

**(2001) 10 CAL CK 0027**  
**In the Calcutta High Court**

**Case No :** G.A. No. 1460 of 2001 and A.P. No. 316 of 1997

Union of India (UOI)

APPELLANT

Vs

Madhusudan Garai

RESPONDENT

**Date of Decision :** 09-10-2001

**Acts Referred:**

Arbitration Act, 1940 — Section 30, 33  
Limitation Act, 1963 — Section 5

**Citation :** (2002) 3 CALLT 378

**Hon'ble Judges :** Asok Kumar Ganguly, J

**Bench :** Single Bench

**Advocate :** I.P. Mukherjee, for the Appellant; Hiranmoy Dutta and Bijon Majumdar, for the Respondent

**Final Decision :** Dismissed

## **Judgement**

A.K. Ganguly, J.—This application has been filed under Sections 30 and 33 of Arbitration Act, 1940 for setting aside an award dated 14.12.2000 passed by the Arbitrator. The award was published by the Arbitrator in respect of disputes and differences between the parties arising out of the agreement No. 5/KCD/1992-93 relating to construction of road along with India Bangladesh border in Nadia District, West Bengal, from SP 145 to BP 148 and surface dressing on the said stretch of 9.411 km. of the road to be constructed.

2. Along with this setting aside application, a petition u/s 5 for condonation of delay was also filed. The Court heard the Section 5 application along with the setting aside petition. This Court considering the explanation given in the said Section 5 application is of the opinion that delay in this case should be condoned and as such this Court condones the delay.

3. In fact, the learned counsel for the respondent claimant has very fairly submitted that he is not pressing the grounds of delay and he has submitted that the Court may proceed to consider the merits of the setting aside application. As such condoning the delay, the Court proceeds to consider the setting aside

application on merits.

4. In this matter, the Arbitrator was appointed on the joint request of the parties by an order dated 17.03.1998 and after removing another Arbitrator who was previously appointed.

5. The award which has been given by the Arbitrator under Arbitration Act, 1940 is a reasoned award which runs into very many pages. Before the Arbitrator, 12 items of claims were lodged by the respondent claimant including the cost of arbitration. All those claims taken together would come to about Rs. 18,21,422/- but the Arbitrator, out of those claims, granted Rs. 4,61,108/- and in respect of several claims, the Arbitrator has given nil award. The Arbitration clause between the parties is set out below:

"Clause 25. Except otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions hereinbefore mentioned and as to the quality of workmanship of materials used on the work or as to any other questions claim, right matter or this whatsoever in any way arising out of or relating to the contract designs, drawings specifications, estimates, instructions orders or these conditions or otherwise concerning the works of the execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitration of the person appointed by the Chief Engineer, CPWD in-charge of the work at the time of dispute or if there be no Chief Engineer the administrative head of the said CPWD at the time of such appointment. It will be no objection to any such appointment that the Arbitrator so appointed is a Government servant, that he has to deal with the matters to which the contract relates and that in the course of his duties as Government servant he has expressed views on all or any of the matters in dispute or difference. The Arbitrator to whom the matter is originally referred to being transferred or vacating his office bedding unable to act for any reason, such Chief Engineer or administrative head as aforesaid at the time of such transfer vacation of office or inability to act, shall appoint another person to act as Arbitrator in accordance with the terms of the contract. Such persons shall be entitled to proceed with the reference from the stage at which it was left by his predecessor. It is also a term of this contract that no person other than a person appointed by such Chief Engineer or administrative head of the CPWD as aforesaid should act as Arbitrator and if or any reason, that is not possible, the matter is not to be referred to arbitration at all. In all cases where the total amount of all the claim in dispute is Rs. 75,000/- (Rupees seventy five thousand only) and above, the Arbitrator shall give reasons for the award.

Subject as aforesaid the provisions of the Arbitration Act, 1940, or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause.

