

Simplex Concrete Piles (India) Ltd. Vs. National Projects Construction Corpn. Ltd.

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Court : Delhi

Decided On : Mar-03-2000

Reported in : 2000VAD(Delhi)86; 2000(53)DRJ580

Judge : J.B. Goel, J.

Acts : [Arbitration Act, 1940](#) - Sections 30 and 33

Appeal No. : I.A. No. 6939/93 & S.No. 4173/92

Appellant : Simplex Concrete Piles (India) Ltd.

Respondent : National Projects Construction Corpn. Ltd.

Advocate for Def. : Mr. S.K. Taneja, Adv.

Advocate for Pet/Ap. : Mr. V.P. Chaudhary, Sr. Advocate and; Ms. Nitinjya Chaudhary, Adv

Judgement :

ORDER

J.B. Goel, J.

1. These are the objections under Section 30 and 33 of the [Arbitration Act, 1940](#) (for short 'the Act') filed by M/s. National Projects Construction Corporation Ltd. (hereinafter called 'the respondent') for setting aside the award dated 15.9.1992 passed by Shri C. Rama Rao, retired Director General of Works, Central PWD as Sole Arbitrator.

2. The work of construction of Turbine Hall, Auxiliary Annexe etc. for BALCO Captive Power Plant at Korba (M.P) was awarded by the respondent to M/s. Simplex Concrete Piles (India) Ltd. (hereinafter called 'the petitioner') by means of letter of award No. 700570/Projects dated 30.5.1985. The estimated value of the work was Rs.1,48,86,150/- and the work was to be completed within 16 months, i.e., by 30.9.1986 commencing from 30.5.1985. Extension was granted up to 31.12.1987 but work was actually completed on 31.7.1988. Disputes arose between the parties as petitioner's dues remained unpaid. The contract provided for arbitration. The Chairman-cum-Managing Director of the respondent the designated authority, on 30.7.1990 appointed Shri Vir Amar Prakash as the Arbitrator, but he resigned after some time and the Chairmancum-Managing Director of the respondent on 12.6.1991 appointed Shri C. Rama Rao, the retired Director General of Works, CPWD as the Sole Arbitrator 'to proceed with the matter from the stage at which it has been left by Shri Vir Amar Prakash'. In the letters of appointment, both of Vir Amar Prakash as well as of Shri C. Rama Rao, the Arbitrator was required to give a reasoned award though not so provided in the arbitration agreement.

3. Shri C. Rama Rao entered upon the reference. Petitioner submitted statement of his claims. Respondent filed reply to the same contesting the claims and also filed two counter claims. Both the parties led documentary evidence. After hearing the parties the learned Arbitrator gave his award dated 15.9.1992.

4. The petitioner had made claims under 11 heads, claim No.10 being for interest, claim No.11 for costs of the arbitration while claim No.6 contained various subheads (a) to (n) and in claim No.9 two claims were made under sub heads (1) and (2). Claim No.1 was withdrawn; claim No.2 being included in claim No.3 was also withdrawn. Claims No.1, 2, 5, 6(a) to (d), (f) to (n), 8 and 9(2) were

disallowed. In Claim No.3, against claim of Rs.5,85,156.11 as 27th final bill, a sum of Rs.5,77,222/- has been awarded. Against claim No.4 for recovery of Rs.53,873.97 which was towards labour wage escalation for the period October 1986 to July 1988, a sum of Rs. 46,115/- was awarded. Claim under sub head 6(e) for recovery of Rs.6,23,350/- towards extra lead in concreting and rehandling of materials, a sum of Rs.2,04,840/- has been awarded to the petitioner. Claim No. 7 for recovery of Rs.9,20,918/- towards refund of security deposit and earnest money of Rs.20,000/- was allowed in full. Against claim No.9(1) which was towards return of scrap steel, it was awarded that the respondent shall return 124 M.T. Scrap steel to the petitioner by 15.10.1992 failing which a sum of Rs.5,93,971/- was awarded to the petitioner. Under claim No.10, interest @ 20% per annum was claimed but interest @ 15% per annum w.e.f. 1.8.1989 on the amounts awarded against claims No.3, 4, 6(e) and 7 and if scrap steel is not returned by 15.10.1992, interest @ 15% per annum on Rs.5,93,971/- w.e.f. 16.10.1992 was awarded. Claim No.11 for costs of arbitration was disallowed.

