

(1974) 02 CAL CK 0031

In the Calcutta High Court

Case No : Appeal No. 119 of 1973 and Special Suit No. 17 of 1971

Union of India (UOI)

APPELLANT

Vs

Romesh Kumar Rajgharia

RESPONDENT

Date of Decision : 19-02-1974

Acts Referred:

Arbitration Act, 1940 — Section 30, 33

Citation : AIR 1974 Cal 345 : (1974) 1 CALLT 359

Hon'ble Judges : S.C. Ghose, J;B.C. Mitra, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Ghose, J.—This appeal is directed against the judgment and order dated February 15, 1973 passed by the Court of first instance dismissing the application made by the appellant for setting aside an interim award dated September, 30, 1972 made by the joint arbitrators directing the appellant to refund to the respondent the sum of Rs. 2.24,582/-on or before November 15, 1972; with interest on the said sum at 9% per annum, if the same were not paid by the appellant on or before November 15, 1972. The said sum was lying deposited with the appellant as and by way of security and or earnest for due performance by the respondent of three several contracts dated July 22, 1969, June 7, 1970 and February 28, 1970 executed by the parties.

2. By and under the above mentioned three several contracts, the respondent agreed to execute certain earth-works and to construct certain minor bridges in connection with the diversion of the main line at the end of and/or relating to the Bokaro Steel City Marshalling and Exchange Yard, as well as the Departure Yard Zone I in connection with the said Marshalling and Exchange Yard.

3. All the said three contracts provided inter alia that the general conditions of the contracts, the special conditions, specification of work and memoranda of measurement of the South Eastern Railway, Schedule of Rates forming parts III

and IV respectively of the South Eastern Railway Schedule of Rules revised edition 1958 corrected upto the correction slip No. 62 dated January 17, 1969 and the additional special conditions and special specifications annexed thereto would form part of the said contracts.

4. Clause 16 of the general conditions of contracts of South Eastern Railway Schedule of Rates inter alia provide for deposit of security for due and faithful performance of his obligations by the contractor under the contract. Such security deposit will consist of. the earnest money initially deposited by the contractor along with the tender submitted by him, together with the balance of the stipulated amount of security deposit either paid by him or deducted by the Railway authorities usually @ 10% from the periodic payments to be made to the contractor on account of the work done by him. In the instant case the security deposit of Rs. 2,24,582/-consisted of the earnest money initially paid by the respondent and deductions made by the Railway Authorities from periodic payments made to the respondent on account of works done by him.

5. Clause 52 of the said general conditions provides that the Railway shall have a lien on any money that may become due and payable to the contractor under the contract and/or also on and over the deposit or security amount lying in deposit and which may become repayable to the contractor, for any debt or sum that may become due and repayable to the Railway by the contractor under the contract or under any other contract or transaction of any nature whatsoever between the Railway and the contractor. The said clause also provides that if the contractor fails to pay the claims of the Railway on demand the Railway would be entitled to deduct the said debt or sum due by the contractor from the monies, securities or deposits which may become payable to the contractor under that contract or under any other contract or transactions whatsoever between the contractor and the Railway.

6. Clause 61 of the said general conditions provides for rescission of the contract by the Railway after giving seven days" notice to the contractor to make good the default committed by the contractor under the contract and thereafter by serving another 48 hours" notice, if the default is not made good. If the respondent abandons the contract or persistently disregards the directions of the engineer in carrying out the said contract to the satisfaction of such engineer or contravenes any provision of the contract, then upon such rescission the Railway would be at liberty to measure the work done by the contractor and get the outstanding work completed by other agencies and in such event to forfeit the whole or any part of the security deposit and to recover from the contractor the extra costs of carrying out the outstanding work if any.

