

(1980) 12 CAL CK 0004
In the Calcutta High Court
Case No : Appeal No. 327 of 1975

Union of India (UOI)

APPELLANT

Vs

Badridas Kedia

RESPONDENT

Date of Decision : 24-12-1980

Acts Referred:

Arbitration Act, 1940 — Section 15

Citation : AIR 1981 Cal 341

Hon'ble Judges : Ramendra Mohan Datta, J;B.C. Basak, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Ramendra Mohan Datta, J.—The appeal arises from the judgment and order of S. K. Roy Chowdhury, J. dated Dec. 24, 1974 in an application for setting aside the award dated May 4, 1973 and for referring the dispute to an arbitrator to be appointed by the Court. The award was passed for a sum of Rs. 5,091/- by the arbitrator. The learned Judge exercised powers u/s 15(b) and (c) of the Arbitration Act, 1940 and modified the award by changing the figure from Rs. 5,091/- to Rupees 10,181.07 and passed judgment in accordance with the said modification and correction. A decree was passed on the enhanced amount with interest.

2. The facts relevant to this appeal are that by an agreement entered into in or about 1956/57 the respondent was entrusted with certain construction works of the South Eastern Railway. By letter dated September 30, 1961 the respondent requested the General Manager, South Eastern Railway to appoint an arbitrator for adjudication of disputes relating to their claims. Pursuant thereto the General Manager, South Eastern Railway communicated his appointment of K. P. Modwell as arbitrator in terms of the arbitration agreement contained in the said contract. Statements and counter-statements were filed and an interim award was made by K. P. Modwell in favour of the respondent on June 10, 1967. Thereafter, on February 12, 1968 the respondent wrote to the District Engineer, Rourkela as

follows:--

"Dear Sir,

A sum of Rs. 10,181.07 p. is lying in special deposit with the F. A. & C. A. O. Bilaspur. We shall, therefore, be obliged if you kindly arrange to refund of the said amount as there is no outstanding amount due from us to the Railway on account of agreement No. 203/CON/SER/56.

Thanking you."

By letter dated March 20, 1968 on behalf of the General Manager the said arbitrator K. P. Modwell was informed as follows:--

"Dear Sir,

Sub. : Arbitration of claims and disputes between Badridas Hanuman Bux v. Union of India (S. E. Railway) under Act No. 203/CON/SER/56.

Ref.: Arbitration hearing dated 8-3-1968. As you are aware, in the concluding Arbitration hearing in the abovementioned case held in Calcutta on 8-3-1968 the contractors pressed for an early refund of the sum of Rupees 10,181.07 p. stated to have been held by the Railway in "Special Deposit Account". The matter has since been examined as directed by you during the hearing and it is seen that the recoveries effected in this regard are pretty old pertaining to the periods as far back as 1959-60 and it will therefore, take some time to ascertaining the full details of the recovery and to arrange refund, if any to the contractors. It may however, be pointed out that this item is not under dispute and has not been referred to you for adjudication. As such, the issue is proposed to be settle directly with the contractor.

YOURS Faithfully. Dy. F. A. & C. A. O. (ARBN) for General Manager.

Copy to M/s. Badridas Hanuman Bux. Contractors, 75 Station Road, Ranchi, Bihar for information. They are requested to contact F. A. & C. A. O. (Con) S. E. R. Bilaspur regarding release of the amount of Rupees 10,181.07 p. and pursue the matter with him. This has reference to their letter No. RD/ AR/13 dated 12-3-1963 with which a copy of the Certificate Officer. Bonai's letter No. 333(3)/ Genl. dated 10-9-1963 was sent.

For General Manager."

3. From the aforesaid communication it will appear that the question of refund of Rs. 10,181.07 p., which is the subject-matter of the present dispute herein, had not been referred to the arbitrator Modwell for adjudication and the same was taken out of the purview of the said reference. The same was to be settled directly with the contractors and direction was accordingly, given as was communicated in the said letter. Thereafter on July 12, 1968 Modwell made a final award. The said award is set out as follows:--

"Whereas the disputes arose between the Union of India represented by General

Manager, South Eastern Railway, Garden Reach, Calcutta and M/s. Badridas Hanuman Bux, Ranchi in connection with the agreement referred to me for arbitration and whereas the disputes are contained in statement of claims, counter-statement, additional statement of claims and additional counter-statement as well as other additional papers submitted before me.