5. Respondent's two counter claims (1) for recovery of Rs.7,29,307.50 towards liquidated damages; (2) for recovery of Rs.3,50,247/- on account of excess payments were disallowed. The net result of the award was that the learned Arbitrator awarded as under:-

1. Claim No.3 Rs.5,77,222.00
2. Claim No.4 Rs. 46,115.00
3. Claim No.6(e) Rs.2,04,840.00
4. Claim No.7. Rs.9,20,918.00

Total : 17,49,095.00

5. Claim No.9(1) Rs.5,93,971.00

(in the alternative)

6. Interest @ 15% per annum on Rs.17.49,095/- w.e.f. 1.8.1989 and on Rs.5,93,971/-, from 16.10.1992 if scrap steel was not returned till then.

6. The respondent alone has filed objections under Sections 30 and 33 of the Act but only in respect of award against claims No.3, 7, 9(2) and 10. The objections are:(1) the arbitrator has misconducted himself and also the proceedings; (2) the award against claim No.3 is beyond the material on record. Material on record for certain claims of respondent against recoveries made for some material was not considered and claims to the extent of Rs.2,18,024/- on account of penal recovery of wastage of steel was not allowed; recovery for steel not allowed at the issue rates and the recovery for cement has been wrongly disallowed beyond permissible 3% limit; claim No.7 has been allowed without proper proof and on the basis of copies only of (i) royalty clearance certificate and (ii) receipt of sale of empty bags; the interest could not be awarded, or in any case not from 1.8.1989 and it is without jurisdiction; the award suffers from errors apparent on the face of the award. Reply was filed on behalf of the petitioner disputing these pleas, factually and legally.

I have heard learned counsel for the parties.

7. The arbitration clause 30 contained in the contract did not provide that the arbitrator will give reasons for his award. However, the Chairmancum-Managing Director the designated authority in the letter of appointment of the arbitrator had directed the arbitrator to give reasons for the award. The Supreme Court in Raipur Development Authority Vs . M/s. Chokhamal Contractors has observed:

'The Arbitrator or Umpire is under no obligation to give reasons in support of the decision reached by him unless under the arbitration agreement or in the deed of submissions he is required to give reasons and if the arbitrator or umpire chooses to give reasons in support of his decision, it is open to the Court to set aside the award if it finds that an error of law has been committed by the arbitrator or umpire on the face of the record on going through such reasons. The arbitrator or umpire shall have to give reasons also where the Court has directed that reasons should be given or where the Statute which governs an arbitration requires him to do so.'

8. Explaining the ratio in Raipur Development Authority (supra), in Food Corporation of India Vs . Jagdish Chander Saha : AIR 1994 SC219 , it has been laid down that:

'What this Court had in contemplation in the above passage was that reasons are obligatory on the arbitrator only where the arbitration clause contains such a requirement or where both the parties agree that the reasons should be given in a deed of submission or by a letter addressed by both the parties to the arbitrator. We do not see how one of the parties to the arbitration agreement can restrict the scope of the arbitrator's powers as envisaged in the arbitration agreement by mentioning certain terms in a unilateral letter of appointment of the arbitrator.'

9. The arbitrator has, given reasons for his award obviously in pursuance of the directions of the appointing authority. However, both the learned counsel have not raised any objection on this aspect and have addressed arguments on the basis of the award as it is.