7. Clause 62 of the general conditions provides for settlement of disputes or difference that may arise in connection with the contract by referring the same by the contractor to the Railway authorities who will have to notify its decision on the said disputes or difference in writing. Except the matters which are "excepted matters" under the contract if the contractor is dissatisfied with the decision of

the Railway on any matter the contractor may demand in writing that such disputes or difference be referred to arbitration. The contractor must specify the disputes or differences which he desires to be referred to arbitration under clause 63 of the general conditions and upon such demand in writing to be made by the contractor specifying such disputes or differences the same would be referred to arbitration of the General Manager of the Railway concerned or a person nominated by him in that behalf, in cases where the value of the subject-matter of disputes is below Rs. 3 lakhs and the disputes are not of a complicated nature. If the value of the subject-matter of the dispute was Rs. 3 lakhs or above or if the issues involved are of a complicated nature, the disputes are to be referred to two gazetted Railway Officers of equal status to be appointed in terms of the Sub-clause (3b) of Clause 63 of the said general conditions.

8. The due date for completion of the works under the said first contract by the respondent was extended from June 30, 1970 to March 31, 1971 at the instance of the respondent. The time thereafter was not extended even though prayed for by the respondent. The time to complete the work under the second contract was extended by the Railway at the instance of the respondent from December 17, 1970 to April 30, 1971. The time to complete the works under 3rd contract likewise was extended by the Railway from January 20, 1971 to June 15, 1971. Disputes and differences thereafter arose between the appellant and the respondent and the appellant claimed to have rescinded the said contracts in terms of clause 61 of the said general conditions.

9. First and third contracts were according to the appellant rescinded by the two letters both dated July 28, 1971 and the second contract is claimed to have been rescinded by the appellant by a letter dated July 9, 1971. On August 9, 1971 the respondent filed an application u/s 20 of the Arbitration Act inter alia for filing the above mentioned three Arbitration agreements contained in above mentioned Clauses 62 and 63 of the general conditions forming part of the said three several contracts and for referring the disputes between the parties to arbitration in terms of the arbitration clauses mentioned above. Upon the said application which was marked as special suit No. 17 of 1971 of the respondent, an order was passed by the Court on September 24, 1971 directing the filing at the arbitration agreements and referring the disputes to the arbitration of two arbitrators, namely Sri G.N. Phadke and Sri R. Das its terms of the aforesaid arbitration clause.

10. On November 1, 1971 the said arbitrators entered upon the reference and directed the respondent to submit his statement of claim which was filed by the respondent before the arbitrators on March 31, 1972 after taking several extensions of time to do so. The appellant filed before the arbitrators its counter statement on July 15, 1972. In the statement of claim filed by respondent, the respondent claimed an award for the sums of Rs. 8,35,746.00, Rs. 2,24,385.97 paise and Rs. 5,30,452.10 p. in respect of the first, second and third contracts. The said claims were referred by the respondent to the Chief Engineer

Construction South Eastern Railway Bilaspur M. P. by three several letters dated July 28, 1971 for his decision in terms of clause 62 of the said general conditions applicable to the said contracts, prior to his demand for arbitration in respect thereof. The said special suit was filed obviously as the respondent was not satisfied with the decision of the Railway on the said disputes referred to it in terms of Clause 62 mentioned above. It should be noted here that none of the claims mentioned above in the said three letters which were referred to the Railway under Clause 62 of the abovementioned general conditions which was condition precedent to the referring of the said disputes to arbitration included any claim for refund of any security lying in deposit under the said three contracts.

11. In the statement of claim filed before the arbitrators the claim for the refund of security deposit was not included as well. On April 13, 1972 the respondent again wrote three several letters requesting the Chief Engineer (Construction) to give his decision on further disputes raised in the said letters in respect of the said three contracts in terms of clause 62 mentioned above.

12. For the first time in the said letters the disputes as to the refund of security deposit was raised and referred for decision of the Railway. On July 15, 1972 the appellant filed its counter statement of facts before the arbitrators. The arbitrators held their sitting on August 19, 1972, August 22, 1972 and September 23 and 24, 1972, in the meeting held by the arbitrators on September 24, 1972, the respondent for the first time filed a letter dated the same day asking for an interim award directing the appellant to pay to the respondent the sum of Rupees 2,24,582/- lying in deposit with the appellant as and by way of security deposit as mentioned hereinabove.

13. The meeting of that day was over and next meeting was fixed to be held on October 7, 1972. On September 27, 1972 the appellant filed a letter with the arbitrators objecting to the making of the interim award. Before the next meeting was held by the arbitrators the arbitrators made and published an interim award on September 30, 1972 directing the appellant to refund the sum of Rs. 2,24,582/- lying in deposit with them as and by way of security under the above mentioned three several contracts. The appellant applied for setting aside of the said award u/s 30 of the Arbitration Act 1940. The application was dismissed by the judgment under appeal.

