
(2013) 04 CAL CK 0015
In the Calcutta High Court
Case No : A.P. No. 333 of 2007

Union of India

APPELLANT

Vs

M/s. Ashoke Tubewell

RESPONDENT

Date of Decision : 24-04-2013

Acts Referred:

Citation : (2013) 3 WBLR 658

Hon'ble Judges : Sanjib Banerjee, J

Bench : Single Bench

Advocate : A.K. Ghosal and Rajendra Chaturvedi, for the Appellant; Parveen Siddiqui, for the Respondent

Judgement

Sanjib Banerjee, J.—Preliminary point has been urged by the Union of India as to the authority of the arbitrator to adjudicate upon the disputes covered by the arbitration agreement. Upon the Court not being impressed by such challenge, the merits of the matter have been canvassed. The award has been assailed in the arbitrator accepting in full or in part the claims made under the first, fourth, eighth and 14th heads. The reference was made under the Arbitration and Conciliation Act, 1996. The petitioner points out that the period required to be afforded to the general manager for constituting the arbitral tribunal was not adhered to by the contractor in the contractor making a premature request u/s 11 of the 1996 Act to the Chief Justice of this Court or his designate. The petitioner says that notwithstanding the arbitrator having been appointed by consent of the parties, as recorded in the order disposing of the request u/s 11 of the 1996 Act, by virtue of sub-paragraph (x) of paragraph 47 of the S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, it was open to the petitioner to challenge the competence of the arbitrator by way of an application before the arbitrator u/s 16 of the 1996 Act. The petitioner submits that such application was made at the earliest stage of the reference, but the arbitrator declined the prayer and continued with the merits of the matter merely on the ground that the petitioner herein had consented to the appointment of the arbitrator as

recorded in the order disposing of the request u/s 11 of the 1996 Act.

2. The petitioner has referred to an unreported judgment rendered on February 25, 2010 in AP No. 340 of 2006 (Union of India v. S.S. Construction) where, on the strength of the Division Bench dictum in the judgment reported at (2009) 4 Cal HN 252 (Builders Corporation), the award was set aside only because the arbitral tribunal was constituted in derogation of the arbitration clause contained in the general conditions governing railway contracts. The petitioner has also carried a single Bench judgment reported at Atul R. Shah Vs. M/s. V. Vrijlal Lalloobhai and Co. and another, The petitioner reads paragraph 5 of the report to emphasise on the Bombay High Court's acceptance of the proposition that since parties cannot confer jurisdiction by consent, the mere failure of a party to raise an objection would not preclude the party from subsequently objecting to the authority of the arbitral tribunal.

3. The facts in the Bombay case need to be appreciated to understand the principle stated therein. The arbitration in that case related to the Bombay Stock Exchange and the Court found that the procedure adopted was in derogation of Section 10 of the 1996 Act. In that case, the party who subsequently carried the objection for setting aside the award had not objected to the constitution of the arbitral tribunal, but had not consented thereto. It was in such context that the Court held that merely because a party had participated in proceedings that were without jurisdiction and had not objected thereto would not disentitle the party from urging the ground of the initial or complete lack of jurisdiction of the tribunal.

4. Paragraph 5 of the judgment in Atul R. Shah, in its relevant part, reads as follows:

5. ... The only argument raised on behalf of the Respondents is that the objection was not raised before the Arbitral Tribunal. That aspect has also been dealt with in the cases referred to above judgment. Even otherwise, the fact that an Arbitral Tribunal is not properly constituted and objection has not been raised by the Petitioner before the Tribunal, cannot result in the Arbitral Tribunal exercising jurisdiction if its constitution was in contravention of Section 10 of the Arbitration and Conciliation Act, 1996. Court's cannot confer jurisdiction on themselves, by consent of the parties and clothe themselves with jurisdiction. A Court without jurisdiction merely on account of non-objection by the parties cannot assume jurisdiction in itself. The same is also true of Arbitral Tribunals. The said contention must therefore be rejected and the award has to be set aside on that count alone.

5. The observation in the above passage that courts "cannot confer jurisdiction on themselves, by consent of the parties and clothe themselves with jurisdiction" must be understood in the context of the issue in that matter. The discussion in the relevant paragraph and the observation towards the end of the passage were against the backdrop of the breach of the statutory condition as stipulated in

Section 10 of the 1996 Act. It goes without saying that if the statute prohibits something, as it does in Section 10 of the said Act, the parties before a court or an arbitral tribunal cannot, by consent, waive the statutory condition. The observation in the passage cannot be understood to imply that parties cannot by consent confer jurisdiction on an arbitral tribunal; since the jurisdiction of the arbitral tribunal is, by definition, consensual.

