

Naginder Singh Vs. Commander 44 Border Road Task Force and anr.

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Court : Guwahati

Decided On : Feb-11-1988

Judge : T.C. Das and S.N. Phukan, JJ.

Acts : [Arbitration Act, 1940](#) - Sections 30; [Constitution of India](#) - Article 226

Appeal No. : M.A. (F) No. 65 of 1983

Appellant : Naginder Singh

Respondent : Commander 44 Border Road Task Force and anr.

Advocate for Def. : S.N. Chetia, Addl. Sr. Central Govt. Standing Counsel

Advocate for Pet/Ap. : G.K. Talukdar and A.K. Bardoloi, Advs.

Disposition : Appeal allowed

Judgement :

Das, J.

1. A well known maxim is often said 'honest men dread arbitration more than they dread law suits.' Here is a case which has entered this Court in a shape of an appeal arising out of an arbitration matter between the present appellant and the respondents. The appellant herein had challenged the legality and validity of the judgment and order dt. 25-6-83 passed by the Deputy Commissioner, West Siang

District, Along refusing to set aside the award dt. 16th April, 1981 passed by the arbitrator (Lt. Col. V. S. Vandari) in an arbitration proceeding between the appellant and the respondent 1. The respondent 2 Union of India is represented by the respondent 1 in this appeal. The learned Deputy Commissioner, West Siang District, Along by the impugned order affirmed the award of the arbitrator and passed the decree by making the same as a rule of the Court. The broad facts leading to this appeal may be summarised hereunder :

2. The appellant, who is a contractor entered into a contract agreement with the Commander 3 BRTF in respect of a contract work for supply of soling stones and broken metal on road side of Along Kaying road between KMO-14. The total quantity of soling stone required to be supplied by the appellant was 1313 Cft. and broken stone metal 3750 Cft. As per terms of the contract the appellant contractor was to supply the material within a stipulated time which was extended till 3rd April, 1967. The contract work was allotted to the appellant on the basis of his tender dt. 28-11-66 for supply of the aforesaid material covering an amount of Rs. 3,41,894.00 in respect of which the work order dt. 23-12-66 was issued to the appellant contractor. On or about 15-2-67 a letter No. 8062/34/E-8 dt. 15-2-67 was issued by the Commander to the appellant for employing more men and materials for completing the work within time. On or about 11-3-67 the Lt. Commander 3 Border Road Task Force 99 APO informed the petitioner ' by letter No. 8062/43/E-8 dt. 11-3-67 that no extension would be granted beyond 3rd April, 1967 which was stated to be the last date for completion of the contract work. However, for the best reason known to the Commander 3 Border Road Task Force by his letter No. 8062/146/E-8 dt. 14th Mar. 1967 and without prior intimation to the appellant terminated the contract on the basis of Clause 12 of the agreement. The date of termination was earlier to the date on which the work was executed. On receipt of the order of termination of the contract, however, the appellant submitted his final bill for the work done under the terms of the contract. There was a long silence till 6-11-70 from the side of the respondent No. 1 and only on or about 6-11-70 a letter No. 8062/11/118 dt. 6th Nov. 1970 was issued by Commander 3 Border Road Task Force to the appellant to agree to refer the matter to the arbitrator as the impugned claim by the appellant was disputed. Therefore, according to the parties a dispute arose which could be referred to a sole arbitrator under Clause