10. The scope of the power of the Court to interfere in an award is circumscribed by Section 30 of the Act. In Jivarajbhai Ujamshi Sheth & Ors. Vs . Chintamanrao Balaji & Ors. : [1964]5SCR480 , it was held as under:-

'An award made by the arbitrator is conclusive as a judgment between the parties, and the Court is entitled to set aside an award if the arbitrator has misconducted himself in the proceedings or when the award has made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under S. 35 of the Arbitration Act or where an award has been improperly procured or is otherwise invalid (Sec. 30 of the Arbitration Act). An award may be set aside by the Court on the ground of error on the face of the award, but an award is not invalid merely because by a process of inference and agreement (sic: argument) it may be demonstrated that the arbitrator has committed some mistake in arriving at his conclusion. As observed in Champsey Bhara and Co. v. Jivraj Balloo Spinning and Weaving Co. Ltd. 50 Ind App 324: AIR 1923 PC 66;

'An error in law on the face of the award means, in their Lordships' view, that you can find in the award or a document actually incorporated thereto, as for instance a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous. It does not mean that if in a narrative a reference is made to a contention of one party, that opens the door to seeing first what that contention is, and then going to the contract on which the parties right depend to see if that contention is sound.'

The Court in dealing with an application to set aside an award has not to consider whether the view of the arbitrator on the evidence is justified. The arbitrator's adjudication is generally considered binding between the parties, for he is a tribunal selected by the parties and the power of the Court to set aside the award is restricted to cases set out in Sec. 30. It is not open to the Court to speculate, where no reasons are given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion. On the assumption that the arbitrator must have arrived at his conclusion by a certain process of reasoning, the Court cannot proceed to determine whether the conclusion is right or wrong. It is not open to the Court to attempt to probe the mental process by which the arbitrator has reached his conclusion where it is not disclosed by the terms of his award.

11. This view was followed in later decisions including in State of Rajasthan Vs . M/s. R.S. Sharma & Co. : (1988)4SCC353 .

Again in Delhi Municipal Corpn. Vs . M/s. Jagan Nath Ashok Kumar : [1988]1SCR180 , it was laid down that:-

'Appraisalment of evidence by the arbitrator is ordinarily never a matter which the Court questions and considers. The parties have selected their own forum and the deciding forum must be conceded the power of appraisalment of evidence The arbitrator is the sole judge of the quality as well as quantity of the evidence and it is not for the Court to take upon itself the task of being a judge of the evidence before the Arbitrator. It may be possible that on the same evidence the Court might arrive at different conclusions than the one arrived at by the arbitrator but that by itself is no ground in our view for setting aside the award of an arbitrator.

12. Further that Section 1 of the Evidence Act, 1872 in its rigour is not intended to apply to proceedings before an arbitrator.

The following observations made by Lord Goddard, C.J. in *Mediterranean & Eastern Export Co. Ltd. v. Fortress Fabrics Ltd.* (1948) 2 All E.R. 186 were also referred to with approval:

'.....The day has long gone by when the Court looked with jealousy on the jurisdiction of the Arbitrators. The modern tendency is in my opinion more especially in commercial arbitrators, to endeavor to uphold awards of the skilled persons that the parties themselves have selected to decide the questions at issue between them. If an arbitrator has acted within the terms of his submission and has not violated any rules of what is so often called natural justice the Courts should be slow indeed to set aside the award.'

13. In *New India Civil Erectors Pvt. Ltd. Vs . Oil and Natural Gas Commissioner* : [1997]2SCR86 , also it was held that normally the Court would not interfere and the attempt of the court should always be to support the award within letter of law where the arbitrator has acted within the terms of his submission and has not violated any rules of natural justice.

Thus, the jurisdiction to interfere by the Court of law in an award made by the arbitrator chosen by the parties is circumscribed by the provisions of the Act.

