
(2010) 07 DEL CK 0048
In the Delhi High Court
Case No : OMP No. 572 of 2009

Union of India (UOI)

APPELLANT

Vs

S. Ranjan and Brothers

RESPONDENT

Date of Decision : 02-07-2010

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34, 34(2)

Citation : (2010) 07 DEL CK 0048

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Geeta Sharma and Preeti Dalal, for the Appellant; Ansuiya Salwan, for the Respondent

Final Decision : Dismissed

Judgement

Rajiv Sahai Endlaw, J.—The petitioner Union of India has preferred this petition u/s 34 of the Arbitration Act, 1996 seeking setting aside of the award dated 4th April, 2009 as modified on 29th May, 2009. Disputes and differences had arisen from a contract dated 25th June, 1999 placed by the petitioner Union of India on the respondent contractor for construction of 50 bedded hospital for National Security Guards (NSG) at Manesar. The arbitrator whose award is under challenge was appointed by this Court vide order dated 3rd April, 2006 in OMP No. 422/2004.

2. It was the case of the petitioner Union of India that the work under the contract was to start on 5th July, 1999 and to be completed within 18 months by 4th January, 2001; however the respondent contractor was neither ready to, nor could discharge its contractual obligations and failed to adhere to the programme schedule which had to be altered time and again at the request of the respondent contractor; however the respondent contractor by 21st December, 2000 i.e. when 97% of the stipulated time was over, completed only 41% of the work; that the contract was ultimately rescinded vide letter dated 22nd February, 2001; that the respondent contractor vide Civil Writ No. 1417/2001 in this Court

challenging the said rescission and vide order in which, the rescission of the contract was stayed on the basis of an undertaking by the respondent contractor to complete the work by 30th April, 2001; that the respondent contractor inspite of such undertaking did not even commence the work and vide order dated 6th August, 2001 in the writ petition aforesaid the petitioner Union of India was permitted to start the construction at their own costs after 31st August, 2001, after taking joint measurement.

3. The petitioner Union of India accordingly made the following claims against the respondent contractor -

- i. of Rs. 51,05,000/- for completion of work at the risk and cost of the respondent.
- ii. of Rs. 5,57,034/- due to increase in Cost Index on account of delays.
- iii. of Rs. 1,07,200/- on account of damages for increase in procurement prices of stipulated materials.
- iv. of damages on account of idle establishment.
- v. of costs of the arbitration proceedings and for
- vi. of pendente lite interest.

4. The respondent contractor contested the aforesaid claims, denying that there was any delay or laxity on its part; delays were attributed to hindrances created by the petitioner Union of India; it was pleaded that the site was handed over after a delay of more than two months i.e. on 9th September, 1999; there was delay in supply of drawings and in arranging the requisite quantity of cement, steel etc.; that the officials of the petitioner Union of India were issuing letters to cover their own default; that the letter of forfeiture of earnest money was issued even prior to handing over of the site; that no show cause notice was issued prior to the rescission of the contract and the show cause notice issued on an earlier occasion had stood exhausted - it was thus averred that the rescission of the contract was illegal; it was further pleaded that there were delays on the part of the petitioner Union of India in supplying the materials viz. cement, steel etc. which under the contract it was to supply; that after the undertaking in the High Court also, the respondent contractor was not permitted to enter the site. The respondent contractor made counter claims against the petitioner Union of India,

- a) of Rs. 1,17,453/- deducted from the running bills on account of rebate.
- b) of Rs. 20 lacs on account of payment due under the final bill for the work done but not paid for.
- c) of Rs. 5 lacs on account of refund of security deposit.
- d) of Rs. 25,000/- on account of wrong derivation of rates for extra items under Clause 12 of the Agreement.

e) of Rs. 50,000/- on account of work done/executed as per directions of the Engineer Incharge but not measured and paid for.

f) of Rs. 3,50,000/- under Clause 12A of the Agreement for the work executed beyond the deviation limit.

g) of Rs. 10,25,000/- on account of idle labour, T&P, Centering/Shuttering materials etc.

h) of Rs. 50,000/- on account of infructuous expenditure attributable to the petitioner Union of India.

i) of Rs. 1 1,87,000/- for loss of profit.

j) of Rs. 6,74,500/- under Clause 10CC of the Agreement.

k) of Rs. 90,000/- on account of deployment of watch and ward staff.

l) of Rs. 2,20,000/- on account of non utilization of surplus T&P.

m) of Rs. 22 lacs on account of cost of T&P, machinery etc.

