
(2003) 04 CAL CK 0022
In the Calcutta High Court
Case No : A.P. No. 212-217 of 2002

Union of India (UOI)

APPELLANT

Vs

Pawandas (Pawan Kumar) Pvt. Ltd. and Others

RESPONDENT

Date of Decision : 24-04-2003

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 16, 34, 4

Citation : (2003) 3 CALLT 342

Hon'ble Judges : Ashim Kumar Banerjee, J

Bench : Single Bench

Advocate : Dipak Bose, for the Appellant; Joyanta Mitra, M.P.K Roy and Shibdas Banerjee, for the Respondent

Judgement

A.K. Banerjee, J.—Since all the above matters relate to identical questions of fact and law I intend to dispose of all the above matters by a common judgment.

2. In the foregoing judgment I would refer to various documents annexed to the pleadings including the rival contentions of the parties mentioned in the pleadings. Those documents and/or averments and their respective page numbers would relate to A.P. No. 212 of 2002.

3. Parties before me entered into a contract for execution of the work specified in the contract. The tender pertaining to the contract stipulated that the general conditions of railway contracts would be applicable in the instant case. The general conditions of contract provided for arbitration in case of any disputes between the parties. The relevant clause as referred to in the petition at page 55 is quoted below:--

"62. Matters finally determined by the Railway-- All disputes or differences of any kind whatever arising out of or in connection with the contracts, whether during the progress of the works or after their completion and whether before or after the determination of the contract, shall be referred by the contractor to the Railway and the Railway shall within a reasonable time after their presentation

make and notify decisions thereon in writing. The decisions, directions and certificates with respect to any matters decision of which is specially provided for by these conditions, given and made by the Railway, or by the Engineer on behalf of the railway, which matters are referred to hereinafter as excepted matters shall be final and binding upon the contractor and shall not be set aside or be attempted to be set aside on account of any informality, omission, delay or error in proceeding in or about the same or on any other ground or for any other reason and shall be without appeal."

4. As per Clause 62 disputes or differences of any kind under the contract are to be referred to the railways and the railways in turn within a reasonable time would notify their decision in writing and such decision of the railways would be final and binding as excepted matters.

5. Clause 63 of the General Conditions provided for arbitration in the event of disputes or differences as to construction or operation of the contract or the respective rights and liabilities of the parties save and except excepted matters referred to in Clause 62. Under the Clause 63 the contractor is to demand arbitration after waiting for 90 days from the date of presentation of the final claim and within 180 days thereof. Under the general conditions of contract all disputes have been defined in three categories:--

(i) Disputes relating to excepted matters.

(ii) Disputes relating to claim which are not admissible in any circumstance.

(iii) Other disputes.

6. As per the general conditions of contract on excepted matters the decision of the railway is final and binding upon the contractor. On the second category no claim is entertainable under this category where there has been a specific bar provided In the general conditions. Thirdly, the disputes which are not covered under the Clause (i) and (ii) above are to be referred to arbitration after 90 days and within 180 days from the date of the making of the claim.

7. Certain disputes arose by and between the parties which resulted in an application u/s 11 of the Arbitration and Conciliation Act, 1996. The learned single Judge taking up arbitration matter after hearing. the parties held that the disputes were referable to arbitration. The Hon"ble Chief Justice appointed Mr. Debal Kumar Banerjee an advocate of this Court as sole Arbitrator.

8. The parties field their respective statement of claim and counter claim. The Arbitrator upon hearing both sides published his reasoned award appearing at pages 167 to 217 of the petition. The claims allowed by the Arbitrator are summersied at page 216 of the petition which is reproduced below:--

Sl. No. Short description of claim Awarded Amount (Rs.)

1.

Extra payment towards increased rate of royalty

2,24,966.00

2.

Payment on account of increase of labour wages due to increase of notified minimum wages

84,556.00

3.

Wrongful/deduction of penalty (at the end of 1st quarter) or alleged no-adherence of quarterly quotas

23,009.00

4.

