
(2021) 04 J&K CK 0062

In the Jammu And Kashmir High Court

Case No : MA No. 138 Of 2007, IA No. 227 Of 2007

Union Of India & Ors

APPELLANT

Vs

Roshni Devi & Ors

RESPONDENT

Date of Decision : 21-04-2021

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 20, 30, 33, 41(a)
Code Of Civil Procedure, 1908 — Order 17 Rule 2

Citation : (2021) 04 J&K CK 0062

Hon'ble Judges : Javed Iqbal Wani, J

Bench : Single Bench

Advocate : Sandeep Gupta, Anil Mahajan

Final Decision : Dismissed

Judgement

1. The appellants herein through the medium of instant appeal challenge Judgment dated 31-05-2007 (for short impugned Judgment) passed by the Court of Additional District Judge, Jammu (for short court below) in case titled as Smt. Roshni Devi & Ors vs. Union of India & Ors.

Background facts:-

2. The background facts those stem out from the memo of appeal as stated therein reveal that a contract bearing No. CEJK-11/83-84 for providing the married accommodation to Officers at Udhampur was allotted to a contractor namely Vishnu Kumar Gupta (deceased predecessor in interest of the respondents herein) by the appellants herein.

3. It is being stated that the deceased signed the final bill on 07-10-1986 with a declaration that he had no further claims and that subsequently the said final bill was paid to the deceased contractor on 03-04-1987, where after receiving the same, the deceased contractor intimated the department vide

communication dated 14-07-1988, a statement of unpaid items of work with a claim appended to said communication which communication is stated to have been acknowledged by the appellants herein.

4. It is being further state that the said claims were refused by the appellants herein where upon the deceased contractor is stated to have approached

this Court while filing Arbitration Petition No. 302/1989 for appointment of an arbitrator under Section 20 of the Arbitration Act (for short the Act)

which is stated to have been dismissed by this Court vide Judgment dated 30-07-1990 on the ground of limitation. The said Judgment is stated to have

been assailed by the deceased contractor in an appeal before the Division Bench which appeal is stated to have been allowed vide Judgment dated 31-

03-1995 holding the Arbitration Petition filed by the deceased contractor under Section 20 to be within time.

5. It is being stated that as a consequence of the Judgment of the Division Bench dated 31-03-1995, the Arbitration Petition got revived and

transferred subsequently to the Court of District Judge, Jammu for adjudication.

6. It is being further stated that the Arbitration Petition came to be allowed by the District Judge, Jammu vide order dated 17-03-1997 directing the

Engineer-in-chief, Army HQ to appoint an arbitrator within one month who will enter upon the reference and make an award within the statutory

period of four months.

7. It is being further stated that the respondents herein filed a petition for appointment of new arbitrator before the Court of Additional District Judge,

Jammu which came to be resisted by the appellants herein on the ground that the arbitrator as per the directions of the District Judge, Jammu dated

17-03-1997 was appointed and delay was caused because of misrepresentation of claim by enhancing/modifying the claims from 7.89 lacs to 14.12

lacs by the deceased contractor.

8. It is being further stated that the Learned Additional District Judge, Jammu vide its Judgment dated 4-08-1997 disposed of the said petition directing

the parties to cause appearance before the arbitrator on 16-08-1997 and that the arbitrator shall make and publish the award within the statutory

period of four months.

9. It is being further stated that in pursuance to order dated 17-03-1997 passed by the District Judge, Jammu, the Engineer-in-chief vide letter dated

10-06-1997 appointed one Brig. G. R. Sud as an arbitrator who entered upon the reference and the parties submitted their claims and pleadings before him. The said Arbitrator is however stated to have resigned during the pendency of the arbitration proceedings vide his letter dated 28-11-1997 owing to his superannuation, whereafter it is being stated that one Brig.T. K. Mittal came to be appointed as a new arbitrator by the competent authority vide letter dated 10-03-1998.

10. It is being further stated that 21 claims were preferred by the deceased contractor totaling 7.89 lacs on 14-07-1988 which however, came to be subsequently enhanced by his alleged partner and attorney to 32 claims amounting to 14.12 lacs on 12-04-1997, after almost nine years, the first claim were submitted.