Now. I. K. P. Modwell after carefully considering all facts and arguments and papers submitted before me by the parties, hereby give my "Final Award" as follows:--

(i) That the Union of India represented by the General Manager, South Eastern Railways, Calcutta pay to M/s. Badridas Hanu-man Bux, Ranchi a further sum of Rupees 3,62,140/- (Rupees three lacs sixty-two thousand one hundred forty) only in full and final satisfaction of all claims of either parties, this award being in addition to the sum of money already awarded under the Interim Award dated 10-6-1967." (ii) That each party bear its own costs of or incurred in connection with the arbitration proceedings.

Sd/- K. P. Modwell Sole Arbitrator."

4. From a perusal of the said award it appears that the arbitrator took into consideration not only the statement of claims filed before him but also the additional other papers which included the said letter dated March 20, 1968. It further appears that by his final award the respondent became entitled to the said sum of Rs. 3,62,140/- in full and final satisfaction of all claims of either parties in addition to the sum already awarded by the interim order dated June 10, 1967. It follows, therefore, that the items of recoveries which were made the subject matter of the said reference were all considered and decided by the arbitrator save and except the claim by way of refund of the said deposit money.

5. Thereafter the dispute arose with regard to the said sum of Rs. 10,181.07 p. sometime in 1972 and the Union of India not having appointed the arbitrator the respondent made an application u/s 20 of the Arbitration Act, 1940 in Special Suit No. 2 of 1972 (Badridas Kedia v. Union of India).

6. Paragraphs 5, 6, 7, 8 and 9 of the said petition read as follows:

"5. Out of the amounts claimed and/or disputed items in the said arbitration proceedings a sum of Rs. 10,181.07 admitted by the defendant as being held in a "special deposit account" was declared by the defendant as not in dispute and therefore outside the scope of the said arbitration proceedings. Upon such representation and/or assurance made before the said arbitrator and indicated in the correspondence of the defendant, the said dispute or claim was kept out of the scope of the said arbitration proceedings. Copies of letters relating to this matter commencing from the General Manager's letter dated March 20, 1968 and various replies or demands in respect thereof are annexed hereto and collectively marked "A"."

"6. By various devices and/or pretexts which appear expressly and/or by

implication in the letters from the defendant to the plaintiff in Annexure "A" hereto, so long as the said arbitration proceedings were pending, the defendant kept deferring payment of the amount in "special deposit" as aforesaid."

"7. The said arbitrator made and published his award in 1968 and after exhausting all avenues of redress your petitioner as a last resort demanded payment of the sum in deposit as aforesaid from the General Manager by a letter dated November 21, 1970 and again sent him a reminder by a letter dated June 18, 1971, but the General Manager has failed and neglected to pay the said sum or to reply to the said letters last mentioned."

"8. An attempt was made after the said arbitration proceeding had concluded to re-tract on behalf of the defendant the position that the said special deposit of Rupees 10,181.07 p. had been kept out of the said arbitration by setting up alleged recoveries twice, one in respect of claims already the subject-matter of the arbitration proceedings and again as against the said special deposit."

"9. The dispute as to the nature of the special deposit and as to whether or not the same is refundable to the plaintiff with interest is one that falls entirely within the ambit of the said arbitration agreement."

7. The learned Judge Roy Chowdhury J. by an order dated September 21, 1972 directed the said arbitration agreement to be filed and by his order referred the disputes as to the refund of the said special deposit to the arbitrator to be appointed in terms of the arbitration agreement. The operative part of the said order dated September 21, 1972 read as follows :--

"In the result, I make the following orders that the agreement No. 203/Con./SER/56 be filed and the dispute referred to in paras. 5 and 9 of the petition be referred to the Arbitrator to be appointed according to the arbitration agreement between the parties by the General Manager by 31st October 1972. The General Manager may consider the appointment of Mr. M. P. Modwell, the previous Arbitrator who had adjudicated the reference under the contract in respect of the previous dispute."