Wrongful deduction of Income Tax at 2% and surcharge beyond contract provision

Not pressed

5.

Interest on wrongful deduction of Income tax calculated at 31.03.1996 and thereafter at the rate of per day

Not pressed

6.

Payment of damages on account of increased market rate of ballast

5,27,511.00

7.

Wrongful deduction from Running Account Bills towards oversize

45,095.00

8.

Wrongful deduction of penalty (after 3rd quarter) towards supply of hand made balls and - machine made ballast

1,97,997.00

9. Shortfall in operation of contract 3,76,997.00

10. Wrongful demurrage charges Nil

11. Interest on delay In payment as accrued 60,939.00

12. Final bill No claim

13.

Release of Bank Guarantee refund of security deposit

Not pressed

14.

Interest at the rate of 18% per annum until the date of arbitral Tribunal entering upon the reference

17,06,563.00

15.

Interest pendente lite @ 18% per annum

17. Costs as accrued 3,48,121.00

Grand Total 35,95,437.00

9. The present application was made by the petitioner, inter alia, praying for setting aside of the said award on various grounds contained in the said petition.

10. Mr. Dipak Basu, learned counsel for the petitioner, while assailing the said award urged as follows:--

(i) The Arbitrator had no jurisdiction to arbitrate the dispute since his appointment was contrary to the provisions contained in the general conditions of contract;

(ii) The claim allowed by the Arbitrator on the head being serial No. 1, 2, 3, 6, 8 and 9 were not tenable as the Arbitrator had no jurisdiction to deal with those claims as those were either excepted matters or were specifically excluded under the general conditions of contract.

11. While elaborating his argument on the first score Mr. Basu relied on two Apex Court decisions in the case of Kankon Railways reported in Narayan Prasad Lohia Vs. Nikunj Kumar Lohia and Others, and in the case of Dater Switch reported in General Manager Northern Railways and Another Vs. Sarvesh Chopra, .

12. Relying on the first decision Mr. Basu submitted that this Hon'ble Court could not have referred all disputes mentioned in the said application u/s 11 of the said Act of 1996 to Arbitration and that too to an Arbitrator appointed by this Court without affording adequate opportunity to the respondents to appoint Arbitrator in accordance with the terms of the contract. In short, the application before this Court u/s 11 was premature. It was significant to mention that the claimants lodged their claim before Chief Engineer on 6th March, 1996 as appears from the averment made at page 135 of the petition and the application was made before this Court in July, 1996 as appears from page 147 thereof. In this regard, Mr. Basu referred to the general conditions of the contract which provides 180 days time for the railways to appoint Arbitrator.

13. The application u/s 11 was ultimately disposed of by an order dated November 27, 1997 appearing at page 149 of the petition. The nomination of the Arbitrator was made by an order dated July 10, 1998.

14. It was further significant to mention that the petitioner even after the presentation of the application and before the appointment of Arbitrator did not chose to appoint Arbitrator in accordance with the contract.

15. It appears from the award that the railways for the first time in the 54th sitting of the arbitration raised an issue with regard to the jurisdiction of the Arbitrator. In view of the decision of the Apex Court in Kankon Railways Arbitrator decided such issue and held that he had jurisdiction to adjudicate the dispute between the parties.

16. Mr. Joyanta Mitra, learned counsel appearing for the claimants, submitted that since the Arbitrator was appointed by this Court u/s 11 of the Arbitration and Conciliation Act, 1996 after affording adequate opportunity of hearing to the parties the railways were not entitled to raise the issue of jurisdiction and that too at the 54th sitting. Mr. Mitra further submitted that the order allowing the application made u/s 11 of the said Act of 1996 was accepted by the parties. The parties filed their respective statements before the Arbitrator. u/s 16 of the said Act, 1996 the issue of jurisdiction was to be raised at the appropriate time being any time before or at the time of filing of the counter statement of facts. Referring to the counter statement annexed to the petition Mr. Mitra submitted that the plea of jurisdiction was never taken in the counter statement. Moreover, 53 sittings were held where the Arbitrator was invited by the parties to go into the disputes on merits. Hence, according to Mr. Mitra the rights, if any, on these score, had been waived by the railways in terms of Section 4 of the said Act, 1996.