11. It is being next stated that the new arbitrator Brigadier. T. K. Mittal entered upon the reference on 25-03-1998 asking the parties to forward their confirmation of earlier submission of their claims before the previous arbitrator. The arbitrator is stated to have directed the parties on 26-05-1998 to comply with the order dated 25-03-1998 and is stated to have fixed the hearing of the case on 15-07-1998 in the office of Chief Engineer, Udhampur Zone, Udhampur.

12. It is being next stated that on 02-06-1998, notices were sent by the Arbitrator notifying that in case either party fails to attend hearing, he shall proceed with reference ex-parte.

13. It is being further stated that the Arbitrator on 24-06-1998 intimated the parties that the venue of hearing is changed from Udhampur to New Delhi. The said venue of hearing is stated to have got changed on the request of the deceased contractor. The hearing of the case is stated to have been fixed on 15-07-1998 and 16-07-1998. It is being stated that the Arbitrator finally passed the award on 24-07-1998.

14. It is being further stated that the respondents herein filed a petition for appointment of an independent arbitrator before the Court of Additional District Judge, Jammu on 24-12-1997 which came to be dismissed on 21-10-1998 with the direction to the Arbitrator to comply with order dated 04-08-1997.

15. It is being further stated that the respondents herein aggrieved of the award dated 24-07-1998 filed a petition under Section 30/33 of the Act for

setting aside of the same before the Court of Additional District Judge, Jammu in response to which the appellants here in are stated to have filed

objections. Issues are stated to have been struck therein the said petition and the Court of Additional District Judge, Jammu is stated to have passed

the Judgment dated 31-05-2007 being impugned in the instant appeal.

Grounds of challenge: -

The impugned Judgment is being challenged inter-alia amongst others on the ground that the same is against the facts of the case and law on the point

inasmuch as that the findings of the Court below are misplaced in so far, the Court below held the arbitrator to have misconducted himself while

passing the award. The Court below is also stated to have proceeded on surmises and conjectures while holding that the award is antedated. The

Arbitrator is stated to have neither misconducted himself nor in the proceedings. The Court below is stated to have passed the impugned Judgment on

findings being misplaced, erroneous and contrary to the record. The arbitrator is stated to have given ample opportunities to the claimants/respondents

herein for appearing and arguing the case. The court below is stated to have overlooked order XVII Rule 2 of Code of Civil Procedure inasmuch as

Section 41 (a) of the Arbitration Act. The arbitrator is stated to have fully complied with the principles of natural justice while adjudicating the dispute.

The findings of the court below in this regard are stated to be erroneous, contrary and misplaced.

16. Heard learned counsel for the parties and perused the record.

17. Learned counsel for the appellants while making submissions reiterated the contentions raised and grounds urged in the memo of appeal whereas

learned counsel for the respondents resisted and controverted the contentions raised and grounds urged by the counsel for the appellants.

18. Before proceeding to advert to the controversy involved in the appeal, perusal and examination of record becomes imperative.

19. Perusal of the record reveals that upon award of the contract in question to the deceased contractor, dispute seemingly arose with respect to the

payment of bill in respect of the contract work which initially related to 21 claims submitted by the deceased contractor amounting to Rs. 7.89 lacs and

subsequently to 34 claims submitted by legal representative and attorney holder of the deceased contractor amounting to Rs. 14.12 lacs.

20. Perusal of the record further reveals that for resolution of said disputes a petition under Section 20 of the Act came to be filed before the court of

District Judge, Jammu, by the deceased contractor in view of clause 7 of the general conditions of contract resulting into passing of an order dated 17-

03-1997 by the said court directing Engineer-in-chief, Army HQ New Delhi to appoint an arbitrator within one month who shall enter upon the

reference and make an award within four months and submit the same before the said court.

21. Further perusal of the record reveals that pursuant to order dated 17-03-1997 Brig. G. R. Sud came to be appointed as an arbitrator by the

Engineer-in-chief vide letter dated 10-06-1997 and after entering upon reference, during the pendency of the arbitration proceedings the said arbitrator

superannuated and consequently submitted his resignation vide letter dated 28-11-1997 resulting into appointment of another arbitrator namely Brig. T.

K. Mittal by the Engineer-in-chief vide letter dated 10-03-1998 which letter had been accompanied with the statement of claims and counter claims of

the parties. The said arbitrator after entering upon the reference has further directed the parties to submit their claims and counter claims latest by 25-

04-1998.