8. Pursuant thereto the General Manages appointed M. C. Kudari to be the sole arbitrator to decide the question. The statement and counter-statement were filed before him and the said sole arbitrator made his award on May 4, 1973 awarding a sum of Rs. 5,091/-only against the claim of Rs. 10,181.07 p. in favour of the respondent against the appellant.

9. The Union of India did not make any application to raise any objection as to the validity of the said award but the respondent applied for setting aside the same.

10. It was argued before the Court below as also before us that the said sole arbitrator should have made the award for the entire amount of Rs. 10,181.07 being the subject-matter of the reference before him inasmuch as there was no question of recovery from out of the said sum and, accordingly, it was not open

to the sole arbitrator to make the award for half of the said amount. The contention was that there was no material before him to arrive at that figure and, as such, the award became perverse. It is contended that the entire question of recovery was duly gone into before the sole arbitrator Modwell and the same was fully decided accordingly and the award made therein was for full and final satisfaction of all claims in the reference, that is to say, after taking into consideration the entire question of recovery. As already indicated, Roy Chowdhury J. after hearing the parties concluded that the arbitrator had made a decision in clear terms that the said amount being the special deposit account for Rs. 10,181.07 p. was refundable and further that the same was not covered by the previous award. As such the plea of res judicata raised on behalf of the Union of India was not tenable. The learned Judge also held to the same effect in dealing with the said application u/s 20 of the Arbitration Act, 1940. He held therein that the issue of refund of the special deposit account was kept out of the previous arbitration proceedings and, as such, the same could not have been covered by the previous award made by Modwell. The learned Judge in the judgment under appeal observed :

"Therefore, the only issue before the arbitrator appointed pursuant to the order of reference made by me on the 21st Sept., 1977 as indicated in my order was the question of refundability of the said special deposit account of the sum of Rs. 10,181.07 p. that is whether it is refundable or not. There was no question of reducing the said amount to half as the award figure seems to be on the face of it. Therefore, in my view the arbitrator has on face of the award made it in an imperfect form and contains an obvious error which can be amended without affecting his decision, The only point decided by the arbitrator by the said Award is that the special deposit account at Rs. 10,181.07 p. is refundable to the petitioner-claimant and that was not the subject-matter of the previous reference and as such, this is a fit case where Court should exercise its power u/s 15(b) of the Arbitration Act and modify and correct the said award by making the figure of Rs. 10,181.07 instead of Rupees 5,091/- which is half of the said amount."

The learned Judge has concluded as follows:

"However, in my view, in a case like this the Court must exercise its power u/s 15(b)(e) of the Arbitration Act, 1946 and modify the award by changing the figure from Rs. 5,091/- to Rs. 10,181.07 p. and pass the judgment in accordance with the modification and correction."

The question is. has the Court power to modify the award under the circumstances by changing the figure from Rs. 5,091/- to Rs 10,181.07/-? In other words, could the Court, under such circumstances exercise power u/s 15(b) and (c) of the Arbitration Act. 1940 ? The learned Judge has exercised powers under the said provisions by holding that the award was imperfect in form and it was an obvious error which could be amended without affecting the decision of the arbitrator in any way.

11. It is no doubt true that at one point of time the amount which was lying in special deposit account was to the extent of the said sum of Rs. 10,181.07 and that the said sum was set apart so that in future if any amount in respect of the recovery would be found out the same was to be adjusted therefrom. But in respect of the dispute before Kudari the said sum could only be reduced if the Government would be able to satisfy by material evidence that there was some recovery outstanding from the said contractor which was not considered by Modwell in the earlier arbitration reference before him. If there would be no recovery which might be brought forward on behalf of the Government then there could be no question of reducing the said sum of Rs. 10,181.07 for, in doing so, the arbitrator would act beyond his jurisdiction to reduce to half the amount without any material before him.