17. Mr. Mitra finally submitted that the issue of jurisdiction had been gone into by the Arbitrator. The Arbitrator had decided such issue by disclosing reasons there for the ultimately held that he had jurisdiction to adjudicate the disputes. Such decision on merits could not be assailed u/s 34 of the said Act, 1996.

18. To decide the first issue Sections 4, 16 and 34 of the said Act, 1996 are relevant herein and are quoted below:--

"4. Waiver of right of object.--A party who knows that-

(a) any provision of this part from which the parties may derogate, or

(b) any requirement under the arbitration, has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object.

16. Competence of arbitral Tribunal to rule on its jurisdiction.-

(1) The arbitral Tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,--

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract, and

(b) a decision by the arbitral Tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral Tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an Arbitrator.

(3) A plea that the arbitral Tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral Tribunal may, in either of the cases referred to in Sub-section (2) or Sub-section (3) and, where the arbitral Tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(5) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34.

34. Application for setting aside arbitral award.--(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with Sub-section (2) and Sub-section (3),

(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 matters 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 from which the parties cannot derogate, or, falling such agreement, was not in accordance with this part; or

(b) the Court finds that-

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation--Without prejudice to the generality of sub- Clause (ii) of Clause (b), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made u/s 33, from the date on which that request had been disposed of by the arbitral Tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under Sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral will eliminate the grounds for setting aside the arbitral award."

19. In terms of Section 16 the plea of jurisdiction cannot be raised after filing the counter statement. Even if it is raised, it is for the Arbitrator to accept such plea and that too with reasons. From the counter statement filed herein it does not appear that the railways were inclined to take up the point of jurisdiction at such stage. It was not the case of the petitioner that the issue was raised earlier before the 54th sitting. The Arbitrator had gone into such issue and ultimately rejected the plea on merits. u/s 34 of the said Act such decision on merits cannot be assailed.

20. The matter can be looked into from another angle. The contract provides for a time for demand for arbitration between 90 days to 180 days from the date of making of the final claim. It also provides for 120 days time to the railways to appoint the Arbitrator from the date of demand. Assuming that the application made before this Court was premature it was open to the railways to appoint Arbitrator at the appropriate stage. In the case of Ajoy Kumar Mukherjee v. Union of India I have recently held that when a demand for arbitration was made

and the time to appoint Arbitrator did not expire the application made u/s 11 was premature and appointment of Arbitrator after initiation of the proceeding was valid. Section 11 provides for appointment of Arbitrator through intervention of Court in case parties did not appoint Arbitrator in accordance with the procedure laid down under the contract. Since the contract provided for a stipulated period any application made before expiry of the said period is premature and is liable to be dismissed. In case of Dater Switch Gear (supra) the Apex Court held that when no time period is mentioned the party can apply u/s 11 after waiting for a reasonable period and according to the Apex Court 30 days period is a reasonable period for appointment of Arbitrator and on the expiry of 30 days period the party can apply u/s 11. It was further held that any appointment after the expiry of 30 days would not be ex facie bad unless it is made after initiation of the proceeding u/s 11. In my view, if the application u/s 11 was premature according to the railways there was no impediment upon them to appoint Arbitrator even after initiation of the proceeding as according to them there was no proceeding at all. Admittedly, the railways did not appoint Arbitrator at the point of time. Hence, such plea of the railways is not tenable.

21. I, therefore, hold that the first contention raised by Mr. Basu on behalf of the railways is not tenable in law and is rejected.