15 of the arbitration agreement. The appellant also agreed to refer the matter as suggested by Commander 3 Border Road Task Force and accordingly the dispute was referred to Lt. Col. R.L Handa who was appointed as arbitrator to arbitrate the dispute between the parties. On or about 27-2-71 Lt. Col. R.L. Handa who was appointed as a sole arbitrator entered into the reference and issued notice to both the parties, namely,, the appellant and the respondent 1, but there was a very little progress in the arbitration proceeding. However, meanwhile, both the parties filed their respective claims and the documents necessary to be referred in the proceeding at the time of hearing the dispute. For more than six years there was no progress in the proceeding and no award was made by the arbitrator. On or about 3rd May, 1977 Lt. Col.R. L. Handa submitted his resignation as arbitrator as he superannuated from the service. Thereafter, on 23rd May, 1977 Lt. Col. D.S. Dogra, Commander 14 BRTF was appointed as arbitrator. Till 12th June, 1980 no progress was made in the arbitration proceeding and no award was passed by Shri Dogra who subsequently on 12th June, 1980 submitted his resignation as arbitrator. Thereafter on 15th July, 1980 Lt. Col. V. S. Vandari, Commander 14 BRTF was appointed as arbitrator to adjudicate the dispute between the parties. The arbitrator issued notices to the parties about the date of hearing of the arbitration proceeding which was proposed to be taken up in a place at Arunachal Pradesh somewhere in the office premises of the 14 B.R.T.F. On receipt of the letter the appellant contractor wrote to the arbitrator to change the venue of the arbitration sitting and to inform the appellant about the date and place for the sitting of the arbitration proceeding. On receipt of the letter from the appellant, the Officiating Commander by his letter No. ARB/3/BRTF/ 25/66-67/146 dt. 13-1-81 informed the appellant about the arbitrator's inability to change the venue of the sitting and informed the appellant about the date of holding the arbitration proceeding on 9-2-81. The appellant by his letter dt. 2nd Feb. 1981 addressed to the arbitrator requested the arbitrator to shift the date of hearing of the arbitration proceeding as he was lying ill and bed-ridden and also disclosed the place of hearing with a guideline as to whether it would be necessary for the appellant while attending the arbitration proceeding to obtain any pass or permit and if it so requires to inform the appellant the authority to whom he is to approach for obtaining such pass or permit to enter the place of venue of the arbitration

proceeding. However, the appellant did not receive any reply to his letter dt. 2nd Feb. 1981 from the arbitrator. Thereafter on 16-4-81 the arbitrator passed the award ex parte and issued notices to the parties as required under Section 14 of the [Arbitration Act, 1940](#) on 3rd May, 1981 intimating both the parties about the passing of the award. It appears from the record that the time for passing of the award was expired long back and till 1-6-81 the arbitrator did not apply to the Court for extension of time to make the award valid. However, on 1-6-81 the arbitrator made an application to the Court under Section 28 of the Arbitration Act for extension of time and also filed the award in the Court of the learned Deputy Commissioner, West Siang District, Along. The learned Deputy Commissioner by his order dated 12-6-81 extended the time for making the award and issued notices on both the parties informing about the filing of the award by the arbitrator. On perusal of the records it appears that no prior notice was issued by the Court before extension of time for making the award valid. On receipt of the notice the appellant appeared before the Court and filed an objection under Section 33 read with Section 30 of the [Arbitration Act, 1940](#) to set aside the award on various grounds stated therein. The learned Deputy Commissioner upon hearing both the parties by his impugned order dt. 25-6-83 rejected the objection filed by the appellant and made the award a rule of the court and passed a decree to the extent of the amount passed in the award. The learned Deputy Commissioner also issued a direction that the sum of Rs. 26,675.46 paise which is to be paid to the contractor-appellant for cost of the work completed by him shall be deducted from the amount to be realised from the contractor-appellant. However, there was no such direction in the award of the arbitrator for such deduction.

3. Being aggrieved by the aforesaid judgment and order of the learned Deputy Commissioner in making the award as a rule of the Court and passed a decree with direction to the appellant, the present appeal has been preferred challenging the legality and propriety of the impugned order and also the validity of the award passed by the learned Deputy Commissioner. This is how the dispute arose between the parties.

4. Mr. G.K. Talukdar, the learned counsel for the appellant has challenged the award mostly on two counts, namely, (i) that the award was passed beyond the

statutory period of limitation. As per Schedule-I of the Arbitration Act the period of limitation to make an award is prescribed and Clause (3) of Schedule-I of the Arbitration Act speaks that the period of making an award by the arbitrator is within 4 months and the arbitrator must complete the award within that period. As no prayer was made for extension of time in Court either by the parties or by the arbitrator himself the award becomes invalid as it was passed beyond the statutory period of limitation. It is further submitted by Mr. Talukdar, the learned counsel for the appellant that the award was passed on 16-4-81 and as soon as the award is passed the arbitrator becomes functus officio. Therefore, he had no jurisdiction to make any application for extension of time almost after two months of the passing of the award. The award was passed on 16-4-81 and the application for extension of time was made on 1-6-81 and the arbitrator being functus officio after the award was made, he had no jurisdiction to make any application for extension of the time for passing of the award or to make the award valid and legal through court process. The learned counsel for the appellant submits that the extension of time as made by the Court under the provision of Section 28 of the Arbitration Act being a judicial order, it could not be passed without issuing any notice to the parties on the face of it that the arbitrator became functus officio after passing of the award dt. 16-4-81 and the application for extension of time was made on 1-6-81. According to the learned counsel the order so passed by the Court under the aforesaid circumstances amounts to violation of principles of natural justice and deprived the parties to submit their say in that regard. If that be the position, according to the learned counsel for the appellant, the award must be deemed to be invalid as the order for extension of time was granted without giving any opportunity to the parties of being heard. The arbitrator also did not issue any notice to any of the parties as submitted by Mr. Talukdar that such an application was made in Court on 1-6-81 for extension of time. Therefore, as submitted by Mr. Talukdar, the award made by the arbitrator is invalid in the eye of law being made beyond the statutory period without asking for extension of time during the process of arbitration or at the time of passing the award. In that context it is further submitted by Mr. Talukdar that the order of the Court extending time under Section 28 of the Act is a judicial order and in passing any judicial order the parties should be informed by notice and reasons must be recorded with ground in allowing the

