
(2001) 11 DEL CK 0058

In the Delhi High Court

Case No : OMP 254/99 and IAs 12603 of 2000

Union of India and Another

APPELLANT

Vs

Nangia Construction (India) Pvt. Ltd.

RESPONDENT

Date of Decision : 02-11-2001

Acts Referred:

Arbitration Act, 1940 — Section 30, 33
Arbitration and Conciliation Act, 1996 — Section 34
Contract Act, 1872 — Section 73

Citation : (2001) 11 DEL CK 0058

Hon'ble Judges : Vinod Sagar Aggarwal, J

Bench : Single Bench

**Advocate : V.K. Shali, for NCT of Delhi and Rajiv Chowdhary, for the Appellant;
Raman Kapur, for the Respondent**

Final Decision : Dismissed

Judgement

V.S. Aggarwal, J.—The respondent/claimant (Nangia Construction (India) Pvt. Ltd.) was engaged in the construction of the chambers for the lawyers in the District Court Shahdara. After execution of the work the applicant lodged a number of claims which had been referred to the arbitrator. The matter as such was gone into by the arbitrator and the award has been announced by the learned arbitrator. Against the same objections have been filed by the National Capital Territory of Delhi (hereinafter described as the objector).

2. It has been alleged that the arbitrator while relying on the applicant's submissions has overlooked the fact that the calculation done by the applicant for increase in the cost was for the work done including the cost of material as supplied by the objector at fixed rate. As such calculation submitted the net value of the work done after deducting the cost of the department works out to Rs. 73.83 lakhs and if escalation as demanded by the claimant at Rs. 30.89 over and above quoted rate is it has to be Rs. 22,8 lakhs approximately. As per Clause 10CC of the agreement claimant has already been compensated. it has further

been alleged that as per Section 73 of the Indian Contract Act when the contract had been breached the party who suffers by breach is entitled to receive from the party who has breached the contract compensation for loss or damage caused to him. Such compensation is not to be given for any remedy or indirect damage sustained. Furthermore it has been asserted that the applicant had claimed loss of profit and establishment charges for prolongation of contract for three years and the arbitrator has awarded Rs. 8,85,000/- after clubbing both the claims which is not proper. The compensation is alleged to have been arrived at on one basis of conjecture and surmises without any material on the record. Accordingly the have said prayer for setting aside of the award had been made.

3. In the reply filed the plea has been raised that claim No. 11 before the arbitrator was towards loss of profit and claim No. 12 was on account of establishment charges for prolongation of the contract from 16.8.1991 to 22.6.1994. The arbitrator found that the contract period stood prolonged from 16.8.1991 to 22.6.1994 entirely on account of reasons for which the objector would be responsible. It was asserted that the arbitrator had rightly found the applicant to be entitled to the ward of loss of profit suffered by them. It is denied that the arbitrator has acted without any material before him or that the award was liable to be set aside.

4. First and foremost question keeping in view of the aforesaid facts that a arises for consideration is as to whether under the Arbitration and Conciliation Act, 1996 the applicant is entitled to invoke Section 34 of the Act to get the award set aside or not. At the outset, the difference between the Arbitration Act, 1940 and the Arbitration and Conciliation Act, 1996 pertaining to the grounds on which the award can be set aside can be taken note of. Sections 30 and 33 of the Arbitration Act, 1940 permitted certain grounds for setting aside of the award and the relevant provisions read:-

30. Grounds for setting aside award - Award shall not be set aside except on one or more of the following grounds, namely-

(a) that an arbitrator or umpire has misconducted himself or the proceedings;

(b) that an award has been made after the issue of an order by the Court superseding the arbitrator or after arbitration proceedings have become invalid u/s 35"

(c) that an award has been improperly procured or is otherwise invalid.

33. Arbitration agreement or award to be contested by application. - Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits:

Provided that where the Court deems it just and expedient, it may set down the application for hearing on other evidence also, and it may pass such orders for

discovery and particulars as it may do in a suit.

5. Presently u/s 34 of the Act the award can be set aside when the same has been passed under the Arbitration and Conciliation Act, 1996. The relevant provision is reproduced below for the sake of facility:-

Application for setting aside arbitral award-(1) Recourse to a court against an arbitral award may be made only by an application for setting aside such award in accordance with Sub-section (2) and Sub-section (3).

