

(2010) 05 CAL CK 0018

In the Calcutta High Court

Case No : APO No. 35 of 2010 and A.C. No. 3 of 1999

Union of India (UOI) and Others

APPELLANT

Vs

Sukbrinder Singh Atwal

RESPONDENT

Date of Decision : 06-05-2010

Acts Referred:

Arbitration Act, 1940 — Section 11, 12, 30, 33, 5

Arbitration and Conciliation Act, 1996 — Section 11, 16

Citation : 114 CWN 804

Hon'ble Judges : Kalidas Mukherjee, J; Ashim Kumar Banerjee, J

Bench : Division Bench

Advocate : D.D. Purkayastha, D.N. Sharma, Deepak Kumar Singh, Anshar Mondal and Vikas Baisya, for the Appellant; Ajoy Krishna Chatterjee and Bijan Majumdar, for the Respondent

Judgement

Ashim Kumar Banerjee, J.—Short question involved in this appeal is whether the appellant is entitled to raise a belated plea of jurisdiction of the arbitrator in view of Clause 64(3)(a)(iii) of the general conditions of contract which specifically provided that the arbitration could only be done through gazetted railway officers and nobody else.

2. The parties entered into an agreement for execution of specified jobs stipulated in the work order. The contract was entered into in 1973 which was to be completed by October 31, 1974. Admittedly, work could not be completed within the said period. The parties blamed each other for the delay. Fact remains, time was extended without imposition of any penalty upon the respondent. After completion of the work, final bill was prepared and paid. The respondent thereafter lodged a claim principally on the issue of escalation of price caused due to delay and idle labour cost and other expenses as well as business loss on account of delay. The railway raised dispute. Joint arbitrators were appointed being two railway gazetted officers. The parties filed their respective claims before the joint arbitrators. For some reason or the other the arbitrators could not conclude the arbitration which resulted in an application for revocation of

their authority u/s 5, 11 and 12 of the said Act of 1940. The learned single Judge vide judgment and order dated July 31, 1991 revoked the authority of the joint arbitrators and appointed Mr. Shibdas Banerjee, a senior advocate of this Court to act as sole arbitrator. The order was passed in presence of the learned advocate for the appellants. On perusal of the order appearing at page 17 of the paper book it does not appear that the appellants ever raised any objection with regard to appointment of Shri Banerjee. The appellants did not prefer any appeal from the said order as we are told. Shri Banerjee entered upon reference and concluded the arbitration proceedings by publishing his award appearing at pages 248-269 of the paper book. The appellants challenged the said award dated September 2, 1998 through an application made u/s 30 and 33 of the said Act of 1940. Perusal of the said application appearing at pages 1-14 reveals that the appellants were aggrieved as the arbitrator ignored the plea of limitation taken by the appellants. The arbitrator also failed to appreciate the effect of Clause 17(3) of the general conditions of contract which forbids payment of any compensation in the event of any failure or delay on the part of the railway in handing over the site to the contractor. According to the appellants, in view of the "no claim certificate" issued by the respondent, there could not have been any claim as ninety six final bills were duly paid as produced at the twelfth sitting of the arbitration. The learned arbitrator also ignored the schedule of rates. The respondent opposed the application by filing affidavit. The learned single Judge heard the parties on the said application and ultimately dismissed the same by holding it meritless. The learned Judge vide judgment and order dated October 22, 2009 appearing at pages 280-290 held that conjoint reading of Section 11 and 12 empowered the Court to remove an arbitrator or an umpire and appoint another person to act as sole arbitrator. The agreement between the parties could not override such express provision of the statute. His Lordship further observed that the appellants duly accepted and acted upon the order dated July 31, 1991 which assumed finality. His Lordship further observed that the appellants never objected to the authority of Shri Banerjee to act as arbitrator. His Lordship observed that the Court of law derived jurisdiction from statute which could not have been overridden by any private agreement.

3. On the plea of limitation His Lordship held that the issue of non-payment was kept alive till June 10, 1998 when the final bills were yet to be settled. Considering such fact His Lordship held that the claim was not barred by limitation. His Lordship also held that the scope of interference u/s 30 and 33 was limited and the Court was not competent to sit on appeal over the award of the arbitrator unless there was any apparent error. Merits of the findings of the arbitrator were not available for challenge in absence of sufficient grounds. His Lordship dismissed the writ petition.