extension of time in the nature of the present case. This having been not done and no reasons are recorded in the order of the learned Court, the order for extension of time cannot be said to be valid in the eye of law. The next submission of Mr. Talukdar is that prior to holding of the sitting the arbitrator was requested by the appellant to adjourn the date which was fixed on 9-2-81 due to the ailment of the appellant and also to inform the appellant about the date and the venue as well as the opinion for the requirement of any pass or permit to approach the venue of the arbitration proceeding. This not having been done by the arbitrator nor informed the subsequent date of hearing and passed the ex parte award without intimating the appellant amounts to violation of the principle of natural justice and a legal misconduct on the part of the arbitrator. It is submitted by the learned counsel for the appellant that even the arbitrator did not inform the appellant as to whether in case of his personal appearance in the place of hearing pass or permit, as the case may be, would be necessary and if so how to obtain those and from whom. It is further submitted that the place of venue being in Arunachal Pradesh inner line pass was necessary under the law and the appellant ought to have been informed by the arbitrator about the aforesaid position so that the appellant could obtain the inner line permit to reach the place or venue of the arbitration proceeding. The failure on the part of the arbitrator even to inform the appellant about the date and place and of taking up the hearing ex parte in absence of the appellant amounts to illegal misconduct on the part of the arbitrator and the award is liable to be set aside. It is further submitted by Mr. Talukdar that on the face of the award it would be apparent that the arbitrator did not apply his mind nor cared to hear the appellant before passing the award and thereby he misconducted himself. It is lastly submitted by Mr. Talukdar that the learned Deputy Commissioner before whom the objection was filed by the appellant for setting aside the award did not even consider the main contentions raised by the appellant before him challenging the legality and validity of the award. Therefore, the impugned order is liable to be set aside. In support of the contention reliance is placed on the decision of the Supreme Court as reported in AIR 1962 SC 78 Hari Shanker Lal v. Shambhu Nath and also of a decision of the Allahabad High Court reported in AIR 1958 All 568, B. Bhagwan Din v. B. Bisheshwar Nath.

5. Mr. Chetia, the learned Additional Central Govt. Standing Counsel appearing on behalf of both the respondents has submitted that as the contractor appellant had failed to make himself available before the arbitrator at the time of holding the arbitration proceeding even OH any day of the sitting in spite of receipt of notice to that effect, no advantage can be taken on those pleas as raised in this Court by the appellant. The appellant had full knowledge about the place and the date of holding the arbitration proceeding and the plea that no such notice was issued to him nor any opportunity was given to him either to appear or to contest the claim of the respondents cannot be available to the appellant. The next submission of Mr. Chetia is that the appellant knew the venue of the sitting of the arbitrator where the proceeding was taken up. But instead of knowing the venue he made certain immaterial queries to the Arbitrator and the letter addressed to the Arbitrator by the appellant on 2-2-81 was nothing but a false query to delay the proceeding of the Arbitrator. It was well within the knowledge of the appellant about the venue of the sitting of the Arbitrator and also the requirement of the pass or permit to attend the proceeding at Arunachal Pradesh. It is further submitted by Mr. Chetia as regards the information relating to location and/or venue of the sitting of the Arbitrator though the place was not mentioned specifically due to strict secrecy normally to be maintained but it was well within the knowledge of the appellant where the arbitration sitting took place. But the appellant did not make any attempt to appear before the arbitrator on the day of the sitting. It is further submitted by Mr. Chetia that the arbitration proceeding being a continuous one since 1970 the appellant knew the venue of the proceeding and other requirements. With regard to extension of time it is submitted by Mr. Chetia that the Court has ample jurisdiction to extend the time even suo motu and the court can exercise its jurisdiction to extend the time even after passing of the award and at any time while dealing with such objection. The learned Court below, as submitted by Mr. Chetia, having rejected the contention raised by the contractor-appellant and having accepted the award to make it a rule of the court, it is implied that the Court extended the period as required under Section 28 of the Arbitration Act. The further submission of the learned counsel is that the appellant having got all opportunities to contest the award in the court below and having failed to obtain any result in his favour cannot raise the plea as advanced by the learned counsel in this Court. According to Mr.