14. The counsel for the appellant contended that in making the interim award the arbitrators exceeded their jurisdiction inasmuch as the refund of security deposit was not the subject-matter of the reference. The counsel for the appellant next contended that the arbitrators did not allow the appellant to conclude its submissions on the question of refundability of the security deposit and making of the interim award in respect of the same and thus misconducted the proceedings. The counsel for appellant further contended that the security deposit stood forfeited and so the arbitrators could not make the interim award. Lastly, the appellant's counsel submitted that the monies and/or damages

claimed by the Union of India as against the contractor for having committed breaches of the terms and conditions of the contract were to be recouped out of the dues of the contractor. Such damages were inter alia the extra expenditure incurred or to be incurred by the Railway in carrying out the residue of the work not performed or executed by the respondent in terms of the contract. Thus, without deciding the said issue the arbitrators could not make the interim award.

15. The counsel for the respondent contended however, that: --

The arbitration agreement which has been set out at page 25 of the paper book is a very wide arbitration agreement and include the adjudication in regard to the refundability of the security deposit. In the statement of claim filed by the contractor it claimed that the Union had not converted the security deposit, in terms of the contract by putting it in fixed deposit account with Banks.

The appellant on the other hand contended that the security money was forfeitable of stood forfeited, therefore the question in regard to the security deposit was (not?) the subject-matter of the reference before the arbitrators.

16. The Union of India did not file any affidavit in opposition to the petition filed in the special suit No. 17 of 1971 u/s 20 of the Indian Arbitration Act. Hence all disputes between the parties were referred to the arbitration by the order passed by the Court in the said suit.

17. On June 12, 1972 the respondent applied to the Court u/s 20 of the Arbitration Act inter alia for referring the dispute in regard to the refundability of the security deposit to arbitration. On July 15, 1972 the counter statement of fact was filed by the appellant in the reference directed in special suit No. 17 of 1971. On March 2, 1973 order was made on an application moved by the appellant u/s 33 of the Indian Arbitration Act deciding that all disputes between the parties were referred to arbitration under the order of reference dated September 24, 1971 made in the Special suit No. 17 of 1971. The counsel for the respondent submitted that because of the order in the application u/s 33 of the Arbitration Act mentioned above directing that that adjudication of the issues raised by the counter statement of fact filed by the appellant should be made in the very same reference, the question in regard to the security deposit became and was included in the subject-matter of the reference.

18. The appellant claimed to have forfeited the security deposit; it claimed in the alternative that the same was, forfeitable in the counter statement of fact. The appellant thus asked for an award to the aforesaid effect in their favour in the reference. The interim award which directs the appellant to pay the security deposit has gone against the appellant, but the appellant who had wanted that his claim as to security deposit should be decided in the reference is estopped from attacking the interim award.

19. Lastly the counsel for the respondent submitted that the appellant's allegation that it was not given a hearing on the question of the refundability of

the security deposit and making an interim award in respect thereof in favour of the respondent should not be taken notice of, because the allegations to that effect made in the petition have" been verified as based on information derived from records. No particulars of such records have been furnished or mentioned. The interim award also recites that the parties were heard and although the appellant was furnished with a copy of the interim award, no denial was made to the said recital contained in the interim award nor any facts to the contrary were ever alleged before filing the application in the instant case. In the premises the statements made in the said recital of the award according to the counsel for the respondent must be deemed to be correct.

20. It is clear from a persual of the Clauses 62 and 63 of the general conditions that the condition precedent to the reference to arbitration of any disputes was or is the demand in writing by the contractor of the settlement of the said specific dispute mentioned in such writing by the Railway and the default on the part of the Railway either to give its decision on the dispute raised by the contractor or the non-acceptance by the contractor of such decision of the Railway.