14. The respondent has challenged the award in respect of claims No.3, 7, 9(2) and 10. Claims No.3 and 7 are interconnected, which as pleaded by the petitioner in their statement of claims read as under:-

'CLAIM NO.3: PAYMENT AGAINST 27TH RA BILL AND FINAL BILL

The details of payment involved against the final bill is enclosed as Annexure-15 setting out the description, amount claimed in the final bill, payment made, 26th bill and the actual amount outstanding item wise of the schedule. It also incorporates the recoveries for materials supplied and also claim for release of excess recovery of materials made by the Respondent and also release of withheld amount in 2nd, 4th, 16th, 17th and 24th RA bills and amount recovered in extra item No. 1 and

penal recovery of cement.

Claim No.7: Release of Security Deposit along with EMD of Rs. 20,000/-

In terms of the contract, 50% of S.D. should be released after 6 months from the date of completion of work. Balance 50% should be released after 12 months of the defects liability period or after preparation of the final bill by the Respondent whichever is later. The work was completed on 31.7.88. Accordingly 50% of the SDZ was due to be paid to us on 1.2.80. Final bill for the above work was submitted to the Respondent on 15.9.88 and balance 50% of SD was due on 1.8.90. Unfortunately for reasons best known to the Respondent the Security amount has not been refunded.

The respondent in their reply has pleaded as under:-

CLAIM NO.03: PAYMENT AGAINST 27TH R.A. & FINAL BILL:

The details of the gross amount and recoveries of the 27th R.A. & Final bill are furnished separately at annexure - I. It can be seen from this annexure that the amount of the final bill works out to be on negative side. The claimant has not signed the abstract of the 27th R.A. & Final bill as a token of acceptance of measurement and guarantee, royalty clearance certificate and proof of having sold empty cement bags to an authorised agency. In view of this the passing of the final bill is held up. Apart from this the claimant had not completed all the works in their scope and had deserted the site leaving certain works incomplete. Subsequently these works were carried out by the respondent at the cost and risk of the claimant. The final bill could only be passed after completion of left over works by the claimant through other agencies so that recovery could be affected in the final bill as per the final bill amount is on negative side, the question of release of any payment against the final bill does not arise. On the contrary the claimant has to pay us back Rs.3,50,247. In this connection the following letters may kindly be referred:

1. 7123202/Simplex/4315, dated 05.01.1998

2. 7123202/Simplex/403, dated 02.05.1988

3. 7123202/Simplex/2085, dated 21.10.1988

4. 7123202/Simplex/2085, dated 30.11.1988

5. 7123202/Simplex/2486, dated 09.12.1988

6. 7123401/Simplex/- dated 17/20.1.1989

CLAIM NO.07: RELEASE OF SECURITY DEPOSIT Along with EMD OF Rs.20.000/-

50% of the security deposit was not released as the claimant had deserted the site leaving some finishing work incomplete. Recoveries had also to be made on account of Substandards against incomplete works could only be ascertained after completion of these works by the respondent through other agencies... As the final bill was coming in negative, the recoveries had to be adjusted to some extent with the Security Deposit only.

Similar is the position with respect to refund of the balance 50% that is to be released after the defect liability period. Moreover the claimant had also not attended to the various requirements of the contract such as:-

1. Submission of performance Bank Guarantee as per clause No.13.0.0 of the letter of award.
2. Proof of selling 90% empty cement bags to the authorised cement bags collecting agency.
3. Submission of royalty clearance certificate.

In view of the above reasons the entire amount of security deposit has to be adjusted against the recoveries due from the claimant.

In this connection our letter No. 7123202/Simplex/2486, dated 8/9-12-1988 and 7123202/Simplex/dated 17/20-01-1989 17/20-01-1989 may kindly be seen.'

15. Both the parties have filed their documents in support of their pleas. As mentioned in the first hearing on 13.9.1991, the learned arbitrator had asked the

respondent to give quantities and rates for each item of final bill in respect of claim No.3. This was considered in the second hearing held on 14.11.1991 and it is noticed as under:-

'Claimants have stated that there are differences in the quantities taken by the respondents in the 27th Final bill, and the quantities taken in their final bill and these will be reconciled at the site of work on 9.12.91 by the representatives of both the parties. Similarly, the differences in the amounts of recoveries, will also be reconciled and the result of the reconciliation will be reported in the 3rd week of December 1991.'

