

Union of India (Uoi) Vs. Unit Construction Co. (Pvt.) Ltd. and anr.

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Court : Kolkata

Decided On : Sep-12-1986

Reported in : AIR1987Cal175

Judge : Pratibha Bonnerjea, J.

Acts : [Arbitration Act, 1940](#) - Sections 8, 9, 11, 12, 13, 29, 30 and 33; ;Intrest Act, 1839 - Section 1

Appeal No. : Award Case No. 146 of 1985

Appellant : Union of India (Uoi)

Respondent : Unit Construction Co. (Pvt.) Ltd. and anr.

Advocate for Def. : Bhaskar Gupta and ;Abhijit Chatterjee, Adv.

Advocate for Pet/Ap. : Sujit Sinha, Adv.

Disposition : Application dismissed

Judgement :

ORDER

Pratibha Bonnerjea, J.

1. The present application has been taken out under Sections 30 and 33 of the Arbitration Act for setting aside the award dt. 28-3-85. The award is a money

award and is a non-speaking one. Under the agreement, the arbitrator was required to give the breakups of the total amount award. In compliance with the said provision, the arbitrator has given the breakup of each item of claim.

2. Although various grounds have been taken in the petition for attacking the said award, during hearing, the learned counsel for the petitioner has pressed only three grounds : --

1) Items Nos. 1 and 2 of the claims are excepted matters and the Chief Engineer has already given his decision on these claims. The said decision is binding on the parties under Clause 61A of the Contract. Therefore, these items are not arbitrable at all.

2) The amounts awarded against claims Nos. 4 and 5 are in violation of the express provisions contained in Clause 11 of the General Conditions of the Contract. The arbitrator misdirected/misconducted himself in allowing the said claims.

3) The arbitrator had no jurisdiction to award interest as no claim for interest was made by the claimant. The arbitrator acted beyond jurisdiction in awarding interest.

3. Regarding ground (1). the petitioner's counsel has invited my attention to the letter of the Chief Engineer dt. 1-5-82 rejecting certain claims of the claimant made earlier. The petitioner's counsel submits that by that letter the Chief Engineer rejected the claimant's claim in items' Nos. 1 and 2 in the statement of fact before the arbitrator. He submits that in terms of Clause 6(a) of the General Conditions of Contract, the decision of the Chief Engineer is final and conclusive between the parties and is an excepted matter, not at all arbitrable. Therefore, by allowing these two claims the arbitrator travelled beyond his jurisdiction. This letter dt. 1-5-82 is Annexure 'B' to the present petition. This argument of the petitioner's counsel is based on the opening words of the arbitration clause '70' as well as Clause 6A of the Contract which are as follows : --

'70'. 'All disputes between the parties to the contract (other than those for which the decision of the C. W. E. or any other person is by the contract expressed to be

final and binding);..... be referred to the arbitration.....'

Clause 6A :-- 'If there are varying or conflicting provisions made in any one document forming part of the contract, the accepting officer shall be the sole deciding authority with regard to the intention of the document and his decision in this respect shall be final and binding.

4. It is an admitted fact that the contract between the parties consisted of several documents. Clause 6A is a long clause giving guideline to the parties as to how the conflicting provisions contained in different documents will have to be reconciled to explain any ambiguity if it arises at the time of construing the documents. If, however, the guideline provided in Clause 6A fails to bring in a reasonable solution or does not help in bringing in a harmonious construction by explaining the ambiguity, then the decision of the officer on this point as mentioned in Clause 6A would be final and conclusive. The decision making authority in this case is the Engineer-in-Chief. The respondent's counsel rightly points out that the petitioner's counsel has misread Clause 6(a) of the contract. According to him, this clause only provides for solution of intra-document conflicts or ambiguities by following the guideline or by the decision of the accepting officer who is the final authority in this respect. But his jurisdiction is limited to that extent only. The accepting officer has no other jurisdiction and cannot decide any substantive claim of any party or any other dispute arising out of the contract. After careful scrutiny of the provisions of Clause 6(a), I have no hesitation to hold that the contention of the respondent's counsel is absolutely correct and I accept the same. Therefore, the letter dated 1st May 1982, being Annexure 'B' to the petition, has not been written by the Engineer-in-chief in exercise of the authority conferred on him under the provisions of Clause 6(a) as by that letter the Chief Engineer had rejected certain monetary claims of the respondent. Clause 6(a) cannot be attracted in such a case. On the contrary, the rejection of these claims of the respondent by the Chief Engineer gave rise to the disputes which were clearly arbitrable under the terms of the contract. The arbitrator had jurisdiction to decide these claims.