n) of Rs. 22,04,846/- for refund of amount adjusted against illegal imposition of compensation.

o) of Rs. 1 lac towards costs of arbitration. 5. The Arbitrator has in the award impugned in this petition-

i. Held the rescission of the contract by the petitioner Union of India to be not in accordance with the Agreement for the reason of the petitioner Union of India having not given show cause notice required to be given prior thereto.

ii. Found that the claim of the petitioner Union of India of Rs. 51,05,000/- included a sum of Rs. 22,04,846/- towards the penalty imposed by the petitioner Union of India on the respondent contractor. Imposition of the said penalty was not arbitrable and a Civil Suit for the same was pending. It was held that the petitioner Union of India could recover the said amount from the respondent contractor only if successful in the said Civil Suit and could not recover the same before that by adjustment thereof from the running bills. The remaining amount in the claim of Rs. 5 1,05,000/- towards the amount which the petitioner Union of India had to pay in excess to the subsequent contractor to get the work completed was also declined to the petitioner Union of India for the reason of the rescission of the contract having been found to be illegal.

iii. The other claims of the petitioner Union of India were also declined for the same reason i.e. of rescission of the contract being illegal.

iv. The claim of the respondent contractor of Rs. 1,17,453/- on account of illegal deductions towards rebate was allowed for a sum of Rs. 51,864.97p only.

v. Out of the claim of the respondent contractor of Rs. 20 lacs for payment due under the final bill for work done but not paid for, a sum of Rs. 5 lacs only was

allowed.

vi. The respondent contractor was held entitled to the refund of security deposit of Rs. 5 lacs.

vii. The claim of the respondent contractor of Rs. 25,000/- on account of wrong derivation of rates for extra items was allowed in full.

viii. The claim of the respondent contractor for Rs. 50,000/- for work done as per the directions of the Engineer-in-Charge, not measured and paid was declined for the reason of being included in the award against the final bill.

ix. Out of the claim of the respondent contractor of Rs. 3,50,000/- under Clause 1 2A of the Agreement, a sum of Rs. 1 lac only was allowed.

x. Out of the claim of the respondent contractor of Rs. 10,25,000/- for idle labour etc. a sum of Rs. 3 lacs only was allowed.

xi. The claim of the respondent contractor of Rs. 50,000/- for infructuous expenditure was disallowed.

xii. Out of the claim of the respondent contractor of Rs. 11,87,000/- on account of loss of profits, a sum of Rs. 10 lacs only was allowed.

xiii. Out of the claim of the respondent contractor of Rs. 6,74,500 under Clause 10CC, a sum of Rs. 3,35,161/- only was allowed.

xiv. Out of the claim of the respondent contractor of Rs. 90,000/- for deployment of watch and ward staff, a sum of Rs. 50,000/- only was allowed.

xv. Out of the claim of the respondent contractor of Rs. 22 lacs on account of T&P, machinery etc., a sum of Rs. 7 lacs only was allowed.

xvi. The claim of the respondent contractor of Rs. 2,20,000/- for non- utilization of surplus T&P was declined.

xvii. The claim of the respondent contractor of Rs. 22,04,846/- on account of refund of amount already adjusted against the illegal imposition of penalty was allowed only for Rs. 9,85,807/- i.e. to the extent the recovery had been made pending the Civil Suit aforesaid.

xviii. Interest at the rate of 9% p.a. from the date of the claim i.e 9th May, 2002 till the date of payment was awarded.

6. The petitioner Union of India has in the petition framed grounds of challenge, as in a Memorandum of Appeal. The argument of the counsel for the petitioner Union of India also is that the award under different claims is arbitrary; objection is also taken to the award of costs of arbitration of Rs. 1,25,000/-.

7. I have in judgment dated 22nd December, 2009 in OMP No. 362/2009 titled Bhagwati Contractors Vs. Union of India (UOI) and Another observed as under with respect to the scope of interference u/s 34 of the Arbitration Act, 1996 and

which observations are found apt for the present also:

7. Arbitration is intended to be a faster and less expensive alternative to the courts. If this is one's motivation and expectation, then the finality of the arbitral award is very important. The remedy provided in Section 34 against an award is in no sense an appeal. The legislative intent in Section 34 was to make the result of the annulment procedure prescribed therein potentially different from that in an appeal. In appeal, the decision under review not only may be confirmed, but may also be modified. In annulment, on the other hand the decision under review only may be invalidated in whole or in part or be left to stand if the plea for annulment is rejected. Annulment operates to negate a decision, in whole or in part, thereby depriving the portion negated of legal force and returning the parties, as to that portion, to their original litigating positions. Annulment can void, while appeal can modify. Section 34 is found to provide for annulment only on the grounds affecting legitimacy of the process of decision as distinct from substantive correctness of the contents of the decision. A remedy of appeal focuses upon both legitimacy of the process of decision and the substantive correctness of the decision. Annulment, in the case of arbitration focuses not on the correctness of decision but rather more narrowly considers whether, regardless of errors in application of law or determination of facts, the decision resulted from a legitimate process.