It is a term of the contract that the party invoking arbitration shall specify the

dispute or disputes to be referred to arbitration under this clause together with the amount or amounts claimed in respect of each such disputes.

It is also a term of the contract that the contractor(s) do/does not make any demand for arbitration in respect of any claim(s) in writing within 90 days of receiving the intimation from the Government that the final bill is ready for payment, the claim of the contractor(s) will be deemed to have been waived and absolutely barred and the Government shall be discharged and release of all liabilities under the contract in respect of these claims.

The Arbitrator(s) may from time to time with consent of the parties enlarge the time, for making and publishing the award.

The decision of the Superintending Engineer regarding the quantum of reduction as well as justification thereof in respect of rates or substandard work which may be decided to be accepted will be final and would not be open to arbitration."

6. The learned counsel for the petitioner has taken this Court through the award and specially highlighting the portion in which the Arbitrator has discussed the reasons for granting claims under the award. In so far as claim No. 1 is concerned, this Court finds that the same was granted by the Arbitrator after a thorough discussion of the case of the parties in all its aspects.

7. The learned counsel for the petitioner submitted that the claim No. 1 is barred in view of Clause 2 of the agreement between the parties. Relying on Clause 2, the learned counsel for the petitioner submitted that time is the essence of the contract and the contractor is to complete the work within the time schedule. In the event, the contractor fails to comply this condition and he shall be liable to pay compensation of an amount equal to 1% or such smaller amount as the Superintendent Engineer may decide. The learned counsel further submitted that this is an excepted matter and cannot be the subject-matter of arbitration before the Arbitrator.

8. From the discussion of this claim by the Arbitrator, it appears that petitioner levied penalty compensation on the contractor to the extent of Rs. 70,186/-. The learned counsel also submitted that this has been done on the basis of a decision taken by the Superintendent Engineer, Murshidabad Circle. The learned counsel submitted that the said decision of the Superintendent Engineer is not arbitrable. But from the arbitration clause which has been set out above, it does not appear that the decision of the Superintendent Engineer on the question of compensation is not arbitrable.

9. From the arbitration clause it appears that the decision of the Superintendent Engineer regarding the quantum of reduction as well as justification in respect of rates of sub-standard work which may be decided is not arbitrable. Therefore, in view of the arbitration clause, this Court is unable to accept the decision of the Superintendent Engineer dated 22.08.1996 levying compensation on the respondent is not arbitrable. Therefore, this Court cannot interfere with the claim

No. 1 awarded by the Arbitrator. The said award was given after proper construction of the arbitration agreement and after recording detailed reasons in support of the award.

10. So far as the amount award against claim No. 5 in concerned, this Court finds that the Arbitrator has given valid and adequate finding in support of the award against the said claim and this Court exercising its jurisdiction in a setting aside proceeding does not find any reason to interfere with the same.

11. So far as the claim No. 7 is concerned, the learned counsel relied on the measurement book which was produced before the Arbitrator. The learned counsel further submits that the Arbitrator has not properly construed the measurement book.

12. This Court is afraid that it is not open to it to re-appreciate the detailed findings made by the Arbitrator on his reading of a measurement book. Since the finding of the Arbitrator is based on relevant materials, this Court cannot, while exercising its discretion in a setting aside application, convert itself into an Appellate forum. As such there is no substance in so far as this contention of the learned counsel is concerned.

13. In so far as the award of the Arbitrator against claim No. 8 is concerned, the learned counsel ought to assail the same by relying on Clause 17 of the agreement. This Court has pursued the said clause and also the award against claim No. 8.

14. This Court from the perusal of the award against claim No. 8, does not discern any error on the face of the record vitiating the grant of award against the said claim. This Court finds that the Arbitrator has considered the Clause 17 and has given detail finding in support of the award of Rs. 70,000/- granted against the said item.

