
(2001) 02 CAL CK 0003
In the Calcutta High Court
Case No : F.A.T. No. 4220 of 2000

Union of India (UOI)

APPELLANT

Vs

S.N. Kanungo

RESPONDENT

Date of Decision : 26-02-2001

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34

Citation : (2001) 2 CALLT 1

Hon'ble Judges : Moloy Kumar Basu, J;Aloke Chakrabarti, J

Bench : Division Bench

Advocate : P.K. Roy and Amber Majumdar, for the Appellant; Hirak Mitra, Sondwip Mukherjee, U.S. Menon and Hemraj Bahadur, for the Respondent

Final Decision : Dismissed

Judgement

Aloke Chakrabarti, J.—This appeal was filed by the Union of India & Ors. challenging the Judgment and Order dated September 29, 2000, passed by the learned District Judge, Andaman & Nicobar Islands, Port Blair, in Misc. Judicial Case No. 12 of 2000 whereby an application u/s 34 of the Arbitration and Conciliation Act, 1996 filed by the Union of India challenging the Award in respect of claim Nos. 1, 3 and 4, was dismissed.

2. Mr. P. K. Roy, learned counsel for the appellants, mainly challenged the findings of the learned Arbitrator in Claim No. 1 and the impugned Judgment relating to the same. Over and above the aforesaid, contention has also been made with regard to the Award relating to the interest allowed and the specific contention of the learned counsel for the appellant is that the award relating to interest requires clarification as neither the date from which interest is payable can be ascertained from the said Award nor the rate has been assessed properly. At this stage, Mr. Hirak Mitra, learned counsel for the respondent, states on instruction that the respondent is agreeable if the same is clarified, even to the extent that the interest is payable from the date of reference. To this proposition, learned counsel for the appellant also agreed as date of reference is subsequent

to the date from which interest is payable according to the contention of the appellant. With regard to the rate of interest, I do not find any ground for interference either with the Award or with the impugned Judgment relating to the same and therefore the impugned Award dated March 22, 1999 relating to the claim for interest as relates to claim No. 4 is required to be clarified to this extent that interest is payable at the rate of 12% per annum from the date of reference of the dispute for arbitration, that is, April, 20, 1998 to the date the amount is actually paid to the claimant.

3. With regard to Claim No. 1, learned counsel for the appellants contended that the same was framed as follows :-

"Claim Item No. 1.

That as per the measurements recorded by the Respondent upto 16th Running Account Bill, the total excavated quantity is 13.470 Lac Cubm. Out of this total quantity, the rock quantity is 12.650 Lac Cubm. As per the agreement, the rock quantity assumed as ordinary rock is only 1.470 Lac Cubm. Considering deviation limit factor, payment for the deviated quantity, exceeding the 25% deviation on 1.470 Lac Cubm is 10.8125 Lac Cubm. Payment at the rate of Rs. 231 for the deviated quantity actually due to the Claimant is Rs. 24975 lacs. But due to force payment made by the Respondent upto 16th RA Bill on the plea of application of void factor, the quantity of Ordinary rock is 5.884 Lac Cubm. Considering the deviation limit of 25% and the original agreement quantity of ordinary rock as 1.470 lac Cubm. the deviated quantity payable at the revised rate is 4.0505 Lac Cubm. Since this is the arbitration during currency period of the Contract, the Claimant claims payment for the deviated quantity of 4.0505 Lac Cubm @ Rs. 231/M3 amounting to Rs. 935.6655 Lacs. Since the Respondent has force paid a sum Rs. 217.6985 Lacs upto 16th RA Bill against ordinary rock, the claimant is entitled to balance payment of Rs. 717.9697 Lacs or Rs. 7.18 Lacs from the Respondent."