5. The second ground of attack on the award is that the arbitrator had allowed respondent's claims in items Nos. 4 and 5 in express disregard of the provisions in

Clause 11 of the General Conditions of Contract prohibiting any payment by way of compensation for delay caused by reasons specified in Sub-clauses (a) and (b) of Clause 11. The question is whether the Court has jurisdiction to look into the provisions of Sub-clauses (a) and (b) of Clause 11 of the General Conditions of Contract to find out what are their provisions and whether the arbitrator had disregarded the same or not in deciding the merit of the case. The Court has no jurisdiction to look into the contract unless the contract is incorporated in the award either expressly or by implication and the ground taken is the error of law apparent on the face of the award. The law is quite settled on this point since Champsey Bhara's case reported in AIR 1923 P.C. 66. The principle laid down in Chamsey Bhara's has been followed and reiterated repeatedly by the Division Bench of this Court reported in : AIR1962 Cal594 , (Union of India v. N. P. Singh) and in : AIR1981 Cal95 (Union of India v. D. B. Rose) as also by the Supreme Court in : [1971]3SCR282 . (Alien Berry & Co. v. Union of India) and : [1975]2SCR811 , (N. Chellappan v. Secretary. Kerala State Electricity Board). The law is exactly the same on this point in England as will be evident from (1953) 2 Lloyd's Rep 427 (429) : (1933 All ER Rep 616) where Denning LJ held :

'As I read the cases, if the Arbitrator says :

On the wording of the clause, I hold and so and so, then that clause is impliedly incorporated into the award because it invites the reading of it'.

Similar observation can be found in (1962) 2 All ER 53, (Giacomo Costa Fu Andrea v. British Italian Trading Co. Ltd.) where Diplock LJ approved the aforesaid observations of Denning LJ. Therefore, in an application for setting aside the award, the Court gets jurisdiction to look into the agreement on the records of the arbitration proceeding provided the contract or its clause or the particular document from the records concerned has been incorporated in the award either expressly or impliedly and the ground taken is the error apparent on the face of the award. Otherwise the Court has no jurisdiction to look into it. In the present case, the award is a non-speaking award and the award has not been attacked on the ground that there is an error apparent on the face of the award. Hence the respondent's counsel submits that the Court is not entitled to go into the merit of

the case or look into Clause 11 at all. But the petitioner's counsel submits that disregard of an express term of the agreement will amount to legal misconduct on the part of the arbitrator and the Court will have the jurisdiction to look into this clause to find out whether the arbitrator is guilty of committing legal misconduct by ignoring the express terms of the contract or not. In support of his contention, the petitioner's counsel strongly relies on (1949) 53 Cal WN 828, (Chhog Mal Rawa Mal v. Sankal Chand G. Shah) at page 830 :--

'The only manner in which this award can be justified is to urge that the arbitrators must have held that there was extension of the due dates under the contract and that they have awarded damages on the proper legal basis of the market rate prevailing after the control order ceased to be operative. Even on that view, the arbitrators were guilty of misconduct. It is legal misconduct to decide that there was an extension when there was absolutely no evidence in support of it and really no material before the arbitrator to justify this finding or conclusion.'

The petitioner's counsel also strongly relied on the observation at page 830 : --

'It is, however, open to the Court to look into the relevant statements filed before the arbitration Tribunal. If the Court is satisfied that the arbitrators were guilty of misconduct then the Court should set aside their award.'

Mr. Sinha, the petitioner's counsel, on the strength of the above observations, submits that (1949) 53 Cal WN 828 lays down a general principle that in all cases of legal misconduct the Court has the jurisdiction to look into the records of the arbitrator, even when the allegation of misconduct relates to the merit of the case. If misconduct is alleged in respect of the merit of the case, I have my doubts whether the Court can make any roving investigation or at all any investigation unless it is a case of error apparent on the face of the award. If 53 Cal WN 828 laid down any such general legal proposition, as submitted by Mr. Sinha, then the same has been impliedly repealed or overruled by the subsequent decisions of the Supreme Court reported in : [1971]3SCR282 and : [1975]2SCR811 where it was held that the arbitrator being the sole Judge of facts and law, the Court has no jurisdiction to set aside the award if the arbitrator goes wrong in his conclusion on the basis of mere error of law or facts unless the same is manifest on the face of

the award or incorporated in it somehow or other. But when the legal misconduct is of a technical nature, viz., non-service of notice, complete absence of evidence or refusal to admit any material document or to examine any witness, viz., procedural defect violating the principle of natural justice, the Court gets jurisdiction to look into the record to find out whether the allegations are correct or not. But it should be noted that the decision of (1949) 53 Cal WN 828 was given on the peculiar facts of that case. In that case, breach of contract was committed when the jute price was controlled by the Government. The Bengal Chamber of Commerce made an award on the basis of the market rate after the controlled price was lifted. But controlled price was lifted long after the due date when breach had been committed. This would be clear from pages 829-830 :

'It is common case as is apparent from the statements filed before the Tribunal of Arbitration of the Bengal Chamber of Commerce that there was no extension of time for delivery under the contract.....