8. In the case of arbitration, the parties through their agreement create an entirely different situation because regardless of how complex or simple a dispute resolution mechanism they create, they almost always agree that the resultant award will be final and binding upon them. In other words, regardless of whether there are errors of application of law or ascertainment of fact, the parties agree that the award will be regarded as substantively correct. Yet, although the content of the award is thus final, parties may still challenge the legitimacy of the decision-making process leading to the award. In essence, parties are always free to argue that they are not bound by a given "award" because what was labeled an award is the result of an illegitimate process of decision.

9. This is the core of the notion of annulment in arbitration. In a sense, annulment is all that doctrinally survives the parties' agreement to regard the award as final and binding. Given the agreement of the parties, annulment requires a challenge to the legitimacy of the process of decision, rather than the substantive correctness of the award.

10. Joseph Raz in his paper "The Politics of the Rule of Law" has opined that the function of the rule of law is to facilitate the integration of a particular piece of legislation with the underlying doctrines of the legal system; the authority of the courts to harness legislation to legal doctrine arises neither from their superior wisdom nor from any superior law of which they are the custodians; it arises out of the need to bring legislation in line with doctrine. The courts ensure coherence of purpose of law, ensuring that its different parts do not fight each other. The

learned author has further observed that a law which is incoherent in purpose serves none of its inconsistent purposes very well. Purposes conflict if due to contingencies of life serving one will in some cases retard the other. The second basis for the authority of the courts to integrate legislation with doctrine is the need to mix the fruits of long established traditions with the urgencies of short term exigencies. In ensuring the coherence of law, the courts are expected to ensure the effectiveness of the democratic rule. In giving weight to the preservation of long established doctrines i.e., the traditions, they protect the long term interest of the people from being swamped by the short term. I have taken the liberty to quote from the aforesaid paper since the courts are being repeatedly called upon to adjudicate on the various provisions of the re-enacted arbitration law. From the various pronouncements in the last about 12 years since reenactment, it appears that the danger of interpreting the new Act in a manner doing away with the whole object/purpose of re-enactment is imminent. The courts continue to be inundated till date, in spite of repeal of the old Act 12 years ago, with cases thereunder also, particularly of challenge to the arbitral award. Provisions of the old and the new Act relating to inference with the arbitral award are vastly different. However, when the courts in the same day are wrestling with a matter concerning arbitral award under the old Act and with that under the new Act, the chances of culling out the huge difference between the two are minimal. It is not to be forgotten that the courts deal with and rule on disputes where monies and properties of real persons are at stake. The courts do not decide in abstract. Thus, when in one case the courts interfere with the award for the reason of the same not rendering to the litigant what the courts would have granted to him, the courts find it difficult in the very next case, though under the new Act to apply different parameters.

11. Arbitration under the 1940 Act could not achieve the savings in time and money for which it is renowned and had merely become a first step in lengthy litigation. It was to get over the said malady that the law was sought to be overhauled. While under the old Act, the award was unenforceable till made rule of the court and for which it had to pass various tests as laid down therein and general power/authority was vested in the court to modify the award, all this was removed in the new Act. The new Act not only made the award executable as a decree after the time for preferring objection with respect thereto had expired and without requiring it to be necessarily made rule of the court but also did away with condonation of delay in filing the said objections. The reason/purpose being expediency. The grounds on which the objections could be filed are also such which if made out, the only consequence thereof could be setting aside of the award. It is for this reason that under new Act there is no power to the court to modify the award or to remit the award etc. as under the old Act. A perusal of the various grounds enunciated in Section 34 will show that the same are procedural in nature i.e., concerning legitimacy of the process of decision. While doing so, the ground of the award being in conflict with Public Policy of India was also incorporated. However the juxtaposition of Section 34(2)(ii) shows that the

reference to Public Policy was also in relation to fraud or corruption in the making of the award. The new Act was being understood so till the Supreme Court in *Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd.*, held that the phrase Public Policy of India is required to be given wider meaning and if the award on the face of it is patently in violation of statutory provisions, it cannot be said to be in public interest and such award/judgment/decision is likely to adversely affect the administration of justice. In para 37 of the judgment it was held that award could be set aside if it is contrary to fundamental policy of Indian Law or the interest of India or justice or morality or if it is patently illegal. A rider was however put that illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that the award is against the public policy. Yet another test laid down is of the award being so unfair and unreasonable that it shakes the conscience of the court.

