

(2011) 02 KAR CK 0011
In the Karnataka High Court
Case No : MFA No. 2267 of 2004

Union of India (UOI)

APPELLANT

Vs

Nabin Designers and Constructors (P) Ltd.

RESPONDENT

Date of Decision : 21-02-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34

Citation : (2011) ILR (Kar) 3051 : (2011) 5 KarLJ 32 : (2011) 3 KCCR 351 SN : (2011) 3 KCCR 349

Hon'ble Judges : K. Govindarajulu, J;Ajit J. Gunjal, J

Bench : Division Bench

Advocate : M.V. Chandrashekar Reddy, for the Appellant; V. Srinivas Raghavan, for Indus Law for C/R, for the Respondent

Final Decision : Dismissed

Judgement

Ajit J. Gunjal, J.—The Union of India is before this Court, questioning the order passed by the learned Trial Judge dismissing their application u/s 34 of the Arbitration and Conciliation Act, 1996 to set aside the order passed by the sole Arbitrator in proceedings between the Appellant and the Respondent.

2. The facts can be summarised as under:

The Respondent herein was awarded three contracts for construction of Telecom Administration Building in CTO compound, at Bangalore, including internal water supply and sanitary installations by an offer letter dated 30.5.1988. The Respondent was to deposit certain amount as earnest money. The total cost of construction of all the three contracts varied from Rs. 2 crores which being 42.07% and 82.07% towards the cost of building works and services respectively. Suffice it to note, that the work was sought to be completed within a specified time inasmuch as it has to be completed within a period of 36 months, with a dead line up to 31.3.1992. The contract of agreement was entered into between the parties stipulating the terms and conditions, the

Respondent however did not complete the work within the stipulated time and has taken 31 months over and above the stipulated period. It is not in dispute that a request was made by the Respondent for extension of time and it was extended till the completion of the work. The dispute has arisen between the Appellant and the Respondent in respect of:

(1) the claim for alleged balance payment towards executed work under scheduled items and alleged extra/substituted items of works to the tune of Rs. 4,69,177/-

(2) for refund of the alleged contractual amount for executed work of Rs. 7,54,283/-

(3) the claim of compensation amount on the alleged increase in the cost of construction for portion during the alleged prolonged period Rs. 18,00,000/-

(4) claim for damages for alleged retaining the Respondent longer on job by the Appellant without earning Rs. 21,00,000/-

(5) claim for refund of bank guarantee submitted on account of security deposit Rs. 76,395/-

(6) towards interest on the executed work and increase in cost of construction from 26.4.1994 to the date of realisation.

(7) claim on account of pendente lite and future interest at 18% pa. from the date of commencement of proceedings till the date of realisation and cost of the proceedings.

3. Since dispute arose in respect of these claims, the matter was referred to an Arbitral Tribunal. Indeed initially one Mr. Bhatia was appointed as an Arbitrator to resolve the dispute between the Appellant and the Respondent. But however, during this interregnum, he had to abandon the arbitral proceedings inasmuch as he was transferred. In his place one Mr. S.B. Lal, with a designation of Chief Engineer was appointed. It is not in dispute that Mr. Lal was appointed on mutual consent of both the Appellant as well as the Respondent. The Respondent filed a claim petition in respect of various claims as stated above for various amounts. Indeed, we notice that there were three different written contracts and three different agreements and three different claim petitions, in respect of three different claims. The Appellant entered appearance, files his statement of objection denying the entire claim of the Respondent. The Respondent has filed rejoinder, to that the Appellant has filed objections. The Arbitral Tribunal went into the factual matrix of the claim of the Respondent as well as the objections raised by the Appellant, accepted certain claims and declined to grant certain claims. Thus, arbitral award was passed in respect of three different contracts. The Appellant has filed an application u/s 34 of the Act, questioning the award passed by the arbitrator on various grounds. Since, there was a contest, the said application was converted into an arbitral suit. The learned Trial judge, having regard to the scope of Section 34 of the Act, was of the view that the contentions

pressed into service by the Appellant do not fall within the ambit of Section 34 of the Act. Hence, dismissed all the applications. As against the said dismissal, the Appellants are before this Court by way of three separate appeals.

4. Mr. Reddy, learned Counsel appearing for the Appellant submits that certain claims in all these three appeals are admitted and accepted by the Appellant. But however, he vehemently submits that the award rendered by the arbitrator with respect to claim No. (3) cannot stand scrutiny of the Court inasmuch as the decision is not backed by any reason. In so far as the claim No. (1) is concerned, he submits that no reasons are forthcoming and they are not satisfactory. In so far as the claim No. (5) is concerned, the same is accepted. He would also urge that the interest is awarded at 15% over and above the agreed rate of interest. Thus, he submits that there is serious error committed by the arbitrator.

5. Mr. Srinivas Raghavan, learned Counsel appearing for the Respondent supports the award as well as the order passed by the learned Trial Judge. He submits that it is not open for the Appellant to contend that a mis-conduct has been committed by the arbitrator. He submits that having regard to the scope of Section 34 of the Act, the power of interference is limited. He further submits that it is not open for the Appellant to contend that there is delay in pronouncing the award. He submits that except for this solitary ground which is urged in the memorandum of appeal before the Trial Court, there is no specific allegation as against the arbitrator as to his competency or otherwise,

6. We have given our anxious consideration to the submissions made by the learned Counsel appearing for the Appellant as well as the Respondent.