Jute was controlled during the relevant period April to June 1940 and the control price operated until expiry of the month of Sept. 1946. The award was made on 16-1-48 on the basis of market rate prevailing after Sept. 1946.'

In fact, the award in 53 Cal WN 828 was set aside on the ground of illegality as would be clear from page 829 of the report :--

'In the absence of any extension this award of damages on the basis of rates exceeding the maximum rates fixed by the Control Order is clearly illegal. To allow the arbitrators to award such damages would be to legalise an act which has been declared to be an offence under the relevant statute and cannot possibly be permitted by a Court of law.'

Then again at page 831 it was held : --

'To circumvent the control order by awarding damages at a higher rate than the maximum fixed by the Order would constitute 'misconduct' and cannot be justified by invoking the rule that an award cannot be set aside on the ground of mere error of law. This is not simply a mere mistake of law. It is a more fundamental question.

No Court or judicial authority could possibly award this damage in clear contravention of the law of the land and, therefore, the award was rightly set aside..... It is a question of illegality which vitiates the award.'

The Division Bench has described this illegal contravention of the law by the arbitrators as 'misconduct'. With great respect I humbly point out that the word 'misconduct' in this context has been loosely used. A 'legal misconduct' by the arbitrator presupposes that while acting within his jurisdiction, he had misconducted the proceeding or himself in some way or other. An act in contravention of a statute, which has been declared to be an offence, is an illegal act and no Court or Judicial authority has the jurisdiction to act in that manner. The question of illegality will cut at the root as it is the question of jurisdiction. Hence, a 'legal misconduct' by the arbitrator cannot be equated with an 'illegal act of the arbitrator'. The first one does not affect his jurisdiction but the latter one does. Coming back to the point, can it be said in the present case that the arbitrator misconducted the proceeding by not taking into consideration the revisions of Sub-clauses (a) and (b) of Clause 11 as submitted by Mr. Sinha. The arbitrator had the jurisdiction to consider whether the delay alleged was covered by the Sub-clauses (a) and (b) of Clause 11. This question was raised and argued. I do not think that in construing the sub-clauses if the arbitrator committed any mistake, that would be a 'misconduct'. : AIR1984 Delhi358 (Delhi Development Authority v. Bhagat Construction Co. (P) Ltd.) Strongly relied on by Mr. Sinha himself supports my view on this point. In that case, the award was tried to be set aside on one of the grounds that the arbitrator misconstrued the contract. It was held in para 7 : --

' It was, therefore, a matter of construction of contract of which the Arbitrator was the final Judge. The award cannot be set aside in respect of this question also.....'

The allegations of misconstruction misinterpretation or wrong understanding of sub-clauses (a) and (b) of Clause 11 by the arbitrator cannot be described as misconduct. The respondent's counsel relies on Chellappan's case reported in : [1975]2SCR811 in support of his contention that mere error of law or fact by the arbitrator is no ground for setting aside the award and does not amount to misconduct. In this case, the Supreme Court held at page 235 : --

'The umpire as the sole arbitrator was not bound to give a reasoned award and if in passing the award, he makes a mistake of law or fact, that is no ground for challenging the validity of the award.'

'The Court has no jurisdiction to investigate into the merit of the case and to examine the documentary and oral evidence on the record for the purpose of finding out whether or not the arbitrator has committed an error of law.'

The same principle was enunciated by the Supreme Court in an earlier decision in *Allenbury's case* reported in : [1971]3SCR282 : --

'The rule thus is that as the parties choose their own arbitrator to be the Judge in the dispute between them, they cannot, when the award is good on the face of it, object to the decision either upon the law or on the facts. Therefore, even when the arbitrator commits a mistake either in law or in fact in determining the matters referred to him, but such mistake does not appear on the face of the award or in a document appended to or incorporated in it so as to form part of it, the award will neither be remitted nor set aside notwithstanding the mistake.'