15. In so far as award granted against claim No. 10 is concerned the learned counsel seeks to rely on Clause 2 of the agreement between the parties and wants this Court to follow an unreported judgment delivered by a Division Bench of this Court in the case of Union of India v. Prince Tiles dated 19th April, 2001.

16. In that case the Division Bench of this Court, to which I was a party, did not approve the grant of award on infructuous expenditure and idle labour in view of the relevant clause in the arbitration agreement. The clause with which the Court was concerned in the case of Prince Tiles, is as follows:

"18. Idle Labour--No claim whatsoever for idle labour, additional establishment, hire charges of tools and plants etc. will be entertained under any circumstances."

17. But in the instant case, the Clause 2 is not worded similarly. In Clause 2 there is no such prohibition as is there in Clause 18 in the case of Prince Tiles. Therefore, the principles which were decided in the case of Prince Tiles are not attracted in the facts of this case.

18. So far as the claims against interest are concerned, the Arbitrator has granted interests @ 15% for the pre-reference period and 10% for the post-award period. This Court does not find any error in the said award of interest but so far as interest @ 9% for the post decree period is concerned; this Court cannot affirm the same. Therefore, the finding of the Arbitrator made in para 4 against claim No. 11 is quashed. This Court quashes the said part of the award since it is severable and it is beyond the jurisdiction of the Arbitrator to grant any interest for the post-decree period.

19. But so far as the award of interest for the pre-reference and post-award period is concerned this Court does not find any error in the award of the Arbitrator. It is well known that if there is no prohibition in the matter of grant of interest the Arbitrator can grant interest for both the pre-reference and post-award period. This Court on perusal of Clause 29 of the agreement does not find that there is any prohibition against the grant of pre-reference and post-award interest by the Arbitrator.

20. About the Arbitrator's jurisdiction to grant such interest, matter is concluded by the judgment of the Supreme Court in the case of Secretary, Irrigation Department, Government of Orissa and others Vs. G.C. Roy, .

21. So far as the award of Rs. 37,000/- granted against item No. 12 towards the cost of arbitration, this Court does not find any reason to interfere with the same.

22. This Court is of the opinion that law relating to interference with the award of the Arbitrator has been repeatedly clarified by the Hon'ble Supreme Court. In a recent decision in the case of M/s. Arosan Enterprises Ltd. Vs. Union of India and Another, , the learned Judges of the Apex Court upon a review of various authorities and upon consideration of Section 30 of Arbitration Act, 1940, laid down the position in para 36 and page 475 of the report which is set out below:

"Be it noted that by reason of a long catena of cases, it is now a well-settled principle of law that reappraisal of evidence by the Court is not permissible and as a matter of fact exercise of power by the Court to reappraise the evidence is unknown to proceedings u/s 30 of the Arbitration Act. In the event if there being no reasons in the award, question of interference of the Court would not arise at all. In the event, however, there are reasons, the interference would still be not available within the jurisdiction of the Court unless of course, there exist a total perversity in the award or the judgment is based on a wrong proposition of law. In the event however two views are possible on a question of law as well, the Court would not be justified in interfering with the award."

23. This Court is in respectful agreement with the said view and following the same in this case does not find any reason to interfere with the same.

24. The learned counsel for the petitioner has relied on a judgment of Supreme Court in the case of State of Orissa v. S.C. Roy, reported in JT 2001(5) SC 267.

25. In that case, the learned Judges of the Supreme Court set aside a part of the

award relating to escalation clause of labour and material as there was no such clause in the agreement. In the instant case, the said decision does not factually apply. The learned counsel has not been able to point out that the Arbitrator has passed the award ignoring any clause in the agreement. Therefore, the principles on the said decision are not attracted in this case.

In the facts and circumstances of this case, this Court is of the opinion that this application cannot succeed and as such is dismissed.

There will be no order as to costs.

Later:

The learned counsel for the applicant prays for stay of operation of the judgment and order, upon consideration of the said prayer the same is refused. The department is directed to issue xerox certified copy of this judgment expeditiously, if applied for.