4. Being aggrieved, the appellants preferred the instant appeal. We heard the parties on the above mentioned date.

5. Mr. D.D. Purkayastha, learned advocate appearing for the appellants

addressed us mainly on the plea of jurisdiction. According to him, the Clause 64(3)(a)(iii) clearly stipulated that no person other than a railway gazetted officer could act as an arbitrator. Such unfettered clause in the agreement was binding upon the parties and would make the subject award void. If such arbitration was held by any person other than the person specified in such Clause, according to Mr. Purkayastha, the award would be void and a nullity and would not be enforceable in law irrespective of whether the appellants contemporaneously raised any objection or not. He contended that at any stage the plea of jurisdiction could be taken. According to him, consent of the parties could not confer jurisdiction over Court. The Court was obliged to honour the agreement. Agreement stipulated arbitration only through railway gazetted officers. Hence, the Court could not have appointed any other person and award passed by any non-railway person would be void and not enforceable in law. Since the claim exceeded Rs. 5 lacs the arbitration could only be held by two arbitrators and not single one. He further contended that the Chief Engineer was party to the contract who was never made party before the learned single Judge while praying for revocation of authority. Hence, the said order was bad in law.

6. In support of his contention Mr. Purkayastha relied on the following decisions:

- i) New Delhi Municipal Committee Vs. Kalu Ram and Another,
- ii) Harshad Chiman Lal Modi Vs. DLF Universal and Another,
- iii) Moran M. Baselios Marthoma Mathews II and Others Vs. State of Kerala and Others,
- iv) Rajasthan State Road Transport Corporation and Another Vs. Bal Mukund Bairwa,
- v) Sneh Gupta Vs. Devi Sarup and Others,
- vi) Union of India (UOI) and Others Vs. Onkar Nath Bhalla and Sons, Page 350

7. Opposing the application Mr. Ajoy Krishna Chatterjee, learned senior advocate contended that the order of revocation of authority attained finality when the appellant did not choose to challenge the said order before the higher forum. They submitted to the jurisdiction of the learned arbitrator. Once the award went against them, the appellants were not entitled to question the same raising the plea of jurisdiction.

8. To support his contention Mr. Chatterjee relied on the decision reported in K.N. Sathyapalan (Dead) by LRs. Vs. State of Kerala and Another,

9. To appreciate the point in controversy let us understand the provisions of law.

10. The following decisions of our case, although not cited by the parties, being relevant herein, are referred to:

- i) Union of India v. Builders Corporation Private Limited 2009 4 CHCN 252

ii) Niraj Kumar Bohra v. Union of India All India Reporter 2009 Calcutta Page 59

iii) Union of India v. Pam Development Pvt. Ltd. 2008 112 CWN 162

11. The core issue, as suggested above, was discussed by two Division Benches in the case of Union of India v. Builders Corporation Private Limited (Supra) and Niraj Kumar Bohra v. Union of India (Supra). In both the said cases, the award was published under the new Act whereas the case, in hand, relates to the old Act being the Act of 1940 which is, perhaps, covered by the other Division Bench decision in the case of Union of India v. Builders Corporation Private Limited (Supra) wherein the Division Bench negated identical contention of the Railways made therein.

12. The Clause in the arbitration agreement referred to above is stipulated in the agreement for a long time. The said clause was prevalent during the period when the said Act of 1940 was in force. The said Clause continued to be prevalent when the Arbitration and Reconciliation Act, 1996 came into force. We are in full agreement with the two Division Benches in the case of Builders Corporation Private Limited (Supra) and Niraj Kumar Bohra (Supra). It is true that the parties conferred jurisdiction on the arbitrator by agreement. The agreement admittedly stipulated that there could not be any arbitration by any individual other than a gazetted railway officer. Hence, an advocate of this Court could not have been appointed as arbitrator. If we stop there the award itself would go as an obvious consequence.

13. If we look to the case in hand we would find that initially joint arbitrators were appointed who were Railway Officers. Their authorities were revoked by the Court u/s 5, 8, 11 and 12 of the said Act of 1940. Once such authority was revoked the Court was empowered to appoint an independent arbitrator. The Court accordingly appointed an advocate of this Court as sole arbitrator. The Railways did not raise any objection before His Lordship to the extent that soon after revocation of the authority of the joint arbitrators, the Court was competent only to appoint new arbitrators from amongst the railway officers and nobody else. Such argument was not advanced as we find from the order passed by the learned single Judge while appointing the sole arbitrator. Assuming such plea was taken, once the learned Judge did not consider such submission the railways should have approached the Division Bench in an appeal and maintained their grievance contemporaneously. They did not do so. They allowed the arbitrator to function, permitted him to publish an award and then objected and questioned his authority when the award went against them. Such conduct, in our view, did not and could not have any support of law under the old Act of 1940. Once the order appointing sole arbitrator attained finality there could not be any scope to reopen such issue, more particularly when the railways invited the arbitrator to decide on merit by appearing before him and arguing the matter on merit. Once the award went against them they were not competent to raise such issue which would be hit by principle of res judicata. The learned Judge was right on that score.