4. It is stated that the earth work pertain to work of extension of the runway admittedly and in the bill of quantities, Item Nos. 2 and 4 provide for rates for excavation. It is stated that the contractor for the first time claimed higher rate of Rs. 231/- per cubic metre at a very late stage and that too without supplying the basis of reaching the said figure. It is stated that no analysis showing how the said rate was arrived, was supplied even at the stage of filling the statement of claim before the Arbitrator. Such analysis was supplied for the first time on at a very late stage. Immediately the appellant expressed its reaction to the said calculation by submitting its analysis showing correction in the capacity of bucket which resulted in reduction of the rate itself to a very low figure of Rs. 23.06 per cubic metre instead of Rs. 231/- per cubic metre as claimed by the contractor.

5. Learned counsel for the appellants specifically contended that this aspect of making claim of enhanced rate on a late disclosure of the analysis and the correctness of the Analysis was not at all considered by the learned Arbitrator

while passing the impugned Award although the appellants faulted the said calculation by submitting sufficient data. It is stated that the learned Arbitrator was within his rights not to accept the contention of the appellant in this regard but he was under obligation to give his reasons while accepting a particular rate in respect of the excavation work for extension of the runway. It has been pointed out on behalf of the appellant that no extra rate was even asked for when the letter dated July, 23, 1996 was issued by the contractor though the extra quantity of work was mentioned therein making a request not to withhold payment. Even at the stage of the letter dated August 4, 1997 the contractor did not indicate the higher rate they were claiming. The rate was specified at Rs. 231/- for the first time on February 18, 1998 though no basis was supplied even at that stage.

6. Further contention of the learned counsel for the appellants is that the excavation work could not be taken separately as admittedly excavation was purely for construction of the runway and such excavation was part of the foundation work. The finding of the learned Arbitrator has been referred to for contending that contrary contention was not even fully accepted by the learned Arbitrator when he recorded the finding as follows.

"I have examined the pleas given by both the sides and I am of the opinion that the work in question is not a work of road or a total work of runway but is merely a work of excavation".

7. Such finding of the learned Arbitrator has been challenged by the appellant as perverse as the reason for the same is not acceptable. It is contended that for such perversity, the findings of the learned Arbitrator requires interference in this appeal.

8. Further challenge to the findings of the learned Arbitrator is on the ground that schedule of rates of 1997 of the Central Public Works Department has been accepted by the learned Arbitrator though contract spoke of the schedule of rates of 1993 with upto date correction only. This has been challenged on a contention that the contractor never relied on the schedule of rates of 1997 either at any stage of the pleadings or at the stage of filing written notes and only in the meeting dated November 6, 1998 before the learned Arbitrator the said schedule of rates of 1997 was merely filed.

9. The Award has been further challenged as perverse as the case made out by the respective parties in course of the arbitration proceeding, as appears from the minutes of the learned Arbitrator, had been overlooked substantially in passing the Award.

10. On a reference to Clause 12A of the terms of tender, it has been contended by the learned counsel for the appellant that the market price, if asked for, it has to be asked at the earliest. It is stated that only in such case the appellant could have decided either to continue the work with the contractor at the enhanced rate claimed or to terminate the same exercising Its power under the agreement.

In the present case, the contractor completed the work and at a late stage Indicated the claim for higher rate and thereby depriving the appellant to take appropriate decision at appropriate time and so disentitles itself from making such claim for enhanced rate.

11. Law in this connection has been referred to by the learned counsel for the appellant as decided in the case of M/s. Gautam Construction and Fisheries Ltd. Vs. National Bank for Agriculture and Rural Development and Another, , Rajinder Krishan Khanna and Others Vs. Union of India and Others, , K.K. Modi Vs. K.N. Modi and Others, , Continental Construction Co. Ltd. Vs. State of Madhya Pradesh, and K.P. Poulouse Vs. State of Kerala and Another, .

12. Mr. Hirak Mitra, learned counsel for the respondent, at the outset contended that such an Award passed under the Arbitration and Conciliation Act, 1996 could be challenged on very limited grounds as specified in Section 34 of the said Act. It is stated that the grounds available u/s 34 of the said Act are not at all available in the present facts and law in this connection has been referred to as decided in the case of National Fertilizers v. Puran Chand Nangia reported in AIR 2001 SC 53 following the case of S. Harcharan Singh Vs. Union of India, . It is stated that only the ground of fraud was available for challenging the present Award in view of the provisions contained in Section 34 of the said Act. But the question of fraud to the extent has been pleaded and raised before the learned trial Court, has not been argued before this Court in the present appeal and therefore the ground of fraud or corruption also is not available to the present appellant.