22. On the second issue Mr. Basu referred to various clauses of the contract which provide for exclusion of certain claims irrespective of the eventuality. Mr. Basu further submitted that the claim under serial Nos. 1, 2, 3, 6, 8 and 9 were either excepted matters or were specifically excluded under various clauses of the contract. Hence, those were not referable to arbitration. In this regard, Mr. Basu referred to revised Clause 62 of the general conditions appearing at page 34 of the affidavit-in-reply to show the items of excepted matters provided under the revised clause. 23. It is, however, not clear from the pleadings as to whether the revised Clause 62 which was for the first time annexed to the affidavit-in-reply was placed before the Arbitrator for his consideration at all.

24. Mr. Mitra on the other hand submitted that under the provision of Section 4 the Railways had waived their right granted under the said Act. Mr. Mitra further submitted that u/s 16 the plea of Jurisdiction must be raised prior to the filing of the counter statement. According to Mr. Mitra the Arbitrator was competent to decide all matters which were placed by the parties before him for his consideration. In short, he submitted that if any dispute was outside the scope of the agreement such issue should have been raised at the earliest opportunity and positively before filing of the counter statement. If such issue was not raised by the respondent and if the parties including the respondent proceeded with the arbitration for adjudication on merits irrespective of the fact whether the same was covered under the agreement or not the Arbitrator was competent to decide such issue. Mr. Mitra submitted that objection from the bar that too at the 54th sitting was not a valid objection on the issue of jurisdiction and the Arbitrator had rightly rejected such plea. Lastly, Mr. Mitra contended that the Arbitrator had

given his well reasoned judgment on merits. Section 34 does not permit this Court to go into those factual findings.

25. To decide on the second issue let me consider the cases cited by the parties-

(1) AIR 2002 SCW 426 (Kankon Railways);

(2) 2000, vol. 8, Supreme Court Cases (Dater Switch Gear Ltd. v. Tata Finance Limited);

(3) Narayan Prasad Lohia Vs. Nikunj Kumar Lohia and Others, ;

(4) General Manager Northern Railways and Another Vs. Sarvesh Chopra, ;

(1) Kankon Railways (supra): The 5 Judges Bench of the Supreme Court analysed Section 11 and came to a conclusion that order under this section is not an adjudicatory order. This section empowers the Chief Justice or his designate to take into account the qualification required for the Arbitrator under the agreement and other consideration to secure the nomination of an independent person. According to the Apex Court the only function of the Court under this section is to fill the gap left by a party to the agreement. Such power is vested on the Chief Justice being a person occupying high judicial office who would take due care for nominating a competent, independent and impartial Arbitrator. It was also held that any objection with regard to the jurisdiction would be considered by the Arbitrator in accordance with the provisions of the Act. The other proposition of law decided by the Apex Court may not be relevant therein and as such I do not discuss the same.

(2) Dater Switch Gear (supra): In the instant case the Apex Court while interpreting Section 11(6) held that when there is no time stipulation for appointment of the Arbitrator 30 days should be considered as reasonable. Hence any party demanding arbitration can apply u/s 11(6) on expiry of 30 days. It was also held that even when the Arbitrator is appointed beyond 30 days period it is not ipso facto bad. However, such appointment is ipso facto when an application u/s 11(6) is pending in the Court of law.

(3) Narayan Prasad Lohia (supra): In this case arbitration was held by two Arbitrators. The said Arbitrators were unanimous while granting award. However, the award was challenged u/s 34 on the ground that the arbitration was void in view of the provision of Section 10 which provided for odd number of Arbitrators. In this back drop the apex Court held that a party to the arbitration must raise his jurisdictional points at a proper stage u/s 16(2) i.e. not later than the submission of the counter statement. A party is free to choose his course of action. If he does not choose to raise such issue he would be deemed to have waived his right u/s 4.

(4) General Manager. Northern Railway (supra): In the instant case the Apex Court considered a similar clause like revised Clause 62. The Apex Court considered the applicability of the ouster clause and the excepted matters,

Paragraph 17 of the said judgment is relevant herein and is quoted below.

