
(1990) 11 CAL CK 0063
In the Calcutta High Court
Case No : Award Case No. 578 of 1989

Union of India (UOI)	Vs	APPELLANT
T.K. Choudhury and Bros. and Co.		RESPONDENT

Date of Decision : 09-11-1990

Acts Referred:

Arbitration Act, 1940 — Section 30, 33

Citation : (1991) 1 CALLT 416

Hon'ble Judges : Monoranjan Mallick, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Monoranjan Mallick, J.—The petitioner, Union of India represented by the General Manager, Eastern Railway, has filed this application u/s 30 read with Section 33 of the Arbitration Act for setting aside the award made and published by the respondent Nos. 2 and 3 dated 16th May 1981.

2. The facts are briefly as follows :-

The Respondent No. 1 was entrusted with the construction work under the petitioner on accepting the tender submitted by the Respondent No. 1 through the Deputy Chief Engineer (Construction) on or about April 14, 1978. The construction was in respect of earth work in embankment, extension of bridges, cabins etc. for third line work between Dankuni and Chandanpur Section-VIII. It is stipulated therein amongst others that the work should be completed within 12 months from the date of issue of the same i.e. by April 13, 1979.

3. After the acceptance of tender there was a formal agreement by and between the parties on or about 28th January 1978. The Respondent No. 1 failed and/or neglected to complete the work as stipulated and at the instance and/or request in writing and several extension were granted, the last of such was upto March 31, 1983. The Respondent No. 1 in contravention of the express provision of the said agreement that the rates quoted by the tenderor and accepted by the

Railway Administration must hold good in the completion of the work and are not subject to fluctuation raised a pretended dispute which the petitioner very much disputed. However, "the Respondent No. 1 filed a Special Suit in the High Court at Calcutta being Special Suit No. 85 of 1986 and in terms of the order passed in that Special Suit, the General Manager, Eastern Railway in terms of the Arbitration Agreement appointed the Respondent Nos. 2 and 3 as Arbitrators. The Respondent No. 1 in the statement of claim raised 10 items of claim. The Joint Arbitrators partially allowed the claim Nos. 1, 2, 3, 7 and 8. The total amount of award was Rs. 2,80,113.80 p. Being aggrieved the Union of India on receiving the notice u/s 14(2) of the Arbitration Act has filed this application. On behalf of the petitioner, it is submitted that the award of the Arbitrators specially the claim Nos. 7 and 8 is vitiated because the Arbitrators granted compensation in respect of escalation in price of labour and materials, establishment as well as business loss on the alleged ground of prolongation of the contract period for more than 5 years when under the contract entered into between the parties, there was express stipulation against such claim of the contractor. It is also alleged that on 3rd May 1989 the Joint Arbitrators after the close of the case of the parties permitted the Respondent No. 1 to produce a series of documents, that the representative of the petitioner having objected to the production of such documents at such a late stage the Joint Arbitrators assured that those documents would not be taken into consideration in the award but the award made was published by the Arbitrators indicate that all the documents produced by the parties upto date were taken into consideration by the Joint Arbitrators and that the petitioner was thus being denied by the Arbitrators to contest and challenge those documents produced at the late stage by the Respondent No. 1 and the Arbitrators" act amounts to lack of fair play which vitiates the award.

4. On behalf of the Respondent No. 1 all the above grounds have been seriously contested. It is submitted that the prohibition against claim for escalation of price in the general condition of contract or in the contract document would not be applicable after the expiry of the original terms of contract and that there were several decisions of the Supreme Court which clearly take the view that when due to laches on the part of the administration the contractor could not complete work within the stipulated period and the administration had to extend the period of contract then justice and fair play would demand that the contractor could be given adequate compensation towards the escalation of price.

5. I would first take up the second ground taken by the petitioner, namely that the Joint Arbitrators are guilty of mis-conduct as they did not show any fair play.

