Court

was unjustified and against the spirit of law, as laid down by the Arbitration Act, 1940. So when the very reference to the concerned Arbitrator was illegally made, any award submitted by those Arbitrators would be void ab initio. In this connection, the order-sheets of the Arbitration proceeding taken before the Arbitrator would also be relevant. The entire record of the arbitration proceeding has been attached with the main suit. The order-sheet dated 8th September 1994 in its margin on the right side shows that notice was served upon the Union of India. The margin of the order-sheet dated 15th October 1994 shows in its margin on the right side that notice was served upon the Divisional Railway Manager, Eastern Railways, Mughal Sarai. The cause title of the plaint shows that there were other Defendants in the suit, i.e. Defendant No. 3, the Chief Engineer, Eastern Railways, 3, Koilaghat Street Calcutta (W.B.) and Defendant No. 2 the Eastern Railways, Administration through its General Manager. 3 Koilaghat Street Calcutta (W.B.); but none of the order-sheets show that notices were served upon Defendant Nos. 2 & 3. Besides the above, it is apparent from the agreement itself that the agreement was signed by the Divisional Engineer, Eastern Railways, Mughal Sarai. So this Engineer was neither party to the suit nor he was, perhaps, noticed, though he was a party to the agreement. So the proceedings before the Arbitrators was also vitiated for non-service of notice against the concerned parties. In such a circumstance, the award rendered by the Arbitrators was void ab initio and illegal from the very inception because the reference itself was not made legally by the Court.

6. In view of the aforesaid illegality attaching to the award rendered by the Arbitrator, I do not think that the award deserved any acceptance by the court nor it could legally be made Rule of the Court. In such a circumstance, the petition filed by the Defendant-Appellant even beyond time limit was fit to be entertained and accepted. The bar of limitation was, under the circumstance, not at all relevant. So I am of the opinion that the impugned order by which the award has been made Rule of the Court is unsustainable.

7. This appeal is accordingly allowed and the impugned order set aside. There shall be no order as to cost of this appeal.