

State of West Bengal Vs. India Construction Co. and ors.

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Court : Kolkata

Decided On : Oct-05-1988

Reported in : (1989)1CALLT176(HC)

Judge : Prabir Kumar Majumdar, J.

Acts : [Arbitration Act, 1940](#) - Sections 20, 30 and 33; ;[Evidence Act, 1872](#) - Section 1

Appeal No. : Award Case No. 114 of 1988

Appellant : State of West Bengal

Respondent : India Construction Co. and ors.

Advocate for Def. : Mr. Sengupta

Advocate for Pet/Ap. : Mr. Sengupta

Disposition : Application dismissed

Judgement :

Prabir Kumar Majumdar, J.

This is an application by State of West Bengal under Sections 30 and 33 of the Arbitration Act for setting aside the award, dated 18th March, 1988 made and published by the sole arbitrator Mr. Anil Kumar Mitra. This is art arbitration without

the intervention of the Court and the arbitrator is a retired Chief Engineer of Irrigation and Waterways Department of the Government of West Bengal.

1. In response to a notice inviting tender the respondent No. 1 M/s. India Construction Company, the claimant before the arbitrator, submitted tender at the rate of 2.97% above the petitioner's schedule of rates for an aggregate sum of Rs. 2,49,97,466. A similar rate had also, been quoted by another tenderer M/s. B. C. Agarwala & Co., and the total work was divided between the said two tenderers the respondent No. 1 herein and M/s. B. C. Agarwala & Co. into 50:50. The work Order was issued by the Executive Engineer Teesta Barrage, Division No. I on 10th December, 1980 and later on a formal contract was entered into in a printed form No. 2911(ii) of the State of West Bengal. According to the petitioner, the contractor delayed the execution of the work and upon the extension granted from time to time by the department the contractor ultimately completed the work in November, 1983. By letter, dated 25th September, 1984 the Contractor submitted a supplementary claim of Rs. 16,01,274.30p before the' Superintending Engineer in connection with the work.

2. Thereafter, the contractor, that is, the respondent No. 1 herein raised a dispute by a letter, dated 16th November, 1985 before the Chief Engineer Irrigation and Waterways Department, Government of West Bengal claiming a sum of Rs. 53,79,422.30 p and prayed for referring the same to the arbitration and thereafter the Chief Engineer, Irrigation and Waterways Department, Government of West Bengal appointed one Anil Kumar Mitra, the retired Chief Engineer as the sole arbitrator for adjudication of the disputes. According to the petitioner before the arbitrator, claimant submitted statement of claim, claiming a sum of Rs. 79,89,973.30 p and the main contention of the respondent No. 1 was that the State, the petitioner in this application was responsible for delay in the execution of the work.

3. During the continuance of the arbitration proceeding the respondent No. 1 filed an application for interim award of Rs. 16,01,274.30p under Section 27 of the [Arbitration Act, 1940](#) and the petitioner filed objection to the said application for interim award. It is the contention of the petitioner that the learned arbitrator heard

the matter on several dates and set aside the said claim on 18th June, 1987 . It is the allegation of the petitioner that the learned arbitrator committed misconduct by not deducting the said amount from total claim as claimed by the respondent No. 1 by way of an interim award.

4. It is also the contention of the petition that the learned sole arbitrator after hearing the submission of the parties in about 28 sittings made and published his award on 18th March, 1988 for a sum of Rs. 46,70,600 plus interest at the rate of 12% per annum on the said amount with effect from the completion of the 90 days of declaration of the said award till the date of payment or decree whichever is earlier.

5. It is the allegation of the petitioner that the respondent No. 1 did not adduce any oral or any cogent evidence before the learned arbitrator to prove its alleged claim and further the learned arbitrator visited the site during the arbitration proceedings and in fact nothing was visible at the site.

6. It is also the allegation of the petitioner that it would be clear from the award that the learned arbitrator did not apply his mind at all in the matter of adjudication of the disputes and simply published a non-speaking award without assigning any reason as to how and in what manner he arrived at the calculation.