6. Mr. Mitra for the petitioner has drawn my attention to the Minutes dated 3rd May 1989 annexed to the petition and has drawn my attention to the paragraph 2 of the Minutes from which it is found that on that date even after the claimant concluded their argument several documents were produced and the Arbitrators permitted the claimant to make further argument on all the claims on the basis of the papers submitted on that day and to conclude his argument. It is

submitted that the petitioner was not given any opportunity to controvert additional documents by the Joint Arbitrators. But on a careful perusal of the Minutes, it is however, found that the petitioner's representation before the Arbitrators was also given final opportunity to submit his views on that day's argument of the claimants, that he thereafter summed up his views briefly and concluded the same on that date. It is also gathered from the Minutes dated 3rd May, 1989 that both the claimant and the respondent also submitted a certificate jointly signed by them read as under-

"We state that in the Arbitration Proceedings, all due and reasonable opportunities were given to place our case properly. We have duly placed our case before the learned Arbitrators and we have nothing further to add to what have been placed."

7. Mr. Mitra has, however, drawn my attention to one affidavit sworn by Mrinal Kanti Laskar, the representative of the petitioner who attended the meeting of the Arbitrators on 3rd May 1989 in which Sri Laskar had made his grievance against the Joint Arbitrators for not giving him opportunity to controvert the documents produced by the respondent by giving assurance that those documents would not be taken into consideration at the time of making and publishing the award.

8. The said affidavit which has been annexed in the petition was sworn on 1st November 1989 long after the award had been made and published. The copy of the Minutes dated 3.5.1989 was supplied to the present petitioner's representative on 8th May 1989 but it is surprising that till 1st November, 1989 no such complaint was made. Moreover from the affidavit it is gathered that the deponent had the impression that the Joint Arbitrators had passed the award for a sum of Rs. 7,40,263.48 p. which is absolutely incorrect. The deponent having himself signed the certificate as indicated in the above, cannot, long after the award had been made and published, make such allegations which if true ought to have been made immediately on receipt of the copy of the Minutes dated 3rd May 1989. Therefore, I am unable to accept the contention of the learned Advocate for the petitioner that the Joint Arbitrators did not show any fair play in the Arbitration proceeding and making and publishing the award.

9. The second contention of Mr. Mitra is that the claim Nos. 7 and 8 ought not to have been allowed as the same was clearly prohibited under the terms of the contract as well as on the general condition of contract. Under item No. 7, namely, "loss due to prolongation contract performed for more than 5 years, escalation in price of labours, material also establishment", amount claimed is Rs. 1,21,000/- and the Joint Arbitrators award Rs. 91,533.32. Under item No. 8, "business loss" total amount claimed was Rs, 1,28,000/- and the amount awarded is Rs. 38,000/-.

10. Mr. Mitra has drawn my attention to the general condition of contract of the Eastern Railway, specially, sub-clause (2) and (3) of Clause 17 and has urged

that the Railway Administration for the delay on account of the Railway can grant extension but for which the contractor is not entitled to claim damage and compensation therefor. My attention has also drawn to the terms of the contract entered into between the petitioner and the Respondent No. 1 being paragraph 12.3 which reads as follows-

"Rate quoted by tenderer and accepted by the Railway Administration must hold good till the completion of work and are not subject to fluctuation. No claim on this account shall be entertained afterwards."

11. Sub-paragraph (2) and (3) of Clause 17 is also reproduced below:

"(2) If the Contractor be delayed at any time in the progress of the works by any act or neglect of the Railway's employees or by any other contractor employed by the Railway under sub-clause (4) of Clause 20 of these conditions, or by strikes, lock-outs, fire, unusual delay in transportation, unavoidable casualties or any causes beyond the Contractor's control, or by delay authorised by the Engineer pending arbitration, or by any cause which the Engineer shall decide to justify the delay, then the time of completion of the works may be extended for such reasonable time as the Engineer on behalf of the Railway may decide.

(3) In the event of any failure or delay by the Railway to hand over to the Contractor possession of the lands necessary for the execution of the works or to give the necessary notice to commence the works or to provide the necessary drawings or instructions or any other delay caused by the Railway due to any other cause whatsoever, then such failure or delay shall in no way affect or vitiate the contract or alter the character thereof or entitle the Contractor to damages or compensation thereof but in any such case, the Railway may grant such extension or extensions of the completion date as may be considered reasonable."