On the next hearing held on 28.12.1991, the learned arbitrator has noticed as under:-

'Earlier on 26.12.1991, the respondents have filed a statement showing the quantities of items claimed by the claimants and the quantities of those items worked out by them explaining the reasons for the differences duly signed by both the parties and also another statement (7 pages) showing the quantities of cement, for steel and structural steel issued and recoverable from the claimants bill.'

16. In hearing held on 28.6.1992, against claim No.7, objection regarding royalty clearance certificate has been considered and it is observed that:

'Claimants have stated that the Royalty clearance certificate was sent directly by the Mining Deptt. to the NPCC and a copy of the same has now been furnished by them to the respondents and the arbitrator.'

Dispute about this certificate was not carried further by the respondent.

In the last 7th hearing held on 29.6.1992, claim No.3 and counter claim No.2 were considered together and the learned Arbitrator has noticed as under:-

'As both of them are corelated to each other, they are dealt with together. Claimants filed a folder (on 29.6.92) containing documents and a revised final bill giving Explanationns on recoveries.

Claimants explained their final bill with reference to the reconciled quantities, with respondents and explained the reasons, in respect of variations in the items of recoveries, as contained in their folder dated 29.6.1992.

Respondents explained their final bill (minus final bill) in detail with reference to the reconciled quantities and certain reconciled items of recovery which were found out after the Claimants representative went to the office of the respondent at the site in December 1991 and explained the recoveries and items of work done.'

Then the learned arbitrator in his award has observed as under:-

'The final bill prepared by the respondent (pages 12 to 17 of respondents folder), has been scrutinised. The measurements of various items of the final bill have been reconciled jointly by both the parties and the reconciled measurements have been given by the respondents on 26.12.91 (page 89 of respondents folder). The gross amount of the final bill works out to Rs. 5,41,073/- as per corrections made in the respondents final bill (page 13 to 16 of respondents folder).

Since a common site store has been maintained for Contracts I and II, the issues and theoretical requirements of cement and steel are considered for both the contracts together. Cement and steel consumed in rectification works and other incidental works, is considered as a genuine use on the work. Cement has been issued in bags. Hence, the permissible variation has been taken as 3% for working out the penal rate recovery.

However, the recoveries have been corrected at pages 16-17 of respondents folder, based on discussions and clarifications obtained in the 7th hearing.'

and against claim No.3 it is awarded as under:-

1. Gross value of work done Rs. 5,41,073.00
2. Add withheld amounts released + Rs. 3,20,500.00

(As per respondents final bill)

Rs. 8,61,573.00

3. Less recoveries made as per

details given on page 16-17

of respondent folder duly

corrected - Rs. 3,30,803.00

Rs. 5,30,770.00

4. Add credit given for excess

recovery made in previous

bill. + Rs. 46,452.00

Nett amount payable

to the claimants. Rs.5,77,222.00

17. As regards claim No.7, the learned arbitrator after considering the pleadings, materials and the contentions of the parties has held as under:-

'A perusal of the final bill (page 13-15 of respondents folder) with reference to the agreement (page 248 of the copy of the agreement folder) indicates that the work as contemplated has been completed by 31.12.1987 and some additional work has also been completed by 31.7.1988. The total value of the work completed was Rs.180.61 lakhs, as against Rs.147.60 lakhs as contemplated in the agreement. This is besides the extra items of work done as per the claims. The claimant had submitted (a) royalty clearance certificate; (b) proof of sale of empty cement bags to the authorised bag collecting agency.

Considering the complexity of working, I consider that the claimants are not in breach of the contract in any manner. Hence, the security deposit of Rs.9,20,918/- (including the earnest money of Rs.20,000/-) is refundable to the Claimant.