(2) An arbitral award may be set aside by the court only if-

(a) the party making the application furnishes proof that-

(i) a party was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration;

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the courts finds that-

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

6. It is patent that while in the Arbitration Act, 1940 the ground that was available which was often pressed into service was that if the arbitrator has misconducted himself the award could be set aside. Presently the court is not concerned with the other ground which is not subject matter of much controversy for disposal of the present petition. The validity of the arbitration agreement of course could also be challenged. The Legislature even when it enacted the Arbitration Act, 1940 did not precisely define as to what was a

misconduct of the arbitrator or the umpire. Under the Arbitration and Conciliation Act, 1996 the award can be set aside in case one of the parties was under an incapacity or the arbitration agreement was invalid. It could also be set aside if the party making the application was not given prior notice of appointment of the arbitrator. Neither of these grounds is being pressed in the present petition.

7. Under Clause (iv) Sub-section (2) to Section 34 the award could also be claimed to be set aside if it deals with a dispute not contemplated by or not falling within terms of the submissions of the arbitrator or it contains decisions or matters beyond the scope of the submissions to the arbitration. This is not the case pleaded that the arbitrator has acted or it contains decisions on matters beyond the scope on submissions to arbitration. This was not even so argued. Therefore, it becomes unnecessary to go into the said controversy because it had been admitted that the disputes between the parties with respect to the claim laid by the applicant had been referred to the arbitration.

8. Confronted with that position, the learned counsel for the applicant alleged that the arbitral award is in conflict with the public policy of India because certain amounts have been awarded which as such could not have been so awarded.

9. The expression "Public Policy" by itself is an illusive concept and has often been prescribed to be "untrustworthy guide" or "unruly horse". The Supreme Court in the case of *Gherulal Parakh Vs. Mahadeodas Maiya and Others*, was dealing with certain Waging Contracts but the question as to what would be a public policy or contrary to public policy had also come up for consideration. It was held that the doctrine of public policy is only a branch of common law and ordinarily one should not extend to the expression public policy to include heads. In paragraph 23 the Supreme Court after holding that legal position in India is the same as in England observed:-

"..... The doctrine of public policy may be summarized thus: Public policy or the policy of the law is an illusive concept; it has been described as "untrustworthy guide", "variable quality", "uncertain one" "unruly horse", etc; the primary duty of a Court of Law is to enforce a promise which the parties have made and uphold the sanctity of contracts which form the basis of society, but in certain cases, the Court may relieve them of their duty on a rule founded on what is called the public policy; for want of better words Lord Atkin describes that something done contrary to public policy is a harmful thing, but the doctrine is extended not only to harmful cases but also to harmful tendencies; thus doctrine of public policy is only a branch of common law, and, just like any other branch of common law, it is governed by precedents; the principles have been crystallized under different heads and though it is permissible for Courts to expound and apply them to different situations, it should only be invoked in clear and incontestable cases of harm to the public, though the heads are not closed and though theoretically it may be permissible to evolve a new head under exceptional circumstances of a changing world, it is advisable in the interest of stability of society not to make any attempt to discover new heads in these days.

10. Similarly in the case of Murlidhar Aggarwal and Another Vs. State of Uttar Pradesh and Others, the Apex Court held that the expression "Public Policy" should weigh the interest of the whole community as well as the interest of considerable section of the society. The balance has to be struck between community interest and sectional interests. It was further held that public policy does not remain static in any given community. In paragraphs 30 and 31 the Supreme Court held:-

30. "Public Policy" has been defined by Winfield as a principle of judicial legislation or interpretation founded on the current needs of the community". (See Percy H. Winfield, "Public Policy in English Common Law," 42 Harvard Law Rev. 76). Now, this would show that the interests of the whole public must be taken into account ; but it leads in practice to the paradox that in many cases what seems to be in contemplation is the interest of one section only of the public, and a small section at that. The Explanation of the paradox is that the courts must certainly weigh the interests of the whole community as well as the interests of a considerable section of it, such as tenants, for instance as a class as in this case. If the decision is in their favor, it means no more than that there is nothing in their conduct which is prejudicial to the nation as a whole. Nor is the benefit of the whole community always a more tacit consideration. The Courts may have to strike a balance in express terms between community interests and sectional interests. So, here we are concerned with the general freedom of contract which everyone possesses as against the principle that this class, to the harassment of suits without valid or reasonable grounds. Though there is considerable support in judicial dicta for the view that courts cannot create new heads of public policy, see Gherulal Parakh Vs. Mahadeodas Maiya and Others, , there is also no lack of judicial authority for the view that the categories of heads of public policy are not closed and that there remains a broad field within which courts can apply a variable notion of policy as a principle of judicial legislation or interpretation founded on the current needs of the community. See Dennis Lloyd, "Public Policy", (1959), pp. 112-113.