21. It is apparent from the letters dated July 28, 1971 mentioned hereinabove that the contractor never asked for settlement of any dispute in regard to the refund of the security deposit by the Railway in terms of Clause 62 of the said general conditions. The contractor did not also mention the dispute as to the non-payment of the security deposit by the Railway in the petition filed in the special suit No. 17 of 1971. The contractor was fully aware of the aforesaid position and so by three several letters dated April 13, 1972 written to the Chief Engineer (Construction) asked for his decision on several disputes raised in the said letters including the question of refund of the security deposit. And thereafter the respondent contractor applied only on June 12, 1972 for referring the further disputes raised in the above mentioned three several letters dated April 13, 1972, to arbitration.

22. The said further disputes included the disputes in regard to the claim of the contractor for the refund of the security deposit. These disputes including that of refund of the security deposit were referred to arbitration on March 19, 1973 in the said special suit No. 27 of 1972 filed by the contractor that is to say, more than five and half months after the making of the impugned interim award.

23. In the application filed u/s 33 of the Arbitration Act 1940 it was held inter alia by the court that the arbitrators had jurisdiction to go into the question of set off and counter claim raised by the appellant, Union of India in the reference by way of defence to the claim of the contractor. Such position was contemplated by the provisions of Order 8, Rule 6 and Order 20, Rule 10 of the Code of Civil Procedure. The said judgment or the claim made by the appellant in the counter statement of facts filed by it before the arbitrators in regard to the security deposit could not widen the scope of the claim made by the respondent in its statement of claim, and could not have the effect of including in the said

statement of claim filed by the respondent any claim for refund of the security deposit. It appears, therefore, that the question of refund of the security deposit by the Union of India to the contractor was never a part of the subject-matter of the reference in special suit No. 17 of 1971, on the date of making the interim award by the arbitrators.

24. We, however, do not want to say anything more on this question inasmuch as the appellant has not made the necessary averments in the petition filed by it for setting aside the award. Specific averments and grounds for setting aside an award have to be stated to enable the Court to set aside an award even though the award may be a nullity as in the instant case. Application has to be made within thirty days of service of notice u/s 14(2) of the Arbitration Act 1940 for setting aside an award. Otherwise the award cannot be set aside on any ground contemplated by Section 30 of the Arbitration Act. The expression "otherwise invalid" appearing in Clause (c) of Section 30 of the Act includes awards that are nullities. (See *Madan Lal Vs. Sunderlal and Another*, ; *Saha and Co. Vs. Ishar Singh Kripal Singh and Co.*,). In the instant case no fact has been stated in the petition to show that the arbitrators exceeded their jurisdiction in making the interim award or in other words that the refund of the security deposit was not the subject-matter of the said reference directed in the special suit No. 17 of 1971.

25. This point was not raised nor argued before the court of the first instance and thus in our opinion should not be allowed to be urged in the instant appeal, especially as the question is dependent upon facts which are conspicuous by their absence in the pleading. In *M.P. Shreevastava Vs. Mrs. Veena*, , the Supreme Court refused to allow to raise a question not raised in Courts below. *Haji Ebrahim Kassam Cochinwalla Vs. Northern Indian Oil Industries Ltd.*, was cited by the counsel for the respondent in support of the proposition that a petitioner in an application for setting aside an award could not travel beyond the grounds urged in the petition. In the said case the ground that the arbitrator omitted to file necessary documents with the award was not taken in the petition filed for setting aside the award. The said ground was sought to be urged on behalf of the petitioner on the basis of allegations made in an affidavit filed in the court at the time of hearing. Such ground was not allowed to be taken.

26. In the *President, State of Orissa and Another Vs. Kalinga Construction Co. (P) Ltd.*, it was held by the Supreme Court that unless an error was apparent on the face of the award it could not be set aside. Similar was the decision of the Supreme Court in *Allen Berry and Co. Pvt. Ltd. Vs. The Union of India (UOI)*, New Delhi, wherein it was held that mistake must be apparent on the face of the award, otherwise the award could not be set aside. The ratio decidendi in *R.N. Jhunjhunwalla v. Alliance Jute Mills* (1970) 74 CWN 510; *Chowdhury Murtaza Hosen v. Mt. Bechunnisa* (1876) 3 Ind App 209 (PC) and *Bhagwati Prasad Vs. Shri Chandramaul*, stated that parties to a reference who wanted their claim to be awarded, cannot challenge the award if it goes against them even though the

arbitrator exercised their jurisdiction irregularly. In the instant case we have failed to discover any mistake apparent on the face of the award or any fact pleaded in the petition to show that the arbitrators had no jurisdiction to make the interim award.