Accordingly, I award that the respondent do pay the Claimant, an amount of Rs.9,20,918/- for settlement of this claim.'

18. The arbitrator being a retired Director General of Works, CPWD, he has held the highest post in Central PWD. He is thus a highly experienced person. He has taken into consideration the material placed, the oral discussions held with the parties including the reconciliation in various details made by the parties, and has given cogent reasons for his award.

19. Learned counsel for the respondent during arguments has raised two contentions: (1) the original royalty clearance certificate was not produced and only copy was produced belatedly; (2) receipt of delivery of empty bags has not been proved and only copies were filed which could not be taken as proof. These documents/circumstances had obviously been considered by the arbitrator. The case of the claimant before the arbitrator was that the Royalty clearance certificate was sent by the concerned department to the respondent and there was no specific denial of this by the respondent. Claimant had produced, perhaps, certified copy thereof before the arbitrator and also supplied another to the respondent as is recorded in one of the proceedings. Correctness of this certificate was not disputed before the arbitrator nor the respondent had demanded any further proof thereof. Similarly, copy of the receipt showing sale of the empty pages was also filed before the arbitrator. This piece of evidence was also not disputed and contested before the learned arbitrator. Here also, the respondent did not ask for any further proof.

20. It is well settled that Section 1 of the Evidence Act, 1872 in its rigour is not intended to apply to proceedings before the arbitrator. The arbitrator has obviously accepted the documents produced before him as good evidence. As noticed earlier, appraisal of evidence by the arbitrator is not a matter which the Court questions and considers. The Court does not sit in appeal to examine the correctness of the award on merits. The arbitrator is the sole judge of the quality as well as quantity of the evidence and it is not for the court to take upon itself the task of being a judge of the evidence before the arbitrator.

21. It is also contended that the learned arbitrator has without any basis allowed recovery of only Rs.3,30,803/- against claim of the respondent of Rs.9,49,187.84. The learned arbitrator has considered the material placed before him. There is no error apparent on the face of the award in this respect also.

22. It was also contended that the learned arbitrator has given the award beyond the material on record and without any basis and has increased the amount payable in the final bill to Rs.5,41,077 instead of Rs.2,78,441/-. The learned arbitrator made the award after taking into consideration the evidence, the oral submissions and the circumstances. Here also, there is no error apparent on the face of the award.

23. Thus there is no error of fact or of law so far as award against claims No.3 and 7 is concerned and as such this part of the award calls for no interference.

24. Against claim No.9, the petitioner's claims for return of 126 tonnes of scrap steel has been allowed, and the respondent has been directed to return 124 M.T. of the steel scrap by 15.10.1992 failing which the respondent should pay an amount of Rs.5,93,971/- to the petitioner.

25. This part of the award is not disputed during arguments and on the other hand respondent have stated in a separate note of submissions dated 19.11.1998 filed in Court that the respondent had handed over 126 M.T. of steel scrap to the claimant on 14.11.1992 and as such they are not liable to pay Rs.5,93,971/-. This part of the award thus has not been challenged. In any case there is no error apparent on the award in this respect also. This part of the award also calls for no interference. If the steel scrap as per award has been returned, as stated this part of the award would stand satisfied.

Claim No.10.

26. This relates to award of interest. Interest has been awarded for prerule period, pendente lite and post award period. The amounts due/claimed were certain and payable on certain date(s). The arbitrator is competent to award interest for all these periods as held in State of Orissa v. B.N.Agarwalla (1977) 2

SCC 469. There is no error apparent on the face of the award in this respect also. This also calls for no interference.

27. In view of the above discussion, the objections filed by the respondent have no merit and the same are hereby dismissed.

28. In the result, the award dated 15.9.1992 made by Shri C. Rama Rao, as arbitrator is made a rule of the Court. Petitioner is also awarded further interest till realisation on the amount of Rs.17,49,095/- @15% p.a. Petitioner will also get costs of these proceedings.

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