courtkutchehry.com

Company : CourtKutchehry
Website : www.courtkutchehry.com
Printed For :
Date : 07/09/2026

(2013) 01 BOM CK 0147

In the Bombay High Court

Case No : Arbitration Appeal No. 28 of 2009 in Civil Miscellaneous Application No. 66 of 2005

Union of India — APPELLANT

Vs

M/s. S.N. Naik and Bros., Railway Contractor — RESPONDENT

Date of Decision : 04-01-2013

Acts Referred:
Arbitration Act, 1940 — Section 29
Arbitration and Conciliation Act, 1996 — Section 28(3), 29, 31(7), 31(7)(a), 34

Citation : (2014) 1 ALLMR 173 : (2013) 2 ARBLR 29 : (2013) 1 BomCR 693 : (2013) 2 MhLj 390

Hon'ble Judges : R.D. Dhanuka, J

Bench : Single Bench

Advocate : Suresh kumar, for the Appellant; Rajdeep Samudrala, for the Respondent

Final Decision : Allowed

Judgement

R.D. Dhanuka, J.—By this appeal filed u/s 37 of the Arbitration and Conciliation Act, 1996, appellant seeks to challenge an order and judgment dated 24th July, 2009 passed by the Principal District Judge, Raigad, Alibaug rejecting application filed by the appellant u/s 34 of the Act (Civil Misc. Application No. 66 of 2005). By the said Civil Misc. Application No. 66 of 2005, the appellant had challenged two claims out of several claims viz. grant of interest at the rate of 21% in the sum of Rs. 2,42,107/- and pende-lite interest in the sum of Rs. 4,68,263/-. Mr. Sureshkumar, the learned counsel appearing on behalf of the appellant places reliance on clause 16 (2) of General Conditions of Contract which reads thus :-

16(2) No interest will be payable upon the earnest money or the security deposit or amounts payable to the Contractor under the contract, but Government securities deposited in terms of Sub-Clause (1) of this clause will be repayable with interest accrued therein.

2. Relying upon this clause, the learned counsel appearing for the appellant

submits that such clause prohibits payment of interest from the appellant to the respondent contractor. It is submitted that though the clause prohibits payment of interest on the earnest money or the security deposit or any amount payable to the contractor under the contract, the learned arbitrator ignored the terms of the contract and in breach thereof has allowed the claim for interest placing reliance upon section 29 of the Arbitration Act, 1940. It is submitted that though admittedly the present reference was under the provisions of Arbitration and Conciliation Act, 1996, the Learned District Judge placed reliance upon section 29 of Arbitration Act, 1940 while rejecting the application filed by the appellant which is totally misplaced and on the face of it, perverse. The learned counsel invited my attention to the judgment of the Supreme Court in case of Sree Kamatchi Amman Constructions Vs. The Divisional Railway Manager (Works), Palghat and Others, and more particularly para (19). Supreme Court has considered the same clause which was relied upon by the appellant and was part of the contract. After considering the same, the Supreme Court in para (19) has held as under :-

19. Section 37(1) of the new Act by using the words "unless otherwise agreed by the parties" categorically clarifies that the arbitrator is bound by the terms of the contract insofar as the award of interest from the date of cause of action to date of award. Therefore where the parties had agreed that no interest shall be payable, arbitral tribunal cannot award interest between the date when the cause of action arose to date of award.

3. The learned counsel also invited my attention to the judgment of the Supreme Court in the case of Union of India vs. M/s. Krafters Engineering Co. in Civil Appeal No. 2005 of 2007 in which the Supreme Court has considered the identical clause and had taken a view that in view of the prohibition, the learned arbitrator could not have awarded interest u/s 31(7) of the Arbitration and Conciliation Act, 1996.

4. The learned counsel also invited my attention to the unreported judgment of this court delivered on 19th October, 2012 by the Division Bench in case of Union of India vs. M/s. Shyam Constructions in Appeal (L) No. 309 of 2011. The Division Bench of this court has followed the judgment of the Supreme Court in case of Sree Kamatchi Amman Constructions (supra) and in para (6) has held thus :-

6. Counsel appearing on behalf of the Appellant has challenged the arbitral award insofar as the following claims came to be awarded viz. Claim Nos. 1, 2, 5, 10, 12 and 13. The principal basis of the appeal is that the award of the claims by the arbitral Tribunal was contrary to the express terms and conditions of the contract. Hence, in order to evaluate these submissions, it would be necessary to consider the arbitral award and the specific contractual conditions governing each head of claim.

i) Claim No. 1 was in respect of work done but not paid in respect of which the

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/union-of-india-appellant-hash-ms-sn…

arbitral Tribunal awarded interest at the rate of 10% per annum from 20 November 1997 to 3 June 2002, in the total amount of Rs. 2,04,813/-. The arbitral Tribunal has noted that an amount of Rs. 4,55,140/- was paid over to the contractor only on 21 May 2002 and on this ground awarded interest for the period of delayed payment. Clause 16(2) of the General Conditions of Contract provides as follows :

16(2) : No interest will be payable upon the Earnest Money and Security Deposits or amounts payable to the Contractor under the Contract...