7. Before considering the scope of Section 34 of the Act and the power of the courts to interfere with an arbitral award, it is necessary for us to look into the provisions of Section 34 of the Act. Section 34 of the Act would read as under:

(2) An arbitral award may be set aside by the Court only if -

(a) the party making the application furnishes proof that -

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matter beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be

separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part form which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

8. A perusal of Section 34 of the Act would indicate that an arbitral award can be interfered only in certain set of circumstances. The application for setting aside the arbitral award can be entertained inasmuch either of the party was under some incapacity, arbitral agreement is not valid under the law to which the parties have subjected to or, failing any indication thereon, under the law for the time being in force, absence of notice of appointment of the arbitrator or of the arbitral proceedings or for some other reason, unable to make himself available before the arbitral proceedings, the arbitral award is in respect of a dispute which is not contemplated by and not falling within the terms of arbitration and the composition of the arbitral Tribunal or the arbitral procedure is not in accordance with the agreement of the parties. Only in these circumstances, the court can interfere with the arbitral award. Indeed, the scope of interference u/s 34 of the Act is more restricted.

Indeed, under the 1940 Act, the scope of interference was little wider inasmuch as the court can look into the misconduct or otherwise of the arbitrator, but pursuant to 1996 Act, this Court has observed that limited interference is warranted. It is only when there is lack or want of jurisdiction or whereas principles of natural justice or for that matter the subject matter which is referred to the arbitral Tribunal is outside the purview of the agreement itself the court can step in. Indeed, we notice that it has become a virtual practice to question each and every award irrespective of whether it comes within the limited power specified u/s 34 of the Act. Indeed, it renders otiose, the intent of creating an arbitral Tribunal i.e. efficient and capable of meeting the needs of the specific arbitration. Indeed, it is also to be noticed that when there is a contractual dispute and when the questions raised before the arbitrator, then the issue as to what comprises dispute between the parties in such cases, and if arbitrator takes a view that certain correspondence exchanged between the parties constitute a part of contract, the Apex Court was of the view that the parties had submitted themselves to the jurisdiction. It is not open either of the parties to wriggle out the situation.

9. The moot question which falls for our consideration is whether this Court should interfere with the award of an Arbitrator? In a long series of judgments, the Apex Court has strictly limited the role of the Courts in arbitration matters and has given wide elbowroom to the arbitrators. Nevertheless cases are plenty in which the courts have re-examined the facts of the dispute and substituted their decision in place of the arbitrator"s.

10. We are of the view that the arbitrator has the final word in a dispute referred to him. Neither party can challenge his award on the ground that he had come to a wrong conclusion. The logic is that the parties have selected their own forum, it should be conceded the power of appraisal of evidence, and whether the particular amount should be paid is a decision within the competency of the arbitrator. The Apex Court in the case of the State of Rajasthan v. Puri Construction Co., reported in 1994 (6) SEC 485 has observed thus;

The arbitrator is the sole judge of the quality as well as the quantity of evidence and it will not be for the Court to take upon itself the task of being judge on the evidence before the arbitrator

11. Indeed it is to be noticed that it may be possible that on the same evidence, the Court may arrive at a different conclusion than the one arrived at by the arbitrator. This itself is no ground for setting-aside the award. The Court cannot investigate into the merits of the case or examine the documentary and oral evidence on the record for the purpose of finding out whether the arbitrator has committed an error of law. The Court cannot even examine whether the view taken by the arbitrator is reasonable, an amorphous term which has been discussed by the judges for centuries. This is because, reason varies in its conclusions according to the idiosyncrasies of the individual and the time and circumstances in which he thinks. An arbitrator acting as a judge has to exercise discretion informed by tradition, methodized by analogy, disciplined by system and subordinated to the primordial necessity or order in social life.

12. Indeed some awards explain the reasons for arriving at the decision. But however it is to be noticed that it is not as if the court's jurisdiction is completely excluded from interfering with the award passed by the Arbitrator. Indeed if the award is totally perverse or if it is based on the wrong proposition of law, the Court can interfere. In the case on hand we are of the view that on question of law as well as on facts, we are not inclined to interfere with the award passed by the Arbitrator. In the case of ONGC v. SAW Pipes Ltd., reported in 2003 (5) SEC 705, the Apex Court has observed that "if the Arbitral Tribunal has committed a mere error of fact or law, the Court has no jurisdiction to interfere with the award. If the reference to the arbitrator is in general terms and the award is based on erroneous legal proposition, the Court can interfere with the said award. If a specific question of law is submitted for arbitration, an erroneous decision on point of law, it does not make the award bad unless the Court is satisfied that the arbitrator has decided or acted illegally".

13. In the case on hand, we notice that the claim petition filed before the arbitrator discloses various amounts which is recoverable by the Respondents herein. The claims are in respect of three contract works which were given to the Respondents. It was agreed that the Appellant would accept the award partly in respect of some of the claims. However, it would attack only awarding of the damages. In all the three claims as observed, we are of the view that the fair assessment made by the arbitrator as to the damages caused to the Respondent

have been quantified. That being the question of fact, we are not inclined to accept the contention of the Appellant and to interfere with arbitrator's award.

14. Indeed, there are catena of decisions. They would clearly indicate unless a serious mis-conduct which are referred to above is proved, the question of interfering with the award passed by the Arbitral Tribunal does not arise. Indeed, we do not propose to burden the judgment with innumerable decisions on the question of interference by this Court in respect of an arbitral award. Only few have been referred, and we are of the view that they are sufficient for us to hold that interference is not warranted, having regard to the limited jurisdiction this Court can exercise. The appeals are sans merit.

All the three appeals are dismissed.