31. Public policy does not remain static in any given community. It may vary from generation to generation and even in the same generation. Public policy would be almost useless if it were to remain in fixed moulds for all time.

11. Similarly in the decision rendered in the case of Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, the same expression was again under consideration. Taking note of the fact that the expression public policy occurs in the Contract Act, the Supreme Court held:-

"The Contract Act does not define the expression "public policy" or "opposed to public policy". From the very nature of things, the expressions "public policy", "opposed to public policy", or "contrary to public policy" are incapable of precise definition. Public policy, however, is not the policy of a particular government. It connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would

be injurious or harmful to the public good or the public interest has varied from time to time. As new concepts take the place of old, transactions which were once considered against public policy are now being upheld by the courts and similarly where there has been a well recognised head of public policy, the courts have not shirked from extending it to new transactions and changed circumstances and have at time not even flinched from inventing a new head of public policy. There are two schools of thought - "the narrow view" school and "the broad view" school. According to the former, courts cannot create new heads of public policy whereas the latter countenances judicial law-making in this area. The adherents of "the narrow view" school would not invalidate a contract on the ground of public policy unless that particular ground had been well established by authorities....".

and thereafter it was further concluded:

".....It is thus clear that the principles governing public policy must be and are capable, on proper occasion of expansion or modification. Practices which were considered perfectly normal at one time have today become obnoxious and oppressive to public conscience. If there is no head of public policy which covers a case, then the court must in consonance with public conscience and in keeping with public good and public interest declare such practice to be opposed to public policy. Above all, in deciding any case which may not be covered by authority our courts have before them the beacon light of the Preamble to the Constitution. Lacking precedent, the court can always be guided by that light and the principles underlying the Fundamental Rights and Directive Principles enshrined in our Constitution.

12. In this connection it would be important further to refer to the decision of the Supreme Court in the case of Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Others, . Though the Supreme Court in the cited case was concerned with a different controversy but it went on to describe that the public policy has its inception in constitution and may accompany either restricted or extended interpretation of the literal expression of a statute. A statute is always presumed to be constitutional. The Supreme Court held that public policy is a variable notion depending on changing manner and moral and economic conditions.

13. The Legislature in its wisdom Therefore keeping in view the aforesaid had not defined the expression public policy because it will have to be interpreted and give its true and logical meaning in accordance with the changing circumstances and facts of each case. However, one thing is apparent the purpose of enacting the Arbitration and Conciliation Act, 1996 was to ordinarily make the award binding between the parties. Instead of using the word "misconduct" pertaining to the arbitrator, the word "conflict with public policy" has been added. The departure has been so made with a purpose. It is obvious. The said purpose was to restrict the interference of the courts because every misconduct will not be contrary to the public policy of India. It will not be possible even for the court to

describe as to what would be contrary to the public policy of India and inf act it would be a folly to attempt a definition. As already referred to above it goes with the facts and circumstances of the each case. If ordinarily reasons have been given, proper opportunity has also been given and material considered that is available on the record it cannot be described to be something contrary to the public policy of India. However, in case the act is mala fide there are extraneous consideration in recording the award, one can conveniently state that it may be contrary to the public policy of India. Once again hastening to add that this is not a exhaustive definition of the expression contrary to public policy of India.

14. Reverting back to the facts of the case that has been alleged in the application filed by the objector it is patent that the objector is basically challenging the award of the arbitrator on certain findings that have been arrived at and are confined to the facts. It is not the case that any of the act would be contrary to the public policy of India. The result would be that even this argument that had been advanced must in any case be rejected.

15. Be that as it may even if for sake of argument the other plea of the applicant is gone into the net result would be same. It was urged that under Clause 10CC of the agreement the escalation had to be given and compensation as such could not be gone into. It was further argued that delay, if any, was not on the part of the department., But even this argument has simply to be stated to be rejected. Firstly, it is a finding of fact arrived at by the arbitrator on appreciation of facts. The escalation clause under Clause 10CC refers to certain increase in labour and cost of material. It is not shown as to how it would cover the present controversy pertaining to the delay on the part of the department and the price that the applicant might have to pay for establishment charges etc. and also for the machinery. In that view of the matter the compensation in any case could be awarded.

16. The net result of the reasons given above would be that the present case could not be entertained u/s 34 of the Arbitration and Conciliation Act, 1996. Therefore, the application filed by the objector must fail and is dismissed.