
(2009) 01 CAL CK 0013
In the Calcutta High Court
Case No : A.P. No. 35 of 2006

Union of India

APPELLANT

Vs

Sri Chitta Ranjan Maity

RESPONDENT

Date of Decision : 27-01-2009

Acts Referred:

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

Citation : (2009) 3 CALLT 224

Hon'ble Judges : Indira Banerjee, J

Bench : Single Bench

Advocate : N.C. Roy Chowdhury and Mr. Jayanta Banerjee, for the Appellant;
Supriyo Bose, for the Respondent

Final Decision : Dismissed

Judgement

Indira Banerjee, J.—This application u/s 34 of the Arbitration and Conciliation Act, 1996, hereinafter referred to as the 1996 Act, is for setting aside an Award made and published on 30th September, 2005 of an Arbitral Tribunal consisting of three Arbitrators, all of whom are senior officials of the Railways.

2. The Petitioner invited tenders for the work of execution of the balance earth work in formation of banks, laying of railway lines, roads and platforms and miscellaneous other jobs in connection with the new goods terminal yard of South Eastern Railways at Sankrail in Howrah District.

3. Disputes that arose between the parties in connection with the aforesaid contract were referred to arbitration in terms of the contract between the parties. The arbitrators after giving the parties an opportunity of hearing and after considering the materials on record made and published the impugned award. The award is a reasoned award.

4. The amounts claimed and the amounts awarded against each item of claim are very briefly as follows:

CLAIM CLAIMED AMOUNT (Rs.) AWARDED AMOUNT (Rs.)

- 1 . Balance amount payable 45,37,230.00 2,39,657.00
- 2 . Claim for price variation due to rise in price of materials, labour and fuel 21,82,719.58 1,17,060.00
- 3 . Claim for security deposit 15,000.00 15,000.00
- 4 . Claim on account of advance payment towards labour supplier 51,000.00 15,300.00
- 5 . Claim for advance payment to the earth supplier 1,80,000.00 54,000.00
- 6 . Claim for remaining idle wage payment 1,80,000.00 54,000.00
- 7 . Claim for overhead charges, i.e., staff salary and house rent 22,000.00 15,000.00
- 8 . Claim for blockage of capital and business loss 12,75,000.00 6,03,119.00
- 9 . Claim for interest. 1,58,23,193.16 12,44,546.00

5. Mr. Roy Chowdhury appearing on behalf of the petitioner with Mr. Jayanta Banerjee submitted that claim Nos. 1, 2, 4, 5, 6, 7, 8 & 9 had illegally been allowed as the aforesaid claims were barred under the contract. Mr. Roy Chowdhury argued that most of the aforesaid claims constituted excepted matters and the learned arbitrators had no jurisdiction to adjudicate the claim.

6. Mr. Roy Chowdhury rightly argued that an Arbitral Tribunal being a creature of the arbitration agreement is bound to arbitrate as per the terms and conditions of the arbitration agreement. The arbitrator cannot ignore the agreement between the parties.

7. An award which is passed without considering the provisions of the contract might undoubtedly be set aside by Court u/s 34 of the 1996 Act. In Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., the Supreme Court held as follows:

Therefore, in our view, the phrase "public policy in India" used in section 34 in context is required to be given a wider meaning. It can be stated " that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on, the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/ judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in Renuagar case it is required to be held that the award could be set aside if it is patently illegal. The result would be - award could be set aside if it is contrary to:

- (a) fundamental policy of Indian law; or
- (b) the interest of India; or
- (c) justice or morality;
- (d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such award is opposed to public policy and is required to be adjudged void.

It is true that if the Arbitral Tribunal has committed mere error of fact or law in reaching its conclusion on the disputed question submitted to it for adjudication then the Court would have no jurisdiction to interfere with the award. But this would depend upon reference made to the arbitrator: (a) if there is a general reference for deciding the contractual dispute between the parties and if the award is based on erroneous legal proposition, the Court could interfere; (b) it is also settled law that in a case of reasoned award, the Court can set aside the same if it is, on the face of it, erroneous on the proposition of law or its application; and (c) if a specific question of law is submitted to the arbitrator, erroneous decision in point of law does not make the award bad, so as to permit its being set aside, unless the Court is satisfied that the arbitrator had proceeded illegally.