14. Situation in the case of Niraj Kumar Bohra (Supra) or the Builders Corporation (Supra) was some what different. There, similar plea was taken. It was negated by the Court. In the case of Niraj Kumar Bohra the plea was taken at the forty-fourth sitting of the arbitration. The Division Bench held that such plea was valid and the award could not be sustained. The Division Bench held so in view of clear provision of Section 16 of the said Act of 1996 which was absent in the said Act of 1940. Section 16 gives power to the arbitrator to rule on his jurisdiction. It further gives right to the unsuccessful party to raise such plea again at the time of making application for setting aside of the award if he so likes.

15. The learned single Judge in the case of Pam Development (Supra) held that the doctrine of quorum non juris would not be applicable in the case of an arbitration as the arbitrator derives jurisdiction by agreement of parties. The logic is accurate. However applicability of such ratio would depend on the backdrop of each case. If a party to the arbitration agreement raised contemporaneous objection with regard to an appointment of non-railway arbitrator, in our view, he would be entitled to succeed on that score both under the old law as well as under the new law. The new law only extends his right up to the stage of setting aside of the award. Such extension is, however, not available under the old law. If we closely look to the provisions of Section 16 of the said Act of 1996 we would find that the intention of the legislature was to caution the party that he must raise such plea at the earliest opportunity. If he is unsuccessful therein he is entitled to raise such plea again and again till the award is not set aside. In the case of Niraj Bohra (Supra) the plea was taken before the arbitrator at the forty-fourth sitting. The arbitrator ignored such plea. Hence, the Division Bench was right in setting aside the award as there was no agreement between the parties to the extent of appointment of non-railway arbitrator. In the case of Bohra (Supra) as well as Builders Corporation (Supra) the other party contended that once the railways failed to appoint arbitrator the Chief Justice was entitled to appoint arbitrator in terms of Section 11 of the new law being the said Act of 1996. Such plea was perfect. However, the scope of the Hon'ble Chief Justice was limited to the extent that His Lordship would have to appoint arbitrator in terms of the agreement. The agreement provides that arbitrator must be a railway gazetted officer. Hence, Chief Justice was not entitled to appoint any person other than a gazetted railway officer which would be beyond the agreement. Hence, we do not find any conflict between Niraj Kumar Bohra (Supra), Builders Corporation (Supra) with Pam Development (Supra).

16. We thus hold that the plea taken by the railways pertinent to Clause 63 is not tenable and as such is rejected.

17. Let us now come to the merits of the matter. On perusal of the application made u/s 30 and 33 of the said Act of 1940 we find that the appellant raised the plea of Clause 17(3) of the general conditions of contract which had forbidden

payment of any compensation in the event of failure or delay on the part of the railways in handing over the site to the contractor. We further find that the claims were made despite such Clause under claims Nos. 1, 2 and 3 and those were partly allowed by the arbitrator without assigning appropriate reasons. The learned single Judge observed that the Court should not sit on appeal over the merits of the finding of the arbitrator unless there was any apparent error. We record our full approval of such abstract proposition of law. We are also aware that Court is not competent to find out sufficiency of reasons. Under the old Act of 1940 the arbitrator was also not bound to disclose reason and to pass a reasoned award. However, once the arbitrator assigned reasons, the Court in our considered view, was entitled to find out the logic behind it with the limited scope as discussed above. In this backdrop if we look back to the award we would find that the claim Nos. 1, 2 and 3 were made to the extent of Rs. 4,80,421/-; Rs. 1, 20,000/- and Rs. 20,8,950/- respectively. These amounts were claimed on account of loss of infrastructure expenditure towards establishment such as labours, staff, transport etc. for delayed issue in work order for the period August 18, 1973 to December 1975. The learned arbitrator did not discuss Clause 17(3) as to why it would not be applicable. The learned arbitrator merely pointed out that there had been delay on the part of the railways in handing over the contractual site or issuing work order. No reference was made to the evidence laid, if any, on that score. What the arbitrator did, was, as we find from the award, to make a summary of the pleadings filed by the respective parties and then reject contentions of the railways by a sweeping observation that no evidence was led that the final bills were prepared and the claimant had given final certificate to the effect that he had no further claim and that the railways had at no stage come out with a clear case that the claims made by the claimant were not payable.

18. There is one more salient feature as we find from the award. The claims were partly allowed under the three heads referred to above without assigning reasons as to why it was reduced and what was the basis of such reduction.