Chetia as the appellant did not take any interest in the arbitration proceeding, the Arbitrator had no other alternative than to pass the award ex parte and as such, the award cannot be declared invalid on account of violation of principles of natural justice. The learned counsel has referred to use decision of Kerala High Court as reported in AIR 1983 Ker 162 P.S. Abdulla v. Director, Forest Research Institute. As regards the plea of misconduct as raised by the appellant Mr. Chetia submits that it was obligatory on the part of the appellant to raise the objection even before the Arbitrator alleging misconduct and the ground of misconduct of the Arbitrator taken subsequently in Court of law cannot be sustained as because according to the learned counsel the appellant is not legally entitled to raise such plea of legal misconduct on the part of the Arbitrator. Reliance is placed by Mr. Chetia on a decision of this Court as reported in (1983) 1 Gau LR 276 Union of India v. Bharat Builders. In this context it is submitted by the learned counsel that considering the facts and circumstances of the present case and adopting the ratio of the aforesaid decision of this Court it cannot be said that there was any legal misconduct on the part of the Arbitrator because the award was made ex parte. As the award was not a speaking award, the court has no jurisdiction to sit as an appellate court to decide the merits and demerits of the award of the Arbitrator. It is further submitted by the learned counsel that the court below though made some elaborate discussions but in substance accepted the award passed by the Arbitrator and therefore there is no legal scope for the appellant to agitate this matter once again in this Court.

6. On scrutiny of the aforesaid rival contentions made by the respective counsel of the parties it emerges that the challenge in this appeal is two-fold, (1) as to whether there was in fact an ex parte award in violation of the principles of natural justice on the part of the Arbitrator, and (2) whether the award is liable to be set aside on the ground of legal misconduct on the part of the Arbitrator. Now the question arises as to whether the appellant was informed by the Arbitrator with the details as required by him to avoid violation of principles of natural justice and to pass ex parte award. In this context we will have to consider the nature of the arbitration proceeding.

7. The main object of all submissions to the arbitration is to obtain speedy end of the strife. If it is not likely to be attained and the parties are likely to be subjected to multiplied expenses and interminable delays by the action of the Arbitrator in an arbitration proceeding, the court can interfere and even revoke the authority of the arbitrator. Unreasonable delay without any reason or unavoidable cause may amount to legal misconduct but the Arbitrator's failure to make his award within 4 months does not automatically result in the cancellation of the arbitration award or agreement.

8. 'Misconduct' is often used in a technical sense as denoting irregularity, and not any moral turpitude, but the term also covers cases where there is a breach of natural justice. Much confusion is caused by the fact that the expression is used to describe both these quite separate grounds for setting aside an award, and it is not wholly clear in some of the decided cases on which of these two grounds a particular award has been set aside. The more difficult question, however, is whether the extent of that irregularity is such as to justify interference by the court either by way of setting aside the award or remitting the award. The determination of that issue depends upon whether the court is satisfied that there may have been -- not must have been -- or that this irregularity may have caused -- not must have caused -- a substantial miscarriage of justice that would be sufficient to justify the setting aside or remitting of the award, unless those resisting the setting aside or remission could show that no other award could properly have been made than that which was in fact made, notwithstanding the irregularity. The Court will not normally review the arbitrator's discretion, provided he acts within his authority and according to the principles of justice and behaves fairly to each party. Therefore, legal misconduct is a term which is commonly used in reference to awards. It does not necessarily involve any moral turpitude or dishonesty on the part of the Arbitrator. It is misconduct in the judicial sense of the word and has been described generally to mean an enormous breach of duty on the part of the Arbitrator, however, honest which causes miscarriage of justice. The expression misconduct has a wide import and includes many things but does not necessarily involve an imputation of moral turpitude in the Arbitrator. If substantial miscarriage is done for instance where the Arbitrator refuses to hear evidence upon a material issue and the material accepts (aspects ?) which is beyond jurisdiction and if the