13. It is stated by the learned counsel that in respect of the questions of fact, the authority of this learned Arbitrator is supreme under the new Act of 1996 and therefore on contentions relating to facts, no challenge can be thrown against an award passed under the new Act.

14. With regard to the rates payable in respect of Claim No. 1, it is stated that Rs. 50/- per cubic metre was the rate decided when the tender was called for and for its calculation, particulars are available with the appellant which have been kept withheld in the present arbitration proceeding.

15. With regard to the Delhi schedule of rates, it is stated that at the stage of agreement, the schedule of rates of 1993 was prevailing and therefore the same was agreed as reliable by the parties mentioning specifically that such schedule as modified upto date was to be supplied. It is stated that therefore the intention of the parties is clear that such schedule of rates as prevailing upto date is to be considered and schedule of rates of 1997 is a mere revision of the schedule of rates of 1993 and therefore has to be accepted as one agreed to by the parties.

16. With regard to the contention that the schedule of rates of 1997 was not disclosed in the pleadings at the earliest stage, it is stated by the learned counsel for the respondent that mention to the same was made in instance No. 2 in paragraph 1 of the rejoinder itself, annexure 1 to the rejoinder of affidavit and in

the minutes of the meeting dated November 5, 1998 wherein the authorities of the appellant relied on the same.

17. With regard to the contention that enhancement of rate was not disclosed by the respondent, it is stated that the relevant documents have been kept withhold by the appellants. It is stated that some documents are already available showing earliest possible disclosure of claim for enhanced rate and for the said purpose, reference was made to the letters dated November 4, 1996, November 28, 1996 and December 11, 1996 disclosed in course of the arbitration proceeding.

18. With regard to Clause 12 of the agreement, it is contended that Clauses (i) and to (v) do not apply here in the present facts. With regard to Clause (vi), it has been stated that when the authorities of the appellants themselves took the item concerned as excavation and the learned Arbitrator who as a technical man, held it so, there is no reason that the appellants can be allowed to raise such question in the present appeal.

19. It is further stated that Clause 12A of the said agreement does not apply at all as admittedly no order was passed in writing and therefore there could not be any expiry of the period of 7 days therefrom.

20. In support of his contention, learned counsel for the respondent relied on the judgment in the cases of M/s. Hind Builders Vs. Union of India, , State of U.P. Vs. M/s. Ram Nath International Const. Pvt. Ltd., , Food Corporation of India v. Joginderpal Mohinderpal reported in (1989) 2 Arb. LR 159 , State of Orissa and Another Vs. Kalinga Construction Co. (P) Ltd., and AIR 1923 66 (Privy Council) .

21. After considering the aforesaid contentions we find that the first contention requires to be considered as to whether the work, which is the subject matter of dispute here, was merely excavation work or it is a part of the foundation work of the extension of the runway. The notice inviting tender contains the name of the work as follows.

"Extension of runway by 1524m (5000 ft.) Sub head : Earth Work.

22. The scope of work as contained in particular specifications is as follows:

"1. Jungle clearance in areas of filling in runway and basic strip.

2. Earth work in excavation in runway, basic strip, transition and tunnel portion in all kinds of soils, ordinary rock and hard rock by hydraulic excavators in the areas shown in tender drawings to the required formation levels.

3. Filling available excavated earth in runway and basic strip under CMC in the areas shown in tender drawings to the required formation levels.

4. Preparation of subgrade by excavating earth to an average of 2275 cm in the area of excavation in runway and shoulders.

5. Carriage of excavated earth, ordinary rock and hard rock from the areas of

excavation upto specified lead and dumping/levelling, line dressing/stacking as described in the relevant item at the place decided by the Engineer-in-Charge."

