
(2010) 02 CAL CK 0033
In the Calcutta High Court
Case No : AP No. 395 of 2008

Union of India (UOI)

APPELLANT

Vs

Graphic Industries Company

RESPONDENT

Date of Decision : 11-02-2010

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 31(6), 34

Citation : (2010) 02 CAL CK 0033

Hon'ble Judges : Sanjib Banerjee, J

Bench : Single Bench

Advocate : N.C. Roy Chowdhury, Saumendra Nath Das and S. Chatterjee, for the Appellant; Ratnanko Banerjee, L. Banerjee and Amitava Das, for the Respondent

Final Decision : Allowed

Judgement

Sanjib Banerjee, J.—An interim award for Rs. 25 lakh is under challenge in these proceedings u/s 34 of the Arbitration and Conciliation Act, 1996.

2. Pursuant to tender invitations issued by the Eastern Railway the respondent submitted offers for supply of store material. It is the respondent's case in the reference that the goods were supplied without any contemporaneous objection as to quality or quantity and the Railways thereafter failed to make payment of the amounts due. The claim goes back to the year 1990. The respondent instituted divers proceedings before this Court and ultimately filed a suit in the year 1994. According to the interim award, the reference commenced in the year 2007.

3. The Arbitrator has recorded that the parties had filed the statement of claims and statement of counter-claims and rejoinders. Written notes of argument had also been filed by the respondent claimant. The interim award notices that the Railways had admitted having withheld payment of 108 bills in an affidavit filed before the Supreme Court in 1992, a statement which was corroborated in

another affidavit filed before this Court in 2002. The Arbitrator found "clear judicial admission" which, according to him, "constitute(d) adequate proof that the materials were supplied and also that Bills to realize the value of supplies made was also raised by the Claimants and submitted to the Respondents." The claimant had received a total payment of Rs. 11,16,528.80 in respect of such 108 bills prior to the interim award being made.

4. The Arbitrator found that though the Railways had asserted in an affidavit filed in the Supreme Court in the year 1992 that they had rejected six items of supply against six purchase orders, there was no communication of rejection of any goods and the Railways had failed to produce any material to substantiate their claim of rejection of the six items. The interim award thereafter records as follows:

Whereas it is also necessary to record that allegations of malpractices against the Claimants in the matter of securing the contracts was raised by the Respondents in their Statement of Counter-Claim, but the Respondents have failed to substantiate their allegations by submitting any proof or evidence, in spite of adequate opportunity given to them in the course of the arbitral hearings. Since no irregularity/malpractice in the matter of placement of the contracts have been proved, the contracts are considered valid, binding and enforceable, making the respondents liable to make payments against materials received there against.

5. The Arbitrator has held that after deducting the bills relating to the alleged rejection of six items and the payment of Rs. 11,16,528.80 already received by the claimant, the residual figure came to Rs. 39,69,564.79 "out of which, I am inclined to pass partial/interim award for Rs. 25 lakhs for the present."

6. The petitioner says that the Arbitrator proceeded in the absence of any material and ignored the provisions of the standard conditions of contract governing railway contracts. A specific ground has been carried that the Arbitrator passed the interim award without taking evidence (ground XIII).

7. It is necessary, in this context, to notice the recording in the minutes of the two meetings held before the Arbitrator immediately preceding the making of the interim award. The respondent has drawn attention to the last paragraphs of the minutes of the two meetings. It will be evident that the Railways had been called upon to produce relevant documents. What was recorded in the minutes of the two meetings, in the relevant part, need to be noticed:

The Learned Arbitrator desire to note from the Respondent whether in their knowledge there is any evidence apart from the what ever has been submitted in his arguments by the Learned Advocate supporting their counterclaim and allegation of exorbitant prices. Also documents showing the concern officers booked and penalized for awarding contracts on alleged exorbitant price. The Respondents are directed to submit any document as asked for positively ring the next hearing. (Minutes of the meeting held on January 23, 2008)

The Learned Arbitrator with displeasure stated that the Learned Advocate from the Respondents is trying to avoid the specific questions asked by the Learned Arbitrator during previous hearing. The statement recorded above only shows that the Respondent have nothing to add further whatever documents they have submitted alongwith their counter statement of claims if this the case than it will be presumed that in support of their counter claim, the Respondent have only one statement signed by some Railway Officer. Secondly the reply on the question of details of official booked and penalized for awarding contract on alleged exorbitant prices has not been given by the Respondent which may be processed that no Railway Officers has been booked and penalized and the Respondent are making merely statement without any substance. Still the Learned Arbitrator can give some time if the Respondent can submit any documents as asked by the Learned Arbitrator by next 10 (Ten) days. (Minutes of the meeting held on February 5, 2008)

8. It is not in dispute that oral evidence has not been received in the reference. As to whether oral evidence is to be received at all is a matter that has to be decided by the Arbitrator on the submission of the parties to a reference. But, it is equally apparent that the Arbitrator gave the Railways an opportunity to produce further documents. It is not evident from the records that the Railways produced any further documents.

9. A fundamental question has arisen. There may have been a violation of the principles of natural justice in that the Railways may not have been made aware that an interim award would follow if they did not submit their documents within the extended time or that their defence was, in effect, to be struck off. Though the respondent here argues that the Railways do not suggest ? far less demonstrate ? even now that they have material to support their defence in the reference, it is plain to see from the minutes of the last meeting before the interim award was delivered that the parties had no inkling that an interim award was in the offing.