The effect of this very clause was considered by the Supreme Court in a judgment in Sree Kamatchi Amman Constructions v. The Divisional Railway Manager (Works), Palghat 1. The Supreme Court held that if there is a specific bar against payment of interest in the contract, the arbitrator cannot award any interest for the pre-reference period or pendente lite. The Supreme Court held that in view of the specific provisions made in the Act of 1996 in Section 31(7)(a) by the use of the words "unless otherwise agreed by the parties"; the arbitrator was bound by the terms of the contract in regard to the award of interest from the date of the cause of action to the date of the award. Hence, where the parties had agreed that no interest shall be payable, the arbitral Tribunal cannot award interest between the date when the cause of action arose to the date of the award. In view of the express provisions of Clause 16(2) of the General Terms of Contract, the award of interest was prohibited and there was an agreement between the parties as "otherwise agreed" within the meaning of Section 31(7)(a). Section 28(3) makes it clear that in all cases the arbitral Tribunal shall decide in accordance with the terms of the contract. It is not open to the arbitral Tribunal to ignore the terms of the contract. Evidently the arbitral Tribunal has acted contrary to the terms of the contract while awarding this claim;

ii) Claim No. 2 related to the refund of security deposit on which interest has been awarded by the arbitral Tribunal at the rate of 10% between 19 November 1998 and 10 October 2002. Here again, it is evident that the award of interest is directly in the teeth of Clause 16(2);

iii) Claim No. 5 is for the award of interest on delayed payments. The arbitral Tribunal has here again awarded interest at 10% per annum. What has been held in regard to the award of interest in respect of claim Nos. 1 and 2 will also apply to the award under this head. The award of interest for the pre-reference period was clearly contrary to the provisions of Clause 16(2);

iv) Claim No. 10 was for the underutilization of overheads. The arbitral Tribunal noted that the contract was extended for approximately two years from 25 March 1994 to 31 March 1996. The Tribunal came to the conclusion that the liability for this delay ought to be shared equally by both the parties and that the claimant - Respondent should be compensated for the non-utilization of overheads for a period of one year for which an award in the amount of Rs. 1.56 lacs was made. Now insofar as this aspect is concerned, clause 17(iii) of the General Conditions

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/union-of-india-appellant-hash-ms-sn…

of Contract provides as follows:

(iii) In the event of any failure or delay by the Railway to handover to the contractor possession of the lands necessary for the execution of the works or to give the necessary notice to commence the works or to provide the necessary drawings or instructions or any other delay caused by the Railway due to any other cause whatsoever, then such failure or delay shall in no way affect or vitiate the contract or alter the character thereof or entitle the contractor to damages or compensation therefore, but in any such case, the Railway may grant such extension or extensions of the completion date as may be considered, reasonable.

v) When the Respondent sought an extension of the period for completion, it had declared that it shall not claim any compensation. The Appellant had while granting extension clarified that the contractor would not be entitled to make claims whatsoever against the Railways by virtue of the extension being granted nor would the Railways entertain or consider any such claim, if made. A similar provision was interpreted in the judgment of the Supreme Court in Ramnath International Construction Private Limited v. Union of India2 In that case, the contractual conditions stipulated that no claim in respect of compensation or otherwise howsoever arising as a result of the extensions granted shall be admitted. The Supreme Court held that in view of the clear terms of the contract, the award of compensation had been rightly set aside by the High Court. A similar view was taken in a judgment of a Learned Single Judge of this Court in Chaitanya Electrical Private Limited v. General Manager Central Railway3 while interpreting the provisions of Clause 17(3). An appeal against the decision was dismissed by the Division Bench on 17 March 20034. In view of the express terms of the contract, the arbitral Tribunal has manifestly erred in ignoring the contract and awarding the claim;

vi) Claim No. 12 and Claim No. 13 related to the award of compensation for the underutilization of labour force and of centering and shuttering respectively. Here again the arbitral Tribunal has granted compensation on account of the extended period of the contract by partly apportioning the liability to the Appellant. The award under both these heads is clearly unsustainable in view of the specific conditions contained in Clause 17(iii) noted earlier.

5. In my view, the facts of this case are identical to the facts before Supreme Court in case of Sree Kamatchi Amman Constructions (supra) which has been followed by the Supreme Court subsequently in case of Union of India vs. M/s. Krafters Engineering Co. (supra).

6. Section 31(7) of the Arbitration and Conciliation Act, 1996 provides that unless otherwise agreed by the parties, the tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/union-of-india-appellant-hash-ms-sn…

made. In view of the express provision of 16(2) of the General Conditions of Contract prohibiting payment of interest, read with section 31(7) (a), it is clear that the payment of interest was prohibited and thus the learned arbitrator has acted contrary to the terms of the contract and also contrary to section 31(7) (a) of the Act. The award is thus contrary in conflict with public policy. The Learned District Judge has also ignored the provisions of section 31(7) (a) and also the prohibition clause prohibiting payment of interest and erroneously relied upon Section 29 of Arbitration Act 1940 which was not applicable to the facts of this case. The award as well as the order passed by the Learned District Judge is clearly unsustainable. The impugned award as well as the judgment delivered by the Learned Judge is thus contrary to the law laid down by the Supreme Court and this Court and also contrary to Section 31(7)(a) and deserves to be set aside.

I, therefore, pass the following order :-

(a) Appeal is allowed.

(b) Impugned order passed by the Learned Principal District Judge on 24th July, 2009 is set aside.

(c) Civil Misc. Application No. 66 of 2005 is allowed.

(d) Impugned award in so far as grant of interest is concerned, is set aside.

(e) By ad-interim order passed by this court on 16th April, 2010, this court had permitted respondent to withdraw a sum of Rs. 7,10,370/- deposited by the appellant on the respondent''s furnishing undertaking that the amount would be brought back or paid to the appellant in the event of appellant succeeding in this appeal. If the respondent has withdrawn any such amount pursuant to the liberty granted by this court on 16th April, 2010, the respondents are directed to pay the said amount with interest at the rate of 6% per annum to the appellant within four weeks from the date of this order. If the respondent has not withdrawn the amount as per order passed by this court on 16th April, 2010, the office is directed to return the said amount to the appellant with accrued interest if any.

(f) Appeal is allowed in the aforesaid terms.

(g) No order as to costs.

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/union-of-india-appellant-hash-ms-sn…