27. The facts of the case recited hereinabove in detail, show that on September 24, 1972, the respondent for the first time wrote the letter a copy whereof appears at page 63 of the paper book requesting the arbitrators to make an interim award for the refund of the security deposit under the said contracts. The Railway's Law Officer, it appears, was not present at the hearing on that date and the Railway could not place its case in regard to the refundability of the security deposit before the arbitrators on that date. It appears that although the next hearing of the reference was fixed to be held on October 7, 1972 the arbitrators all on a sudden made and published their interim award on September 30, 1972.

28. It is true that verification in the petition on this aspect of the matter is far from satisfactory but taking the averments in the petition on this question together with the averments made by Neti Ramanjaneyulu who was personally present at the hearing on 24th September, 1972 in his affidavit affirmed on January 25, 1973 make it clear that the arbitrators hastily concluded the hearing on the question of refundability of security deposit even prior to the filing by the appellant of any written objection to the written application of Respondent for an interim award in respect of the security deposit.

29. The hearing on that question seems to have been concluded the very day on which the respondent all on a sudden filed the letter addressed to the arbitrators to make an interim award for the refund of the security deposit. Although the said claim was not included in the statement of claim filed by the respondent, the appellant was not even asked by the arbitrators to file any rejoinder to the written application made by the respondent on this question. It appears, to us that the arbitrators did not give proper opportunity to the appellant to present its case on the question of refundability of the security deposit in the said reference and made their award hastily. The arbitrators did not give any notice of their intention to make an interim award on the said question to the parties even on September 24, 1972. The arbitrators on 24th September 1972, should have made it clear that the proceeding in regard to the security deposit was at an end. For the reasons aforesaid the arbitrators in our opinion misconducted the proceeding and the impugned, award is bad and must be set aside. We have come to this conclusion, notwithstanding the statement made in the recital part of the award that the arbitrators had heard the parties. In Union of India (UOI) Vs. T.R. Varma, , the Supreme Court stated that where there is a dispute as to what happened before a court or tribunal, the statement of the Presiding officer was generally taken to be correct. In expressing the said view, the Supreme Court was influenced by the fact that in the said case there was no reason why the statement of the presiding officer was not to be accepted as correct. The

facts in the instant case are different and are sufficient to induce us not to adopt or accept the general practice.

30. The impugned award must be set aside in our view also on the ground that by making the impugned interim award the arbitrators have purported to reject the claim made by the appellant in its counter statement of fact to have the damages suffered by it for non performance by the respondent of the obligations cast upon it by the said contracts, set off inter alia against the said security deposit.

31. Under clause 52 of the general conditions mentioned above "the Union of India has general lien on the security as well as all monies that were due and payable by the appellant to the respondent under the said contracts. The said clause entitles the appellant to recover out of the security deposit and/or the other sums payable by it to the respondents, all damages suffered by it and extra expenses incurred by it in having the residue of the work under the said contracts done by a third party. The said counter claim has been made by the appellant in annexure 30 to the counter statement of fact filed by it in the reference directed in the special suit No. 17 of 1971. The claim to the refund of the security deposit is thus, irretrievably connected with the claim of the Union of India for the damages and/or extra expenses suffered or incurred or to be incurred by it as mentioned above. The refund of the security deposit cannot be ordered without hearing the said claim for damages and extra expenses and the claim made by the appellant to recover such damages and extra expenses out of, inter alia the said security deposit, and deciding the said questions. The arbitrators did not hear the parties on the question of damages and extra expenses incurred or to be incurred by the appellant as claimed in the counter statement of fact nor did they hear the parties on the claim made by the appellant to recover such damages and extra expenses out of inter alia the said security deposit. In the premises the interim award directing the payment of the said security deposit to the respondent must be held to be bad and set aside.

32. For the reasons stated above this appeal must succeed and is allowed. The judgment and order of the court of first instance is set aside. The interim award is set aside. In the facts and circumstances of the case we direct each party to pay and bear his or its costs of and incidental to this appeal.

B.C. Mitra, J.

33. I agree.