

Bharat Heavy Electrical Ltd. Vs. M/S. Bst Engineering Services

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Court : Delhi

Decided On : Sep-19-1994

Reported in : 1995(2)ARBLR403(Delhi); 56(1994)DLT47

Judge : R.C. Lahoti, J.

Appeal No. : Suit No. 3697-A of 1990

Appellant : Bharat Heavy Electrical Ltd.

Respondent : M/S. Bst Engineering Services

Advocate for Def. : D.R. Bhatia, Adv.

Advocate for Pet/Ap. : Raj Panjwani, Adv

Judgement :

R. C. Lahoti, J.

1. This order shall also govern the disposal of OMP 133/90 and 199/90.
2. Briefly stated the facts in so far as relevant for the purpose of disposing of these three matters and setting out the background in which the controversy for adjudication before the court has arisen are as follows :

'The parties had entered into a contract which contains an arbitration clause contemplating appointment of three Arbitrators. The disputes having arisen

between the parties, the petitioner M/s. Bharat Heavy Electricals Limited, (hereinafter BHEL, for short) nominated Shri T. M. Ramchandran as Arbitrator vide letter dated 29.7.1988. M/s. Bharat Steel Tubes Engineering Services (hereinafter BSTES, for short) nominated Shri B. P. Bhattacharya as their Arbitrator. The third Arbitrator was to be appointed by the President of the Indian Council of Arbitration. However, Suit No. 608-A/89 was filed by one of the parties before this court resulting into appointment of Shri G. C. Jain, a retired Judge of this court as a third Arbitrator, BHEL referred its disputes to the Arbitrators setting out its claims in the shape of counter-claims.'

3. On 7th April, 1990, the Arbitrators framed the following preliminary issues :

(i) Whether the Arbitrators have the jurisdiction to determine the counter-claims filed by the respondents and the counter-claims are maintainable

(ii) Whether the claim of the claimant is not covered by the arbitration clause contained in the agreement between the parties and is not arbitrable

(iii) Whether the question involved is issues No. 1 and 2 can be gone into by the Arbitrators

4. The issue No. 3 was not pressed for decision by the parties meaning thereby that the questions covered by issues No. 1 and 2 could be gone into by the Arbitrators. On issue No. 1 the Arbitrators recorded a finding that the counter-claims were not maintainable before them as they had no jurisdiction to entertain the disputes raised before them by way of counter-claims. On issue No. 2, the Arbitrators held that the claims were covered by the arbitration clause but they were not expressing any opinion on merits of the claims. These findings of the Arbitrators are recorded in the interim award dated 5th October, 1990.

5. OMP 133/90 has been filed by BHEL under Section 28 of the Arbitration Act seeking enlargement of time for making the award by the Arbitrator.

Suit No. 3697-A/89 has been filed by BHEL under Section 20 of the Arbitration Act seeking setting aside of the award to the extent to which it decides issue No. 1 followed by a direction to the Arbitrator to adjudicate upon the counter-claims by

the Arbitrators.

OMP No. 199/90 has also been filed BHEL under Section 33 of the Arbitration Act seeking determination of the existence/validity of arbitration agreement so as to find out its effect and scope in the light of the findings recorded by the Arbitrators in their interim award.

6. Whether or not the disputes raised by way of counter-claims are capable of determination by the Arbitrators is a question which no more appears to be rest integra. In *Indian Oil Corporation Ltd. v. Amritsar Gas Service* : (1991)1SCC533 : Relied on). Vide para 15, their Lordships of the Supreme Court noticed the appellant's grievance regarding non-consideration of its counter-claims and since the occasion to make a counter-claim in the written statement could raise only after the order of reference, their Lordships of the Supreme Court have held :

'Refusal to consider the counter-claim for the only reason given the award does, therefore, disclose an error of law apparent on the face of the award.'

In *K. V. George v. Secretary to the Govt. Water & Power Deptt., Trivendrum* : AIR 1990 SC53 : Relied on), their Lordships of the Supreme Court have held :

'It is not disputed that the Arbitrator did not at all consider the counter-claims and kept the same for consideration subsequently while making award in respect of the claims filed by the appellant. Undoubtedly, this award made by the Arbitrator is not sustainable in law and the Arbitrator has misconducted himself and in the proceedings by making such an award. It is the duty of the Arbitrator while considering the claims of the appellant to consider also the counter-claims made on behalf of the respondents.'

7. Inasmuch as the Arbitrators have themselves held that the disputes raised before them by way of counter claim did arise out of the contract, they ought to have adjudicated upon those claims too and it did not make any difference if the disputes were set out before them in the form of counter-claims. To this extent the award discloses an error apparent on the face of the award.

8. For the foregoing reasons the interim award dated 5.10.1990 is set aside to the extent of finding recorded on issue No. 1 and the award is remitted back to the Arbitrators for consideration and decision afresh. The Arbitrators are allowed a period of six months from the date of communication of this order to them for disposing of the reference. Time for giving the award may be extended to them for disposing of the reference. Time for giving the award may be extended by the Arbitrators if jointly prayed for or agreed to by the parties. All the three matters stand disposed of accordingly. Let copies of this order be communicated to the three Arbitrators duly to both the parties.

9. Application allowed.

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