To put it shortly, excepting in case of error apparent on the face of the award, the Court has no jurisdiction to investigate into the correctness of arbitrator's decision on the merit of the case either on point of law or on facts. To put it more shortly, the arbitrator's decision on the merit of the case is final both on point of law and facts. His wrong decision is not a 'legal misconduct'. Hence, in such a case, the question of investigation regarding the facts of the case by the Court does not arise. But the arbitrator's laches or negligence or failure to observe the principles of natural justice in procedural matters, while conducting the arbitration proceeding, will amount to legal misconduct. In such a case, the Court will have the jurisdiction to find out whether the arbitrator has misconducted the preceding or violated the principle of natural justice. The award will stand or fall on the basis of that finding. The question of perversity or apprehension of bias or actual bias of the arbitrator which vitiates the award also will come under the term 'legal misconduct'. The illegality and the lack of jurisdiction are other grounds on the basis of which the validity of the award can also be challenged. 'Error apparent on the face of the award', 'legal misconduct' and 'lack of jurisdiction or illegality' are

three distinct and different types of attacks on the award. The first one confers jurisdiction on the Court to enquire into the merit of the case to find out the correctness of the decision of the arbitrator. The second one confers jurisdiction on the Court to find out whether there was procedural irregularity resulting in miscarriage of justice or violation of principle of natural justice. The third one goes to the root and empowers the Court to investigate the fundamental question of arbitrator's authority or jurisdiction.

6. In the present case, the ground urged does not fall within any of the three classes of attacks mentioned above. The Court therefore neither can investigate on merit nor can enquire into the procedure followed by the arbitrator. The attack as made also does not affect the jurisdiction of the arbitrator. The petitioner is really agitating before this Court that the arbitrator wrongly construed the terms of the contract or did not understand the terms of Clause 11. This is not a misconduct as already held above.

7. The last ground is the question of interest. The petitioner's counsel submits that by awarding interest the arbitrator acted beyond his jurisdiction as no claim for interest was made in the statement of claim filed by the respondent. The respondent's counsel submits that it was a private reference and the claim for interim interest was made at the rate of 18% per annum in the rejoinder. Reading the award it is clear that the arbitrator has allowed only interim interest. The petitioner did not object when the respondent raised this claim for interim interest in the reference by filing its rejoinder. This being a private reference, the parties could enlarge the scope of the reference either by express agreement or by their conduct. There is no averment in the petition that the petitioner raised any objection when the claim for interim interest was introduced in the reference. The petitioner contested this claim. The petitioner's case is that the interest was awarded in violation of the provisions of the Interest Act. But the Interest Act will not apply when the claim is for interest pendente lite. In the present case, the reference was started by the letter dt. 23-5-83 and the interim interest was awarded from 23-5-83 to 28-2-85 which was the date of the award. It is submitted by the petitioner's counsel that the arbitrator has the jurisdiction to allow interest pendente lite only from the date of his entering upon the reference and not for the

period before entering upon the reference. In support of his contention, he relied on : AIR1981 Cal101 . (Jiwani Engineering Works (P) Ltd. v. Union of India) para 6 where it was held that an arbitrator could allow interest pendente lite from the date of entering upon the reference till the date of the award. The words 'pendente lite' mean during the pendency of the case. A reference starts as soon as the disputes are referred for adjudication. Disputes may be referred to a named arbitrator or to an arbitrator to be appointed subsequently. If the named arbitrator fails to enter upon the reference within one month from the date of calling upon him to do so, he becomes liable to be removed for his failure to enter upon and proceed with the reference within the meaning of explanation to Section 9 of the [Arbitration Act, 1940](#). In such a case, when the arbitrator remains inactive a new arbitrator can be appointed Under Section 8 of the Act to continue the pending reference. If, however, the said arbitrator is removed under Sections 8, 9, 11 and 12 of the Act by the Court, the Court can fill up the vacancy by appointing a sole arbitrator. Therefore, reference remains pending irrespective of the fact whether the arbitrator has entered upon the reference or not otherwise where the vacancy would occur to be filled up by the Court under Section 12(1) of the Act. After a reference is made, it remains pending irrespective of the question that the arbitrator has to be appointed or there is a named arbitrator or whether the arbitrator has entered upon the reference or not. It remains pending until finalised by passing of a decree upon the award or is superseded by the Court. The submission that the reference only starts or becomes a pending reference only from the date of entering upon the reference by the arbitrator militates against the express provisions of Sections 8, 9, 11 and 12 of the Arbitration Act. In : AIR1981 Cal101 , the arbitrator could have allowed interest pendente lite from the date of the reference till the date of the award. Instead the arbitrator granted interest from the date of entering upon the reference till the date of the award. It is not an authority to lay down the principle that reference does not start until the arbitrator enters upon the reference as submitted by the petitioner's counsel. Hence the arbitrator has jurisdiction to allow interest pendente lite both from the date of the reference and from the date of entering upon the reference till the date of making of the award. In the instant case, the arbitrator awarded interest pendente lite from the date of the reference till the date of the award and was perfectly within his

jurisdiction to do so. Hence this ground agitated by the petitioner must be rejected.

8. In the premises, the application fails and the award is upheld. The respondent is entitled to the cost of this application from the petitioner.

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