6. In the present case, the principle would not be applicable. The petitioner herein had consented in course of the request u/s 11 of the 1996 Act to the appointment of the arbitrator. The petitioner must be seen to have been aware of the qualification necessary for an arbitrator to be appointed to adjudicate upon the disputes covered by the arbitration agreement. Nonetheless, the petitioner consented to the appointment of a person who did not meet the qualifications. The petitioner was perfectly at liberty to do so. But having so consented, the petitioner was, thereafter, precluded from challenging the appointment on the ground that a gazetted officer of the railways had to arbitrate upon the disputes in accordance with the arbitration agreement contained in the general conditions governing railway contracts. Though the petitioner is right in its assertion that paragraph 47(x) of the Patel Engineering Limited judgment permitted subsequent objections as to the constitution of the arbitral tribunal to be carried u/s 16 of the 1996 Act; it cannot be accepted that even when the arbitral tribunal had been constituted not in consonance of the arbitration agreement but with the consent of a party to the arbitration agreement, such party had also been conferred a right, notwithstanding its consent, to challenge the constitution of the tribunal.

7. There is no merit in the preliminary ground urged on behalf of the petitioner and the same is repelled.

8. On the merits of the award, the petitioner has first questioned the award made under the first head of claim. The petitioner has relied on Clause 45(a) of the general conditions governing railway contracts to suggest that the measurement of works made in accordance with the provisions of the general conditions had to be accepted by the contractor and, if the contractor was either absent at the time of the measurement or if the contractor did not seek any measurement and the railways had unilaterally carried out the same, the railways' obligation was only to pay according to the measurement undertaken in terms of the general conditions.

9. It, however, appears from the relevant part of the award on the first head of claim that the arbitrator referred to the oral evidence and documents relied upon by the parties in course of the reference and the arbitrator expressed surprise at the "cavalier" manner in which the railways chose to deal with such head of claim. Indeed, the arbitrator commented that the railways cross-examined the contractor's witness for nearly three years, but did not rely on the oral evidence in dealing with the primary head of claim of the contractor. The arbitrator wondered if the entire exercise of cross-examining the contractor's witness for a prolonged period was a sheer waste of public money. The challenge to the first

head of claim cannot be accepted for the reason that the arbitrator considered all material relevant to the aspect and the arbitrator was mindful of the relevant clause in the general conditions governing railway contracts. To begin with, in this jurisdiction Courts do not ordinarily interfere with the errors made by an arbitrator in matters which fall within the domain of the arbitrator's adjudication. Courts generally step in when the arbitrator exceeds the bounds of his authority. In the present case, given the reasoning in support of the first head of claim and the material alluded to by the arbitrator in course thereof, there does not appear to be any cogent ground made out u/s 34 of the 1996 Act for any judicial interference.

10. The petitioner has next challenged the award made under claim No. 4(a) for refund of electricity charges. It appears from the discussion in the relevant part of the award that a meter was allotted by the railways to the contractor but there was no bifurcation of the meter on account of the use of electricity thereunder by the railways and on account of its use by the contractor. The arbitrator referred to the contractor's admission that if a separate basis could be made out by the railways as to the contractor's consumption of electricity, the contractor would be bound to bear such expense. However, it does not appear that the railways could quantify the amount of electricity exclusively consumed by the contractor and separate it from what was used by the railways. In any event, the matter was within the exclusive domain of the arbitrator's authority and it does not appear that in awarding the amount on the basis of the reasons disclosed, the arbitrator acted in derogation of the relevant special condition at page 148 of the papers that the petitioner has relied on.

11. The petitioner has also questioned the grant under the eighth head of claim on account of infructuous expenses during the extended period of the contract. The petitioner has referred to clause 39(1) of the general conditions in support of its contention that if the tenure of the agreement was extended, the contractor would not be entitled to any additional payment during the period of the extension. The arbitrator has referred to the case of General Manager Northern Railways and Another Vs. Sarvesh Chopra, in considering such head of claim and on the arbitrator's reading of the Supreme Court dictum and the arbitrator's satisfaction that the extension was because of the failure on the part of the railways, held in favour of the claimant on such count. The limited scope of intervention permitted u/s 34 of the 1996 Act, given that a petition of the present kind is not to be treated as an appeal from the award, does not permit any interference with the arbitrator's finding on the eighth head of claim.

12. The petitioner's final challenge is on the arbitrator's award of interest under the 14th head for the period covered by the reference. The petitioner refers to the recent judgment of the Supreme Court in Union of India (UOI) Vs. Krafters Engineering and Leasing (P) Ltd., of the report leave no manner of doubt that if the agreement between the parties precludes interest being awarded, the arbitrator would not have any authority to grant interest. For the reasons as

indicated in the Supreme Court judgment, the award of pendente lite interest under the 14th head of claim cannot be sustained and is set aside. However, the interest at the rate granted by the arbitrator will operate on the principal sum awarded from the date of the award till payment.

13. AP No. 333 of 2007 is allowed to the limited extent as indicated in the last preceding paragraph and the rest of the challenge canvassed by the petitioner is rejected. There will be no order as to costs.

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