"To sum up our conclusion are: (i) while deciding a petition u/s 20 of the Arbitration Act, 1940, the Court is obliged to examine whether a difference which is sought to be referred to arbitration is one to which the arbitration agreement applies. If it is a matter excepted from the arbitration agreement, the Court shall be justified in withholding the reference, (ii) to be an excepted matter it is not necessary that a departmental or "in-house" remedy for settlement of claim must be provided by the contract. Merely for the absence of provision for in house settlement of the claim, the claim does not cease to be an excepted matter, (iii) an issue as to arbitrability of claim is available for determination at all the three stages-- while making reference to arbitration, in the course of arbitral proceedings and while making the award a rule of the Court."

26. In paragraph 15 of the said judgment the Apex Court was of the view that under the Indian Law inspite of there being a contract between the parties whereunder the contractor has undertaken not to make any claim for delay in performance of the contract occasioned by an act of the employer, still a claim would be entertained in one of the following situations:--

(i) If the contractor repudiates the contract exercising his right to do so u/s 55 of the Contract Act.

(ii) The employer gives an extension of time either by entering into supplemental agreement or by making it clear that escalation of rates or compensation for delay would be permissible.

(iii) If the contractor makes it clear that escalation of rates or compensation for delay shall have to be made by the employer and employer accepts performance by the contractor in spite of delay and such notice by the contractor putting the employer on terms.

27. It is however significant that in the said decision the view expressed by the Apex Court was on an application made u/s 20 of the Old Act, 1940 and not u/s 11 of the New Act.

28. After analysing the proposition of law laid down in the above decisions of the Apex Court cited at the bar my understanding of the law is as follows:

(i) The Arbitrator was to rule on his jurisdiction be it relating to his appointment and/or be it relating to the subject matter brought before him.

(ii) Objections either with regard to the excepted matters or with regard to the ouster clause must be raised at the earliest opportunity and not after filing the counter statement of claim.

(iii) Any belated objection with regard to the jurisdiction without having express leave from the Arbitrator is not tenable.

(iv) In case objection is not raised at the appropriate time and the Arbitrator is

allowed to go into the disputes brought before him right, if any to raise such objection is deemed to have been waived.

(v) Even if a claim is barred by the ouster clause such claim can be entertained if it subsists after the test laid down by the Apex Court in case of General Manager (supra) and quoted supra.

29. In the instant case the application u/s 11 was heard and disposed of by the learned single Judge holding that it was a fit and proper case for nomination of an independent Arbitrator by the Chief Justice. Accordingly, the Arbitrator was appointed by the Chief Justice. At no point of time either before this Court or before the Arbitrator at the appropriate stage objection was raised by the applicant that subject claims were either hit by the ouster clause or were not arbitrable in view of clause relating to "excepted matters". In any event, whether the subject claims were hit by the said two clauses or whether the claims covered by the ouster clause had qualified the test laid down by the Apex Court, was gone into by the Arbitrator and he had given his detailed finding on merits dealing with all issues raised before him. Such finding of facts cannot be upset by this Court u/s 11.

30. The matter can be viewed from another angle. u/s 28 of the Contract Act, as amended, such ouster clause cannot operate as bar on a party who is otherwise entitled to enforce his right under the statute. In the case of General Manager, Northern Railway (supra) the Apex Court held that when a party raises objection for delay caused by the employer at the earliest opportunity and repudiates the contract on that score or accepts extension subject to payment of damage that party is entitled to claim such damage irrespective of such ouster clause. Hence. Whether contractor had raised appropriate objection at the appropriate time and thereby reserved their right to claim damages and/or any other extra cost irrespective of ouster clause was a relevant aspect and had been gone into by the Arbitrator on merits. The parties allowed the Arbitrator to go into such question on merits and ultimately got his award on that score. I am not competent to upset that award. To upset the said award I have to examine the validity of the reasoning given by the Arbitrator on merits which would amount to sitting on appeal over the factual finding of the Arbitrator which is not permissible in law.

Hence, the application falls and is hereby dismissed. There would be, however, no order as to costs.

There would be stay of operation of this judgment and order for a period of fortnight from the date.