7. The petitioner has challenged the said award, dated 18th March, 1988 by the said sole arbitrator on several grounds.

8. At the hearing of this application, the learned counsel for the petitioner has submitted that there is no evidence, oral or documentary to support the conclusion arrived at by the arbitrator, the respondent No. 1 having accepted the amount in respect of its claim from the petitioner in full and final settlement of its claim cannot press for a further claim before the arbitrator. The learned counsel for the petitioner has also submitted that some of the claims before the learned arbitrator were barred by laws of limitation. It has also been the submission of the learned counsel that the arbitrator has failed to indicate reasons which he is obliged to do so in making his award. Another point has been taken by the learned counsel for the petitioner that the awarded amount is more than the amount claimed.

9. The learned counsel appearing for the respondent No. 1 has submitted that the learned arbitrator has made his award after giving full hearing to the parties and after considering all the relevant materials placed before the arbitrator. It has been argued by the learned counsel for the respondent No. 1 that this Court cannot make any further investigation to find out whether those materials before the arbitrator were sufficient or adequate to support the conclusion arrived at by the arbitrator. The learned counsel for the respondent No. 1 submits that it is not correct to say that there was no evidence before the arbitrator.

10. I will now deal with the respective contentions of the parties.

11. In support of the contention that there was no evidence before the arbitrator to support the conclusion arrived at by the arbitrator, Mr. Sengupta the learned counsel for the petitioner has cited a decision of Delhi High Court reported in AIR 1987 Delhi 148. It is the contention of the learned counsel that the award is not based on any evidence. In the case of Bombay Ammonia Pvt. Ltd. v. Union of India reported in AIR 1987 Delhi 148, on the facts of this case the learned Judge held that the award was not based on evidence and as such was liable to be set aside. It was further held in this case that the award was made without considering a vital document and on that ground the award was also liable to be set aside. Mr. Sengupta appearing for the respondent No. 1 has also taken a point that the claimant was asked to produce certain documents by the arbitrator but the claimant did not produce the same and the arbitrator made this impugned award without calling for the said document, which according to the petitioner are vital documents. Mr. Sengupta has referred to 'a minutes of the 16th sittings held on 18th June, 1987. It appears from the said minutes that the Advocate for the claimant had opened his case and started arguing for his point quoting relevant reference and on the request of the respondent the claimant agreed to supply to the respondent as also the arbitrator, a list of document mentioned in the said minutes. It appears from the other minutes that all the relevant documents were produced by the claimant, that is the respondent No. 1 herein, and there was no objection on the part of the petitioner to the disclosure of those documents by the respondent No. 1. The case before the Delhi High Court is distinguishable in the sense that the learned Judge of the Delhi High Court found in that case that the

conclusion made by the arbitrator was not supported by any evidence. But in the present case, upon a perusal of the minutes, it appears that there was evidence before the arbitrator to support the award made by the arbitrator. It also appears from the recital of the award that after having perused the statement of facts and the counter statement of facts and the documents relied on the parties the arbitrator made the said award in favour of the respondent No. 1. It also appears that various documents were produced before the arbitrator and there was ample evidence for the arbitrator to act upon. The Evidence Act does not apply to arbitration as is evident from Section 1 of the [Evidence Act, 1872](#). Therefore, the question of legal or admissible evidence did not arise and it will be sufficient to sustain the award if it is found that there was some evidence before the arbitrator on the basis of which the arbitrator could come to his findings. It is true that if there was no evidence at all before the arbitrator then the award could be assailed as being erroneous on the face of it, but this is not the case in the instant proceeding.

12. It is the grievance of the petitioner that the documents filed before the arbitrator were not proved by anyone by giving oral evidence. It is not in dispute that arbitrator can decide the procedure to be adopted by him. Further, the petitioner participated in the proceedings without raising any objection as to the procedure adopted by the arbitrator.