12. The courts have thereafter been inundated with challenges to the award. The objections to the award are drafted like appeals to the courts; grounds are urged to show each and every finding of the arbitrator to be either contrary to the record or to the law and thus pleaded to be against the Public Policy of India. As aforesaid, the courts are vested with a difficult task of simultaneously dealing with such objections under two diverse provisions and which has led to the courts in some instances dealing with awards under the new Act on the parameters under the old Act.

13. The result is that the goal of re-enactment has been missed.

14. The re-enactment was not only to achieve savings in time and prevent arbitration from merely becoming the first step in lengthy litigation but also in consensus with the international treaties and commitments of this country thereto. Since the enactment of the 1940 Act, the international barriers had disappeared and the volume of international trade had grown phenomenally. The new Act was modeled on the model law of international commercial arbitration of the United Nations Commission on International Trade. It was enacted to make it more responsive to contemporary requirements. The process of economic liberalization had brought huge foreign investment in India. Such foreign investment was hesitant, owing to there being no effective mode of settlement of domestic and international disputes. It was with such lofty ideals and with a view to attract foreign investment that the re-enactment was done. If the courts are to, notwithstanding such re-enactment, deal with the arbitration matters as under the old Act it would be a breach of the commitment made under the treaties on international trade.

8. Neither in the petition nor during the hearing has the petitioner Union of India even remotely challenged the legitimacy of the decision making process leading to the award. The grounds urged, of the findings of the arbitrator on the various issues and claims being contrary to the evidence documentary and oral, before the arbitrator do not constitute grounds for setting aside of the award u/s 34 of the Arbitration Act.

9. The counsel for the petitioner Union of India has contended that the arbitrator has awarded interest also on the security deposit notwithstanding Clause 29 in the Agreement entitling it to do withhold the same and expressly providing that no claim for interest thereon would lie. The counsel for the respondent contractor has contended that neither was any such issue raised before the arbitrator nor has any ground with respect thereto been pleaded in the petition preferred before this Court. It is also contended that the said clause would not apply owing to the petitioner Union of India having claimed to have forfeited and not withheld the security deposit.

10. In the aforesaid circumstances, it cannot really be said that the award of interest on security deposit, not from the date of forfeiture but only from the date of the claim, is contrary to any written contract between the parties and by which the arbitrator is bound. Similarly, costs of Rs. 1,25,000/- awarded by the arbitrator, though in excess of the costs claimed by the respondent contractor of Rs. 1 lac, appear to be on the assessment of the actual costs of arbitration and in any case being in the discretion of the arbitrator, award with respect thereto also does not call for any interference.

11. As far as the contention of the petitioner Union of India of the arbitrator having not given any basis for the amounts awarded under various claims, the arbitrator on the basis of the material before it has made an assessment of the amount due under each claim and such assessment cannot be the subject matter of challenge u/s 34 of the Arbitration Act.

12. The counsel for the petitioner Union of India has also contended that though the arbitrator on application of the petitioner Union of India modified the award by deleting an admission attributed to the petitioner Union of India but has failed to give any effect thereof on the award. The arbitrator, while dealing with the claim of the respondent contractor of Rs. 22 lacs on account of cost of T&P, machinery etc. had recorded that the witness of the petitioner Union of India in his cross examination had admitted that the Union of India had not sent any reply to the letter Exhibit R-5 1 of the respondent contractor and concluded therefrom that the material of the respondent contractor had remained on the site. The petitioner Union of India sought modification claiming that its witness had not made any such admission. The said modification was allowed. However the arbitrator has in the award given other reasons also for concluding that the material of the respondent contractor remained on the site. It thus cannot be said that by the reason of modification, the award of Rs. 7 lacs out of the claim aforesaid of Rs. 22 lacs was liable to be set aside.

13. No other grounds have been urged. No case for setting aside/annulment of the award u/s 34 of the Arbitration Act is made out.

The petition is dismissed.

No order as to costs.