Arbitrator behind the back of the party receives evidence against him, this would cover the word and expression 'misconduct'. If the Arbitrator behind the back of the party receives evidence against him the evil is not cured by the Arbitrator even informing him about it. The person who is to be breached by the evidence ought to be present to hear it so that he would be able to meet and answer it. Therefore, it is incumbent on the part of the Arbitrator to follow the procedure at the time of enquiry. It is no doubt true that the Arbitrator is ordinarily free from fetters of adjective law, but that does not make him free from the fundamental principles of justice. Though the Arbitrator may not be strictly bound by the rules and procedures observed in Court it does not mean that his procedure should be opposed to natural justice. The basic principle seems to be that where there has been an opportunity afforded to one side to get an advantage with the Arbitrator over the other, either by lack of notice or by the absence of the other side and there is even a remote possibility that the advantage so obtained may have unconsciously influenced the mind of the Arbitrator, the proceedings are vitiated by the breach of the principles of natural justice. The Arbitrator misconceives his duty if he listens to the evidence of one party behind the back of the other who might be interested either in controverting or is legally entitled to controvert it. Though the Evidence Act is not applicable to proceedings before an Arbitrator but he is bound by the rules of evidence that have been prescribed by the Act and the Civil Procedure Code which are attracted in the arbitration proceedings. It is true that even in spite of the notice if one of the parties does not voluntarily appear nor it shows the desire to contest the dispute or the claim of the other as the case may be, an ex parte award may be justified. If the parties are not given proper notice either of the venue and the date of sitting by the Arbitrator and the award is passed behind his back, it would clearly amount misconduct on the part of the Arbitrator. In the present case it appears from record that the appellant made a prayer through his letter dt. 2nd Feb. 1981 to fix another date for taking up the arbitration proceeding instead of 9-2-81 on the ground of his bed-ridden illness and also to inform the actual venue for the sitting of the Arbitrator with further information as to whether the appellant was required to obtain any pass or permit as the case may be, the Arbitrator was silent and did not inform the appellant, and instead, passed the award ex parte. To make the rule of the court of an award and

to pass a decree on the terms of the award, the following conditions must be fulfilled (a) that the award has been filed in accordance with Section 14 of the Arbitration Act, (b) that the Court has jurisdiction to entertain the application for filing of the award, (c) that the court has given notice to the parties under Section 14(2) of the Act, (d) that the time for filing of objections against the award has been expired or such application having been made has been refused and (e) that the court sees no cause to set aside or remit the award. If these conditions are fulfilled, the court can pass a decree in terms of the award.

9. We have perused the impugned order of the learned Deputy Commissioner making the award as a rule of the court. We have noticed one important fact that the learned Deputy Commissioner while accepted the award, directed for deduction of an amount which is to be paid to the appellant for cost of the works completed by him from the amount already assessed by the Arbitrator. In the award such direction is not given. Therefore, in our opinion, this direction ought not to have been passed unless the party in whose favour the award was made approaches the Arbitrator at the time of passing the award. It is true that the Arbitrator is not bound to write a reasoned award. The award may not be a speaking award in its true sense. If that be the position, the Court cannot sit as a court of appeal over the arbitration proceeding. It is admitted by the learned counsel of both the parties that the award is not a speaking award nor a reasoned award. It appears that the learned Court below discussed the award from all sides, gave his reason of acceptance and further issued certain directions in the decree relating to the award. Therefore, in that view of the matter also the impugned order is not acceptable.

10. We have considered the submissions of the respective counsel of the parties, examined the records ourselves and the award passed by the Arbitrator. The Arbitrator passed the award without giving a final information to the appellant or a reply to his query as per his letter dt. 2nd Feb. 1981. It amounts to passing an award behind the back of the parties and in violation of the principles of natural justice. Therefore, the Arbitrator has committed legal misconduct in passing the award. If that be the position, the judgment and order of the Court below in accepting the award and making it a rule of the court must be set aside. From the

facts and circumstances of the case and also the materials available on record we irresistibly conclude that the award is invalid on the ground of legal misconduct of the Arbitrator in passing the award in violation of principles of natural justice and without giving any opportunity to the appellant of being heard at the time of sitting of the arbitration proceeding before passing any award. We, accordingly, set aside the impugned judgment and order of the learned Deputy Commissioner, West Siang District, Along in making the award as a rule of the court and set aside the award for' the reasons as stated above.

11. In the result, the appeal is allowed but we leave the parties to bear their own costs. It is, however, open for the parties to settle the dispute afresh by a fresh arbitration in view of the terms of the contract agreement if otherwise it is permissible.

S.N. Phukan, J.

12. I agree.

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