13. It has been held by this Court that if it is true that although provision of [Evidence Act, 1872](#) did not in terms apply to arbitration proceeding, but the principles of Law of Evidence generally apply to the arbitration proceedings and by the principles of Law of Evidence, it is meant that it is the duty of the arbitrator to see that there is no violation of principles of natural justice in the proceeding and no evidence is taken behind the back of any party or that no evidence is taken without allowing the other party to scrutinise the same, see *Union of India v. D. Bose* reported in : AIR1981 Cal95 which has been relied on by the learned Counsel for the respondent No. 1. Further in my view, the learned Counsel for the petitioner No. 1 has not been able to substantiate his contention that the material documents were not before the arbitrator or were withheld from the arbitrator.

14. Another contention on behalf of the petitioner is that the amount awarded is more than the amount claimed. It is contended by the learned Counsel for the petitioner that the claimant had prayed for ,an interim award, but such prayer had been rejected by the arbitrator., The learned Counsel submits that the arbitrator had misconducted himself by not deducting the claim for which the interim award was prayed, and therefore, the award was much more than the claim of the claimant. There is no substance in this contention. The learned arbitrator was not inclined to make any interim award but he wanted to make a single award after considering the entire claim of the claimant. This would be evident from his order dated 18th June, 1987.

15. The next contention of the learned Counsel for the petitioner is that after having accepted payment in full and final settlement of the petitioner's claim, the petitioner cannot press for any further claims before the arbitrator. In support of this contention, the learned Counsel for the petitioner has cited a Supreme Court decision reported in : (1982)1SCC415 and also another Supreme Court decision reported in : [1988]3SCR402 . In the case of Union of India v. L.K. Ahuja reported in : [1988]3SCR402 , the Supreme Court observed that in order to be entitled to ask for a reference under Section 20, there must be an entitlement to money and a difference or dispute in respect of the same. It has also been observed by the Supreme Court in this case that it is true that on completion of the work, right to get payment would normally arise and it is also true that on settlement of the final bill, the right to get further payment gets weakened but the claim subsists and whether it does subsist, is a matter which is arbitrable. In my view, this decision of the Supreme Court does not lend any support to the contention of the learned Counsel for the petitioner. In the case reported in : (1982)1SCC415 , the Supreme Court observed that if in any bill of the contractor it was expressly stated that the bill was in final settlement of his demand for the work concerned, that would be an admission against its maker who would, therefore, be bound by it unless he could explain it away satisfactorily. In my opinion this is a question arbitrable before the arbitrator, and this Court cannot sit in judgment over the decision of the arbitrator, unless such is an erroneous decision appearing on the face of the award. Further, I find that this decision of the Supreme Court reported in : (1982)1SCC415 is not on the question whether there has been full and final settlement or not could be a

dispute before the arbitrator.

16. The learned Counsel for the respondent No. 1 on this question that the claimant cannot press for any further claim after having accepted payment in full and final settlement of its claim, has relied on the Supreme Court decision in *Damodar Valley Corporation v. K.K. Kar* reported in : [1974]2SCR240 . In this case the Supreme Court has observed that the question whether there had been a full and final settlement of a claim under the contract was itself a dispute arising upon or in relation to or in connection with the contract. Mr. Bhabra has also relied on a bench decision of this Court, *Union of India v. D. Bose* (Supra) in support his said contention. Mr. Bhabra has also referred to another decision of Madhya Pradesh High Court, in the case of *Union of India v. Prithipal Singh & Company* reported in : AIR 1988 MP191 . In this case the Madhya Pradesh High Court referred to another Supreme Court decision in *Union of India v. Kishanlal*, : [1960]1SCR493 and observed that the view taken by the Supreme Court is that the question whether there was a full payment in final settlement of the final bill to the contractor was a matter which had to be decided by the arbitrator being a question arising from and in relation to the contract.

17. I do not see any substance in the objection raised by and on behalf of the petitioner. From the cases cited above, it appears that the question whether there had been a full and final settlement of the claim under the contract is itself a dispute arising upon or in relation to or in connection with the contract.

18. It has been next contended by the learned counsel for the petitioner that some of the claims before the arbitrator had become barred by limitation and the arbitrator had misconducted himself in making an award on the claims which had already been barred by law of limitation.