12. Mr. Mitra has also drawn my attention to the decision of the Supreme Court reported in Continental Construction Co. Ltd. Vs. State of Madhya Pradesh, and has urged that in that decision the Division Bench of the Supreme Court presided by Sabyasachi Mukherjee (as His Lordship then was) has approved the order of the District Judge as well as by the Division Bench of the High Court setting aside the award when the Arbitrator in view of the clear stipulation in Clause 2.16 and 2.4 of the contract against the claim of escalation of price awarded compensation on account of escalation of price even though the same was clearly prohibited in the terms of contract. It has been clearly held that the Arbitrator misconducted himself in not deciding the specific objection raised by the State regarding the legality of the extra claim of the appellant which was clearly prohibited under the terms of the contract.

13. Mr. Roy, learned Counsel appearing for the Respondent has submitted that the facts of Continental Construction Co. Ltd. v. State of Madhya Pradesh are clearly distinguishable from the facts of the present case, and that the decisions of the Supreme Court in Tarapore and Company Vs. Cochin Shipyard Ltd., Cochin

and Another, reported in 1985 SC 607 and has urged that there was no such prohibition in the present contract as was indicated in paragraph 8 of the judgment in Continental Construction Co. Ltd. and therefore that case is clearly distinguishable.

14. I find that in paragraph 8 in Continental Construction Co.'s case the Supreme Court observed that Clauses 2.16 and 2.4 stipulated that the contractor had to complete the work in spite of rise in price in materials and also rise in price of labour charges as stipulated in contract. In the paragraph 12.3 of the contract or in general condition of the contract Clause 17(3) there was no such specific prohibition. As the contract was extended for 5 years we can take judicial notice of the fact that the prices of labour and materials would increase and contractor had to keep their establishment for 5 years more. Contractor would not be able to take up any other job because he would be stuck up with the present contract. In Tarapur Co.'s case there was no provision for price escalation but even in the absence of price escalation clause the Supreme Court has held that when the original contract period had expired and the contractor had to work beyond the original contract period he should be compensated for the extra costs with regard to the labour and material etc. I also find from the decision reported in Hyderabad Municipal Corporation Vs. M. Krishnaswami Mudaliar and Mudaliar and Another, that the Supreme Court has observed that both in equity and law the contractor is entitled to get extra payment for the escalation of price for the work done during the extended period. Mr. Roy has also referred two decisions of the Delhi High Court reported in AIR 1980 Del. 266 Metro Electric Co. v. Delhi Development Authority and in Delhi Development Authority Vs. Alkaram, in which the Division Bench of Delhi High Court on considering all the relevant decisions of the Supreme Court have also observed that the contractor is entitled to get escalation of price when the term of the original contract has to be extended due to the fault of the administration.

15. In view of the above decisions, I am of the view that regard being had to the terms and conditions of the present contract the decisions relied on by Mr. Roy will be attracted to the facts of this case and the facts of Continental Construction Co. are clearly distinguishable. Moreover, Mr. Roy has also drawn my attention to the Division Bench of our High Court reported in 89 CWN 70 Engineers Collaborated v. Indian Statistical Institute in which in respect of a non-speaking award, the Division Bench held that when the prohibition in the contract was against payment of compensation and damage but when the award was a non-speaking award and it could not be ascertained as to whether the Arbitrator granted a damage on the basis of quantum meruit or not, then the award which is a non-speaking award cannot be held to be vitiated by mis-conduct.

16. In this case also the award being a non-speaking award it cannot be stated that with certainty that the compensation or damages on the basis of quantum meruit was awarded. The reasonable view may be taken that only the cost of rising price of materials etc. was taken into consideration by the Joint Arbitrators.

Moreover, the fact that the contractor had to extend the work for 5 years there was sufficient justification for the joint Arbitrators to award some amount for business loss, even though for business loss Rs. 1,20,000/- was claimed the joint arbitrator awarded Rs. 38,000/toward business loss. "

17. In that view of the matter, the contentions raised by the petitioner are not sustainable. The petition u/s 30 read with Section 33 of the Arbitration Act is hereby dismissed.

I would hereby direct the parties to bear their respective costs themselves. Let the judgment upon award appear in Wednesday next.