From the aforesaid discussions, it can be held that:

- (1) Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same.
- (2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in section 73 of the Contract Act.
- (3) Section 74 is to be read along with section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract.
- (4) In some contracts, it would be impossible for the Court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or the Court can award the same if it is genuine pre-estimate

by the parties as the measure of reasonable compensation.

For the reasons stated above, the impugned award directing the appellant to refund the amount deducted for the breach as per contractual terms requires to be set aside and is hereby set aside.

8. In *General Manager Northern Railways and Another Vs. Sarvesh Chopra*, cited by Mr. Roy Chowdhury the Supreme Court found the claims under various clauses of the contract case, and particularly Clause 18 of the General Conditions and Clauses 2.4.2(b) and 12.1.2 of the Special Conditions excepted matters and held that the same could not be referred to arbitration.

9. The proposition of law emphasized by Mr. Roy Chowdhury is undoubtedly unexceptionable. The question is whether the Arbitral Tribunal has, in fact, ignored the provisions of the contract altogether.

10. This Court, adjudicating an application u/s 34 of the 1996 Act, does not sit in appeal over the award. This Court may not consider the merits of factual findings unless such factual findings are perverse.

11. The Court can, in no circumstances, reassess evidence relied upon by the Arbitral Tribunal or substitute its opinion for the opinion arrived at by the arbitrators on the basis of materials on record. The impugned award made by an Arbitral Tribunal comprising of three senior, technically competent officials, is a reasoned award. There is no such apparent illegality in the reasoning, that calls for interference of this Court u/s 34 of the 1996 Act.

12. The petitioner has not questioned the factual findings of the Arbitral Tribunal, which the petitioner could not have, in any case, done in an application u/s 34 of the 1996 Act. The Arbitral Tribunal has on 1 consideration of the pleadings of the respective parties, the submissions made and the materials on record found that there was considerable delay in making over the site to the respondent.

13. The findings are supported by factual data and are upon consideration of evidence. The Arbitral Tribunal was, upon consideration of the contractual provisions, in the light of a circular of the Railway Board, of the view that escalation could be considered for the part of the work done during the extension period, after the first year.

14. Having arrived at the definite factual finding of delay in making over the site to the respondent for reasons not attributable to the respondent, the Arbitral Tribunal on its own interpretation of the provisions of the contract with the aid of relevant circulars, considered the claims of the respondent on account of escalation:

15. In arbitration proceedings, it is permissible for the Arbitral Tribunal to take recourse to departmental orders and circulars to interpret a term of the contract. That is exactly what has been done in the instant case. By recourse to a Government circular, the Arbitral Tribunal found that the restriction on price

variation would not apply to a case of extension of the period of the contract beyond one year.

16. The Arbitral Tribunal which, as observed above, comprised technical and financial experts, who are high ranking officials of the petitioner, took into account the fact that price variation clauses did not have application to contracts exceeding one year.

17. As observed above, there can be no dispute with the proposition enunciated in *ONGC v. Saw Pipes Ltd.* (supra) and in *General Manager, Northern Railways v. Sarvesh Chopra* (supra) that an arbitrator being a creature of agreement is bound by the terms of the agreement.

18. Where, however, the Arbitral Tribunal interprets a term of an agreement, having regard to the Government circulars which govern such contracts, there can be no question of interference of Court with such interpretation u/s 34 of the 1996 Act.

19. The next question is whether the learned arbitrators ought to have awarded interest in view of Clause 16, sub-clause (2) of the General Conditions of Contract of the petitioner. Clause 16(2) of the General Conditions of Contract provides as follows:

2. Interest on amounts.--No interest will be payable upon the earnest money or the security deposit or amounts payable to the contractor under the contract.

20. In *Secretary, Irrigation Department, Government of Orissa and others Vs. G.C. Roy*, , cited by Mr. Roy Chowdhury, a Constitutional Bench of the Supreme Court held that the arbitrator had power to grant pendente lite interest unless the agreement prohibited grant of interest.

21. Relying on the said judgment, Mr. Roy Chowdhury argued that the arbitrator had no power to grant Pendente lite interest in view of the bar of Clause 16(2) quoted above. The judgment in *G.C. Roy* (supra) was rendered in proceedings under the Arbitration Act of 1940 which has since been repealed by the 1996 Act.

Section 31 (7) of the 1996 Act provides as follows:

31(7) (a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral 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 made.

(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment.