10. If the last sentence of the minutes of the meeting held on February 5, 2008 is understood to imply that the Railways could furnish no document after the expiry of a period of ten days therefrom, it would mean that the final award could be made without any further evidence being entertained. There was no occasion therefore, at this advanced stage of the reference, to make an interim award. There is no indication in the minutes of the last meeting held before the interim award was made that the Arbitrator would consider the claimant's application for making an interim award or that the Arbitrator would make an interim award. After making the interim award, the Arbitrator left only the issue of the six allegedly rejected bills pending to "be adjudicated after final hearing." Even the counter-claim was rejected in full.

11. It seems rather unusual that if evidence is closed and no indication is given that only one issue is kept pending and the rest of the matter would be decided, an interim award is made thereafter covering the entire gamut of disputes

including the counter-claim but leaving the claim on account of six bills for adjudication at a future date. An interim award may be made on any matter with respect to which an arbitral tribunal may make a final award. An interim award may be made at any time during the arbitral proceedings. But parties have to be made aware that an interim award is in the contemplation. Ordinarily, an interim award may not be made at the very end of the reference; its purpose is to provide the claimant a part of the relief at an early stage of what could be a protracted reference. An interim award for payment would imply that such part of the claim was indisputable.

12. One of the grounds on which the Railways sought to resist the claim in the reference was that the claimant had been favoured with high rates by railway officials who had connived with the claimant. The Arbitrator held that though a photocopy of a committee report had been produced in the reference by the Railways, the original document had not been brought nor had the Railways satisfied the Arbitrator as to the authority of the committee or the authenticity of its findings. There is no doubt that the conduct of the Railways in the reference has been far from exemplary. It is apparent from the minutes of the meetings relied upon by the Railways that from the year 2007 the Railways have failed to produce any material despite the indulgence shown by the Arbitrator. But the obvious unsatisfactory conduct notwithstanding, the Railways deserved to be told that their defence and counter-claim were likely to be struck off for their failure to substantiate the same by any documentary evidence; or that an interim award was to be made if the documents were not forthcoming within the time fixed therefore.

13. Based on the conduct of the Railways, as evident from the minutes of the meetings, the Arbitrator may have concluded the reference and passed a final award. But the Arbitrator was required to indicate the same. The Railways ought to have been made aware that in the absence of their producing any evidence in support of their defence or counter-claim, the reference would be closed and an award made. It is this which is not evident from the minutes of the two meetings held in January and February 2008 before the award was made in May, 2008. It is a matter which amounts to the violation of the principles of natural justice. If the Arbitrator had made it clear to the Railways at the meeting of February 5, 2008 that the failure to produce documentary evidence would result in a final award or an interim award being made, there may have been some justification in an interim award being passed thereafter. But when no such indication is apparent from the minutes of the meetings held on January 23, 2008 and February 5, 2008, the making of the interim award appears to have taken the Railways by surprise. On February 5, 2008 the Arbitrator afforded the Railways ten further days to submit documentary evidence in support of what had been urged on their behalf. It would have been open to the Arbitrator, who is the master of the procedure in a reference, to thereafter convene a meeting and record that since the deadline had not been met the Arbitrator would proceed to decide on the basis of the material before him. The Arbitrator did not follow such

course of action.

14. Again, if the documents did not come within a period of ten days from February 5, 2008, there is no apparent reason for the Arbitrator to have carved out an exception for the defence in respect of the six items of supply that were allegedly rejected and make an award on all other matters in issue in the reference.

15. Despite the obvious poor conduct of the Railways and the apparent dilatory tactics adopted by them, the principles of natural justice demanded that they be put on notice that the failure to produce any documentary evidence in support of their defence or counter-claim would result in the same being annulled. There ought to have been some indication in the minutes of the meetings held immediately prior to the interim award being made that the same was coming. In the absence of such indication in the minutes or otherwise, the interim award is vitiated and cannot be sustained. The Arbitrator did not specify in the minutes of the meetings immediately preceding the interim award that all other issues save the issue as to the six items of supply allegedly rejected would be conclusively pronounced upon.

16. Even though it is not necessary that an interim award as recognised by Section 31(6) of the Arbitration and Conciliation Act, 1996 is based on any admission only, an interim award for payment of money would imply that the final award could never be for a sum less than the amount covered by the interim award. Since the Arbitrator here did not altogether preclude documentary evidence to be submitted, notwithstanding the deadline of ten days set on February 5, 2008, it is theoretically possible that if the Railways are now diligent and suddenly produce all relevant material in support of their defence or counter-claim, such material would either have to be disregarded or, if the evidence produced justifies the Railways' stand, the quantum of the interim award would have to be reduced. That, by itself would rob the interim award of the finality that is conferred on it by the 1996 Act.

17. The interim award of May 12, 2008 is set aside. The Arbitrator is left free to decide on the future course of the reference and fix such time as he may deem fit for evidence to be brought on record and even specify a default Clause which should clearly stipulate the consequence of the failure to meet the deadline. The Arbitrator will also be free to give the same reasons as evident in the interim award in any future interim or final award that he may make, but subject to the Arbitrator complying with the principles of natural justice.

18. It is made clear that the merits of the matter have not been gone into and the interim award has been set aside only on the ground that there was no indication by the Arbitrator that an interim award was to be made upon the Railways failing to produce documentary evidence within ten days of the time permitted in that regard at the hearing of February 5, 2008. Since the claim has been lingering, in one form or the other, from the year 1990, the Arbitrator

would do well in not allowing much indulgence to the parties and concluding the reference as expeditiously as possible.

19. AP No. 395 of 2008 succeeds but there will be no order as to costs.

20. Urgent certified photocopies of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.