19. Mr. Sengupta the learned counsel for the petitioner has relied on a decision of this Court in the case of *State of West Bengal v. M/s. A. Mondal* reported in : AIR1985 Cal12 . In my view, this decision does not lend any support to the contention of the learned counsel for the petitioner. In this case the Court was mainly concerned with the question as to what was to be the starting point of limitation in making an application for, setting aside the award, in the context of

Article 119(b) of the Limitation Act. In a passing reference the Division Bench of this Court made an observation that the arbitrator is to decide whether the claim referred to him is time barred or not. The direct case on the point on this question is another decision of this Court. In the case of *Union of India v. Salween Timber & Construction Company* reported in : AIR1963 Cal307 , it has been held by this Court that whether a claim is barred by limitation or not is clearly a question to be decided by the arbitrator.

20. It has also been argued by the learned counsel for the petitioner that the impugned award is a non-speaking award and arbitrator should indicate the reasons in the award itself and in absence thereof the award is liable to be set aside. Mr. Sengupta the learned counsel appearing for the petitioner had relied on a very recent decision of Supreme Court. In the case of *Food Corporation of India v. Great Eastern Shipping Company*, reported in : [1988]3SCR366 . In this case, it was found that there was a mandate given to the arbitrators to state reasons for the award but it was not complied with. It was also found that such a mandate has been given by one of the parties but not both. The Supreme Court observed that the arbitrator could not act on the mandate of one of the parties. It was also contended in that case that the arbitrator should have given reasons, and unreasoned award was bad. The Supreme Court in dealing with that contention observed that it was true that the recent trend was to have a reasoned award, indeed a matter is pending before a larger bench of the Supreme Court on this aspect.

21. In this connection, another very recent decision of the Supreme Court may be referred to. This is the case of *Indian Oil v. Union of India* reported in : [1988]3SCR426 . The Supreme Court has observed in this case that the recent trend is to indicate the reasons but as has been observed by the Supreme Court in the other case referred to above the Supreme Court noted that this question is awaiting a decision of the larger branch of the Supreme Court.

22. It has been very strenuously contended by the petitioner that there has been no evidence to support the award or that the evidence before the arbitrator was not such as to support the conclusion arrived at by the arbitrator. It is now settled

pronouncement that in the proceeding to set aside an award, the Court cannot sit in appeal over the conclusion of the arbitrator by re-examining or re-appraising the evidence considered by the arbitrator. It is also settled that even if the Court dealing with an application for setting aside the award comes to a different conclusion on the basis of the evidence adduced before the arbitrator, the Court cannot on that ground set aside the award. It is also settled proposition of law that if there is any error appearing on the face of the award then only a Court can interfere with the award and may set aside the same if the Court is satisfied that there is an error appearing on the face of the award, see *Union of India v. Kalinga Construction* reported in : [1971]2SCR184 . It is also settled proposition of law that the parties select their arbitrator and even 'when an arbitrator committed a mistake either in law or in fact in determine ing the matters referred to him and if such a mistake does not appear on the face of the award or any document appended to or incorporated in it is so as to form part of the award, it would neither be remitted nor set aside notwithstanding a mistake. This is the view of the Supreme Court in the decision of *Allen Berry & Co. v. Union of India* reported in AIR 1971 SC 969. The Supreme Court has also reiterated same view in the another case. *N. Chelappan v. Kerala State Electricity Board*, reported in : [1975]2SCR811 . From the case on the point it appears that it is not for the Court dealing with an application for setting aside the award to enquire whether there was sufficient material to support the conclusion of the arbitrator or whether the arbitrator has given proper weight to such evidence adduced before the arbitrator. It is also well settled that the arbitrator is the Sole Judge of the question both on fact and law.

23. I do not see any substance in any of the objections raised by the petitioner in assailing the impugned award.

24. For the reasons aforesaid, this application for setting aside the award is dismissed with cost.

25. There will be a stay of operation of this Order, as prayed for by the petitioner, till 12th October, 1988.