23. The aforesaid read with other materials available show conclusively that the subject matter of the said contract relates to a specific sub head namely, Earth work. The scope of the work admittedly relates to jungle clearance, earth work in excavation in runway, filling available excavated earth, preparation of subgrade and carriage of excavated earth etc. The dispute as contained in Claim No. 1 exclusively related to excavation only. In such circumstances, the finding of the Arbitrator that "the work in question is not a work of road or a total work of runway but is merely a work of excavation" cannot be hold to be wrong. Admittedly it was not a total work of runway and only a portion and the dispute is relating to excavation. In such circumstances, the said contention of the appellant relating to the nature of the work which is relevant for the purpose of determining the rate, cannot be accepted.

24. The next contention made on behalf of the appellant is with regard to the rate of Rs. 231/- per cubic metre as claimed by the contractor. But the complaint of the appellant is that the said higher rate has been asked for at late stage and that too without applying the basis thereof upto a late stage and the learned Arbitrator failed to consider the said aspects in the Award. Upon consideration of the said Award we find that the learned Arbitrator considered the said rate and the break up of the analysis for the demanded rate as also the fact that the same has been faulted by the respondents. There is a categorical finding in the Award as follows.

"The basis for the same is adhoc and in the absence of agreement from both the sides or any observations being done jointly, it is difficult to accept this rate as a market rate."

25. Therefore it is apparent that the said rate as suggested by the contractor or suggested by the appellant while faulting the demanded rate, has not been accepted as a market rate. Therefore, the contentions of the appellant relating to the said rate of Rs. 231/-, need not be considered as the same has not been accepted in the impugned Award. The late disclosure of the said rate also has no bearing particularly when admittedly the contractor made a claim for enhanced rate within a very reasonable time.

26. The next contention of the appellant related to acceptance of the Delhi schedule of rate of 1997. Admittedly the said schedule of rates of 1993 was accepted as basis in prescribed circumstances in the agreement itself will categorical reference of its modifications upto date. The schedule of rates of 1997 has been shown to be a revision of the schedule of rates of 1993. No contrary material has been show by the appellant to the aforesaid. Moreover, the contention of the appellant with regard to the said schedule of rates of 1997 that the same was only referred to by the contractor at any stage of the pleadings or any stage of the written notes, is also not factually correct. On behalf of the

respondents, it has been shown that the said schedule of rates of 1997 has been referred to in the rejoinder filed by the contractor in course of the arbitration proceeding and its annexure also supported the said contention. It is also apparent that the appellant referred to the said rates of 1997 in course of the meeting of the Arbitrator. In such circumstances, reliance on the said schedule of rates of 1997 by the Arbitrator cannot be challenged by the appellant as on existing materials, such findings of the Arbitrator cannot be altered substituting another opinion, within the scope of Section 34 of the Act.

27. The contention that the Impugned Award is perverse in view of the minutes, cannot be also accepted as such challenge in the present facts is not permissible within the scope of Section 34 of the said Act

28. In view of the finding that the subject work under the contract is mainly excavation work, the contention with regard to the application of sub-clause (vi) of Clause 12 and Clause 12A of the contract, also will have no bearing. Moreover findings in the impugned Award on such question, even if, is on wrong Interpretation of the agreement, the same does not form a good ground of challenge of the Award u/s 34 of the Act.

29. Finally with regard to the scope of challenge u/s 34 of the Act of 1996, the law as contained in the statute has been considered and it does not appear that the present contentions bring the case within the scope of such challenge. In course of argument on behalf of the appellant, nothing has been shown as forming a case of fraud. Therefore, applying the law as relied on by the parties and mentioned hereinabove, we are of the view that no Interference can be made to the Award or the Impugned judgment on the facts available on records keeping in mind the scope of challenge u/s 34 of the Act of 1996.

30. In view of the aforesaid finding, the Impugned Award dated March 22, 1999 relating to the claim for Interest as contained in Claim No. 4, is clarified to this extent that Interest at the rate of 12% per annum from the date of reference or the dispute for arbitration, that is, April 20, 1998 to the date the amount is actually paid to the claimant, will be payable by the appellant to the claimant.

With the aforesaid clarification, the appeal is otherwise dismissed.

Moloy Kumar Basu, J.

31. I agree.