19 Had it been a total non-speaking award our hands would have been tied by the precedents decided by the Apex Court settling the proposition of law to the effect that non-reasoned award under the old Act of 1940 could not be touched by the Court of Law. Here the arbitrator passed a reasoned award. Hence we are entitled to examine the same as discussed hereinbefore. We find no evidence in support of the part of the claim under claim Nos. 1, 2 and 3. The learned Judge, in our view, should have properly examined the issue particularly when the railways specifically took the plea of Clause 17(3) in their application for setting aside of the award.

20. In our view, this part of the award cannot be sustained and should be remitted back to the arbitrator for being considered afresh.

21. The decision in the case of K.N. Sathya Palan (Supra) is a complete answer to Mr. Purokayastha's contention that Clause 17(3) would have no application if

the arbitrator ultimately finds that there has been a breach on the part of the railways in handing over the site to the contractor within the stipulated period. The Apex Court in a given case observed. "ordinarily the parties would be bound by the terms agreed upon in the contract, but in the event one of the parties to the contract is unable to fulfil its obligations under the contract which has a direct bearing on the work to be executed by the other party, the arbitrator is vested with the authority to compensate the second party for the extra costs incurred by him as a result of the failure of the first party to live up to its obligations". We however feel that the arbitrator should come to such a conclusion upon consideration of the relevant facts, if any, came out through evidence or pleadings before him. Such attempt, in our view, was a prerequisite before allowing the claim Nos. 1, 2 and 3.

22. The decisions in the case of Sneh Gupta (Supra) and Moran M. Baselios Marthoma Mathews (Supra) were cited by Mr. Purokayastha to support his contention that the plea of jurisdiction could be taken at any stage. In our view these two decisions of the apex Court did not and could not have any bearing in the case in hand before us. Here not only the plea was not taken contemporaneously but also the railways invited the arbitrator to adjudicate the dispute on merit by submitting to his jurisdiction. Hence, the right, if any, of the railways to take the plea of jurisdiction of the arbitrator stood waived. In other way once the parties by agreement and by their conduct invited the arbitrator to decide on the controversy on merit such decision could not be assailed, at least under the old law, afterwards on the plea of jurisdiction. Mr. Purokayastha relied on the latest Apex Court decision in the case of Union of India and Others v. Onkar Nath (Supra). It was a case under the new Act of 1996 where a belated plea could be considered because of the reasons discussed above. This decision, in our view, could not have any effect herein. In the case of Rajasthan State Road Transport (Supra) the Apex Court considered the provisions of the Industrial Disputes Act which specifically ousted the jurisdiction of the Civil court. We are unable to find out as to how these decisions could have any bearing on the present issue.

23. In the case of Harshad Chiman (Supra), the Apex Court observed, the jurisdiction of a Court was derived from the statute and not by agreement. hence, it would have no effect on the present controversy.

24. The decision in the case of New Delhi Municipal Committee (Supra), was cited on the issue of limitation. The learned Judge already held that the arbitrator considered the issue of limitation. Such decision, being a decision on mixed question of fact and law, in our view, was not open to judicial review. In an application under 30 and 33 of the said Act of 1940 the learned single Judge very rightly did not reopen such issue.

25. The appeals succeed in part. The judgment and order of the learned Single Judge is set aside to the extent which allowed the award in respect of claim Nos. 1, 2 and 3.

26. The award dated September 21, 1998 filed on January 15, 1999 published by the sole arbitrator in the instant case is set aside in respect of claim Nos. 1, 2 and 3. The matter is remanded back to the arbitrator on the limited scope with a direction that he would consider claim Nos. 1, 2 and 3 upon hearing the parties afresh and upon giving opportunities to the parties to adduce oral and documentary evidence in support of their pleadings. Needless to mention, the arbitrator must pass a reasoned award. The entire process must be completed within a period of four months from the date of entering of reference by the arbitrator. We expect that the arbitrator would enter upon reference as soon as this order is served upon him.

27. The arbitrator would be entitled to his remuneration and expenses as per the original direction contained in the order appointing him as sole arbitrator.

28. The appellant deposited a sum of rupees twenty lacs with the Registrar, Original Side of this Court. The money was directed to be kept in fixed deposit by the Registrar. The Registrar should encash the said fixed deposit, if not matured in the mean time. The Registrar upon being satisfied with the compilation of the balance claim would pay to the respondents the awarded amount barring claim Nos. 1, 2 and 3 together with interest as directed therein and approved by the learned single Judge. The Registrar before making payment must verify the amount upon notice to the appellants. Upon such payments being made if any excess sum is found lying with the Registrar the same may be reinvested under the same terms and conditions and would be held till the arbitrator passes his award in terms of the order passed herein.

29. The appeal is thus disposed of without any order as to costs.

30. Urgent xerox certified copy would be given to the parties, if applied for.

Kalidas Mukherjee, J.

31. I agree.