22. Further perusal of the record reveals that after the resignation of the first arbitrator Brig. G. R. Sud, another petition had been filed by the

claimants in the Court of Additional District Judge, Jammu for appointment of arbitrator which came to be decided on 21-10-1998 by the said court

directing the second arbitrator Brig. T. K. Mittal to comply with the court order dated 04-08-1997 passed in file No. 3/Misc. of the Court of Additional

District Judge, Jammu wherein it had been directed that it would be well within the rights of the parties to add or modify their claims and counter

claims before the arbitrator of course restricting it to the matter in controversy i.e., with regard to contract CEJK-11/83-84 and that it would be well

within the competence of the parties or their counsel to raise the controversy regarding the additional claims of the petitioner.

23. Perusal of the record further reveals that arbitrator passed an award on 24th July, 1998 which came to be challenged by the claimants/respondents

herein before the court below inter-alia on multiple grounds fundamentally on the ground that the arbitrator misconducted himself and the proceedings

inasmuch as failed to adhere to the orders of this Court dated 21-10-1998 and that no opportunity of hearing was granted to the deceased

contractor/claimants/respondents herein, by the arbitrator.

24. Further perusal of the record reveals that the court below struck four issues in the proceedings supra wherein the fundamental and moot point

being as to whether the arbitrator has misconducted himself and in the proceedings.

25. Further perusal of the record reveals that while considering the matter set up before it by the parties, the court below noticed following facts;

â??Brig. T. K. Mittal, after entering upon the reference, fixed the date of hearing on 15-07- 1998 in the office of Chief Engineer,

Udhampur Zone vide letter dated 02-06-1998. Thereafter, he sent telegram dated 24-06-1998 to both the sides changing the place of venue

from Udhampur to Delhi and as also informing them the dates of holding the hearing. In reply the claimants sent him a letter averring

therein that their counsel is not available on the said dates and he would be available in the 1st to 3rd week of August preferably at New

Delhi vide letter dated 02-06-1998.

Letter dated 11-06-1998 sent by Commander Works Engineer (authorized person) to the Arbitrator reveals that said Commander had made

a representation that the hearing fixed at Udhampur is more suitable at Udhampur and the date of hearing may be altered and fixed after

14th July, 1998.

Vide letter dated 29-06-1998 claimants requested the arbitrator to decide the issues put before him in their correspondence and again

requested him to adjourn the arbitration proceedings to 3rd week of August on the ground of non-availability of their advocate due to

illness in the family.

Thereafter the Chief Engineer through telegrams dated 3rd July informed the arbitrator that it is not possible due to administrative reasons

for him to leave the station and their legal counsel is not available on 15th /16th July, 1998. The hearing be postponed and fixed at

Udhampur or Jammu on any suitable date between 20th July to August 10th and the other party has also been informed about the same. In

reply the arbitrator disallowed the request of the postponing of hearing of the

case vide telegram.

The telegram sent by the Union of India were confirmed by letter dated 11-07-1998. Thereafter the Union of India vide letter dated 13th

July, 1998 sent communication to the arbitrator that they will attend the hearing fixed for 15th/16th July, 1998 in Delhi. This letter was filed

before the arbitrator on 15-07-1998 and the copy was sent to the objector thereafter as nobody appeared for the objectors before the

arbitrator on the dates so fixed.

The record of attendance in the office of Arbitrator of 15th and 16th July, 1998 reveals that nobody appeared for the Contractor. The

telegram sent by claimants to the arbitrator seeking adjournment of the hearing and also informing him that they are unable to attend the

hearing on 15-07-1998 and as also to resolve the three issues raised by them is also on record and the Post Offices stamp shows it to be 11-

07- 1998.

However, the Award makes it clear that the Arbitrator considered the stand/arguments of the Contractor and thereafter gave his decisions

on the claim. However, he did not consider the additional claims sought to be raised by the claimants and did not adhere to the court orders

dated 04-08-1997 and 21-10-1998 and no pleadings were filed before the arbitrator by either party.â??