22. In view of the express provision of section 31 (7)(a) of the 1996 Act, the

Interest Act can have no application to pendente lite interest in arbitral proceedings under the 1996 Act. The provisions of the special statute will prevail over the provisions of the general law relating to award of interest.

23. Clause 16(2) of the General Conditions of Contract has been considered by a Division Bench of this Court in Union of India (UOI) Vs. Pam Development Pvt. Ltd., . The Division Bench held as follows:

We are in agreement with the ratio of the judgments of this Court in the case of Board of Trustees for the Port of Calcutta v. Mahalakshmi Constructions (supra) and that of the Hon''ble High Court of Andhra Pradesh in the case of N.G. Gunani Vs. The Union of India (UOI) and Another, . In the present case, the interest prohibition clause admittedly was incorporated in the GCC, but not in the Arbitration Clause forming the Arbitration Contract. In our opinion, a plain reading of the contract does not reflect intention of the parties to denude the power of the Arbitrator to award interest. Clause 16(2) of the GCC has not been included in the list of excepted matters in Clause 63 thereof. It has also not been argued before us the issue of award of interest came within excepted matters. Accordingly, we are of the view that the interest exclusion clause should be held in the present case to be an embargo on the power of the appellant or its officers to award interest, but the Arbitrator''s power to award interest has not been curbed in the agreement.

24. Mr. Roy Chowdhury relied on an unreported judgment dated 7th May 2008 of a Division Bench of Hon''ble Mr. Justice Bhaskar Bhattacharya and Hon''ble Mr. Justice Rudendra Nath Banerjee in A.C. No.608 of 2005, APOT No.696 of 2005 (Union of India v. M/s. Budlani Engineering Pvt. Ltd.). It appears that, their Lordships differed with the view taken in Peon Developments (supra) and referred the question of law regarding the power of the arbitrator to award interest, notwithstanding Clause 16(2) of the General Conditions of Contract to a larger Bench. The award was, however, set aside on a different ground that is, the ground of a bar in the agreement, to the grant of damages. The issue is pending before a larger Bench.

25. On the issue of the power of an arbitrator to grant pendente lite interest, where there is a clause like section 16(2) of the General Conditions of contract, there are contrary decisions of this Court. Section 31(7) (a) is capable of more than one interpretation. It could be interpreted to mean that unless the arbitration clause expressly denuded the arbitrator of the power to decide the issue of interest, the arbitrator might grant interest, as done by the Division Bench in Pam Developments (supra).

26. Taking a pragmatic and justice oriented approach, the aforesaid interpretation is more acceptable than the interpretation suggested by the petitioners. The contractor cannot claim interest as of right. Interest may, however, be granted at the discretion of the Arbitral Tribunal. Where there is a slight delay, the Arbitral Tribunal might exercise its discretion not to grant

interest.

27. It would, however, be unfair and against all norms of justice to deny a person, wrongfully deprived of his dues for years who ultimately succeeds in arbitration, of *pendente lite* interest, even where delay in disposal of the arbitration proceedings is for reasons not attributable to him. Be it noted that unlike the 1940 Act, there is no time stipulation for the making of an award under the 1996 Act.

28. The award was published on 26th October, 2005 after delivery of judgment in *Pam Developments* (supra). There are also other earlier Division Bench judgments approving the view that Clause 16(2) of the General Conditions of Contract does not denude the arbitrator of power to grant interest. It is true that the arbitrator has not expressly referred to the decision in *Pam Development* (supra). However, if the arbitrator has proceeded on the basis of an interpretation of section 31(7) (a) which is in consonance with the view taken by different Division Benches of this Court, the award cannot, in my view, be interfered with.

29. If the arbitrator commits an error in construction of the contract or an error in construction of a statutory provision and makes an award that error is an error within jurisdiction, and cannot be interfered with. As observed in *ONGC v. Saw Pipes Ltd.* (supra), if the illegality is of a trivial nature, the award cannot be said to be against public policy. An award may be set aside, if the construction of a contractual provision is so unreasonable and unfair that it shocks the conscience of the Court.

30. Having regard to the reasoning of the Arbitral Tribunal, the award impugned is certainly not unconscionable. Rather the award is apparently just and fair. The award does not suffer from any such legal infirmity that calls for interference u/s 34 of the 1996 Act.

31. For the reasons discussed above, the application of the petitioner for setting aside of the award impugned dated 26th October, 2005 is dismissed.