12. It is to be noted that the terms of reference before M. C. Kudari was of a limited nature and that was decided by the said order dated September 21, 1972. The sole arbitrator derived his powers by the said order dated September 21, 1972 made by Roy Chowdhury J. in the said application u/s 20 of the Arbitration Act, 1940. Various points were raised in the said application on behalf of the Government but the same were negatived by the learned Judge in that application. In the said matter the learned Judge took note of the fact that the Government by its letter dated July 30, 1968 made certain remarks about the payment of the said sum representing special deposits and that the said sum was not refundable save and except the balance amount to be found due after adjustment of such claims of the Government. The learned Judge held that all those items which were claimed by the defendant in the said letter dated July 30, 1968 were included in the statements filed before the arbitrator in the previous reference. The learned Judge also held that all those items were included as items wrongfully recovered from the respondent by the Government and the same were gone into by the Arbitrator who made the award after hearing the parties. The learned Judge further held that in the said application u/s 20. it could not be contended by the Government that said sum of Rs. 10,181.07 p. was the subject-matter of the previous reference, as it was specifically kept out of the said reference by agreement of the parties. The learned Judge further held that the Government was estopped from contending that the said amount was the subject-matter of the previous reference before Modwell.

13. It appears that the arbitrator M. C. Kudari failed to appreciate the terms of the reference before him. He failed to appreciate that the order made in the application u/s 20 of the Arbitration Act. put a limit to the scope of the reference. There it was made clear that the Government could not dispute that the said sum of Rupees 10,181.07 was being held in a special deposit account. The said letter dated March 20, 1968 and the previous replies and demands in respect thereto were annexed to the said petition. What the Government complained of by the said letter dated March 20, 1968 was that it would take some time to ascertain the full details of the recovery and to arrange refund, if any, to the contractors. The sum and substance of the said letter was that subject to the question of

further recovery the admitted sum of Rs. 10,181.07 was to be paid in full. The question of reduction of the aforesaid amount could only come in if any items of recovery could be proved by the Government. Before Kudari such materials could not be placed by the Government in order to enable the Government to make any recovery out of the said sum of Rs. 10,181.07. This being the position, the purported reduction of the amount by the arbitrator in his award could not have been made since there was no question of any recovery to be made therefrom. That being the position, the sole arbitrator Kudari had no option but to allow the entire amount of Rs. 10,181.07 p. on the basis of the materials before him.

14. In this case the arbitrator has stated in his award that he has examined and considered the statement and counter-statement and all documents and on that basis has made his award. To my mind, the sole arbitrator Kudari had no material before him to enable him to reduce the said sum of Rupees 10,181.07 by half the amount. But at the same time it has to be borne in mind that it is not a matter to be modified by the Court by deriving its powers u/s 15(b) or (c) of the Arbitration Act, 1940. It is essentially within the domain of the arbitrator to appreciate the position and to make a proper award. The award under the circumstances could not have been said to be made in imperfect form or that it contained an obvious error which could be amended without affecting the decision of the arbitrator. The said arbitrator without appreciating the scope of the reference before him had made a perverse award without any material before him to arrive at that finding. It was totally against the materials placed before him and any reasonable person sitting in this position could not have arrived at such a finding on the materials before him. In my opinion, it is a fit case which ought to be remitted to the said arbitrator so that he could make a proper award on the materials before him. That is the only way the award can be made an arbitrator's award; otherwise, if the amount is allowed to be enhanced by Court it would be an award made on the basis of a decision taken by the Court which the parties did not agree to by making the reference. That would amount to the taking of a decision contrary to that of the arbitrator and thereby affecting his decision. The error is neither an obvious error nor an error of such a character that it can be corrected or amended or rectified without affecting the decision of the arbitrator. (Mahendranath Khundu Vs. Suresh Chandra Pramanik,).

15. I, accordingly, make an order remitting the award to the said sole arbitrator Kudari u/s 16, Clause (e) of the Arbitration Act, 1940 and in his absence to the General Manager in terms of the agreement entered into by the parties. Let the papers be sent to the sole arbitrator so that he could reconsider the matter in accordance with the terms of the reference and on the materials already placed before him in the light of the observations made herein and make an award. The arbitrator do make his award within three months from the date he would be served with this order. The General Manager, the arbitrator and all parties do act on a signed copy of the minutes.

16. The appeal is allowed and the matter is remitted for reconsideration by the arbitrator accordingly. In the facts and circumstances of this case there will be no order as to costs.

Basak, J.

17. I agree.