26. Having regard to the aforesaid factual position in general and the supra in particular as noticed by the court below not being denied by either of the

parties, this court intends to deal with the fundamental and primary issue as to whether the arbitrator denied an opportunity of hearing to the

claimants/respondents herein resulting into passing of the ex-parte award and in the process thus mis-conducted himself and in the proceedings

27. The date of hearing fixed by the arbitrator on 15th and 16th July, 1998 seemingly have been effective dates of hearing fixed by the arbitrator and

thus the parties ought to have been given a fair and reasonable opportunity to represent their respective case, by the arbitrator. However, as has been

noticed in the preceding paras upon perusal of the record, the arbitrator has proceeded to conclude the proceedings in absence of the

claimants/respondents herein overlooking the facts that an adjournment motion much earlier the dates fixed had been laid not only by the

claimants/respondents herein but also by the appellants as well though initially sought adjournment qua the dates fixed by the arbitrator viz 15th and

16th July, 1998 with an intimation to the claimants/respondents herein as well yet participated in the proceedings in pursuance to a subsequent

motion/letter addressed to the arbitrator though with an intimation to the claimants/respondents herein on 15th August, 1998 i.e., the date of hearing

fixed by the arbitrator. The claimants/respondents herein admittedly had not been present either themselves or through their counsel before the

arbitrator on the said dates.

28. Herein it would be advantageous and appropriate to refer to a Division Bench Judgment of the High Court of Calcutta titled as

â??Juggilal Kamlapat Appellants vs. General Fibre Dealers, Ltd. Respondentsâ?? reported in AIR 1955 Calcutta 354 wherein following has

been noticed and observed:

â??the question as to the right of an arbitrator to proceed ex-parte and the effect of his doing so when he does not issue a notice that he

would proceed in the absence of any party who would fail to attend on the date of hearing has been discussed in â??Russell on

Arbitrationâ?. In the fifteenth edition of the book, the discussion is to be found at pages 144 and 145. It appears from the four decisions to

which I have already referred and the statement of law in Russell that the procedural rule applicable to arbitration proceedings is more

tolerant than the rule followed in Courts of Law. Broadly stated, the principles which govern the matter are the following. If a party to an

arbitration agreement fails to appear at one of the sittings, the arbitrator cannot not or, at least ought not to, proceed ex-parte against him

at that sitting. Wherein such a case it does not appear that the non-appearance was anything but accidental or casual, the arbitrator ought

ordinarily to proceed in the ordinary way, fixing another date of hearing and awaiting the future behavior of the defaulting party. If, on the

other hand, it appears that the defaulting party had absented himself with a view to preventing justice or defeating the object of the

reference, the arbitrator should issue a notice that he intends at specified time and place to proceed with the reference and that if the party

concerned does not attend, he would proceed in his absence. But if after making

such peremptory appointment issuing such a notice the arbitrator does not in fact proceed ex-parte on the day fixed, but fixes another subsequent date, he cannot not proceed ex-parte on such subsequent date, unless he issued a similar notice in respect of that date as well. If he issues a similar notice and the party concerned does not appear, an award made ex-parte will be in order. But, if he does not issue such a notice on the second occasion but nevertheless proceeds ex-parte, the award will be liable to be set aside in spite of a notice of peremptory hearing having been given in respect of the earlier date, subject however to the condition that prejudice was caused to the party against whom the ex-parte order was made.â??

29. A further reference to the Judgment of the Apex Court passed in case titled as â??Food Corporation of India vs. Joginder pal Mohinder pal &

Anr.â?? reported in 1989 (Vol. 2) SCC 347 would as well be advantageous being relevant and germane herein wherein following has been noticed;

â??We should make the law of arbitration simple, less technical and more responsible to the actual realities of the situation, but must be

responsive to the canons of justice and fair play and make the Arbitrator adhere to such process and norms which will create confidence,

not only by doing justice between the parties, but by creating a sense that justice appears to have been done.â??

30. In the light of the aforesaid facts, circumstances inasmuch as the legal position supra this court agrees with the view taken by the court below in

impugned Judgment and is of the considered opinion that the arbitrator has failed to provide a reasonable opportunity of hearing to the

claimants/respondents herein while conducting arbitration proceedings in question culminating into passing of award dated 24-07-1998 and in the

process thus having misconducted himself and the proceedings.

31. The court below having noticed all these facts has rightly drawn the conclusions in the impugned Judgment that the arbitrator has misconducted

and has thus rightly set aside the award and passed the impugned order within the para-meters and principles of law occupying the field.

32. The other grounds of challenge urged in the appeal in hand by the appellant in view of aforesaid analysis need not to be dealt with or deliberated

upon, in that, same as such pales into insignificance.

33. Viewed thus, what has been observed, analyzed and considered herein above, the appeal entails dismissal and is accordingly dismissed as a result whereof the Judgment dated 31-05-2007 passed by the court below is upheld.