

Union of India (Uoi) Vs. Pam Developments Pvt. Ltd.

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Court : Kolkata

Decided On : Oct-28-2003

Reported in : 2004(2)ARBLR480(Cal),2004(1)CHN407

Judge : Subhro Kamal Mukherjee, J.

Acts : [Arbitration and Conciliation Act, 1996](#) - Sections 11 and 34

Appeal No. : A.P. No. 137 of 2002

Appellant : Union of India (Uoi)

Respondent : Pam Developments Pvt. Ltd.

Advocate for Def. : Pranab Kumar Ray, ;Promit Roy and ;Tapan Kumar Sengupta, Advs.

Advocate for Pet/Ap. : Rathindra Nath Das, ;Jayanta Banerjee and ;Sarajit Sen, Advs.

Disposition : Application rejected

Judgement :

1. This is an application under Section 34 of the [Arbitration and Conciliation Act, 1996](#) (the 'said Act' in short) for setting aside of the award made and published on January 25, 2002 by Mr. Satyabrata Mitra, a retired Judge of this Court.

2. On April 9, 1992 the petitioner invited tenders for construction of industrial covered electrical loco-shed and allied works at Santragachi (Phases I and II). The respondent submitted its tender. The petitioner accepted the offer of the respondent by a letter dated October 19, 1992. A formal agreement was, also, entered into between the parties being contract agreement No. CPM/GRC/36/ 92 dated October 19, 1992. The said agreement, inter alia, incorporated the general conditions of contract and some additional special conditions and specifications.

The arbitration clause was as under:

'64(3)(a) ARBITRATION : Matters in question, dispute or difference to be arbitrated upon shall be referred for decision to:--

3(a)(i) A sole Arbitrator who shall be the General Manager or a Gazetted Railway Officer nominated by him in that behalf in cases where the claim in question is below Rs. 5,00,000/- (Rupees five lakhs) and in cases where the issues involved are not of a complicated nature. The General Manager shall be the sole Judge to decide whether or not the issues involved are of a complicated nature.

3(a)(ii). Two Arbitrators who shall be Gazetted Railway Officers of equal status to be appointed in the manner laid in Clause 64(3)(b) for all claims of Rs. 5,00,000/- (Rupees five lakhs) and above, and for all claims irrespective of the amount of value of such claims if the issues involved are of a complicated nature. The General Manager shall be the sole Judge to decide whether the issues involved are of a complicated nature or not. In the event of the two Arbitrators being divided in their opinions the matter under disputes will be referred to an Umpire to be appointed in the manner laid down in Clause 3(b) for his decision.

3(a)(iii) It is a term of this contract that no person other than a Gazetted Railway Officer, should act as an Arbitrator/Umpire and if for any reason, that is not possible, the matter is not to be referred to Arbitration at all.

3(a)(iv) In cases where the claim is up to Rs. 5,00,000/- (Rupees five lakh), the Arbitrators)/Umpire so appointed, as the case may be, shall give the award on all matters referred to arbitration indicating therein break-up of the sums awarded

separately on each individual item of dispute. In cases where the claim is more than Rs. 5,00,000/- (Rupees Five lakh), the Arbitrators)/Umpire so appointed, as the case may be, shall give intelligible award (i.e. the reasoning leading to the award should be stated) with the sums awarded separately on each individual item of dispute referred to arbitration.

3.(b) For the purpose of appointing two arbitrators as referred to in Sub-clause (a)(ii) above, the Railway will send a panel of more than three names of Gazetted Railway Officers of one or more departments of the Railway to the contractor who will be asked to suggest to the General Manager one name out the list for appointment as the contractor's nominee.

3. The General Manager, while so appointing the contractor's nominee, will also appoint a second arbitrator as the Railway's nominee either from the panel or from outside the panel, ensuring that one of the two arbitrators so nominated is invariably from the Accounts Department. Before entering upon the reference the two arbitrators shall nominate an Umpire who shall be a Gazetted Railway Officer to whom the case will be referred to in the event of any difference between the two arbitrators. Officers of the Junior Administrative grade of the Accounts Department of the Railways shall be considered as of equal status to the officers in the intermediate administrative grade of other departments of the Railway for the purpose of appointment as arbitrators.'

4. It has been alleged that as the progress of the work of the respondent was not satisfactory, the petitioner terminated the said agreement in terms of the provisions of Clause 64 of the general conditions of contract. Since disputes and differences arose between the parties the respondent on September 30, 1996, inter alia, requested the General Manager, South Eastern Railway for constitution of the arbitral tribunal. As the said General Manager failed to constitute the arbitral tribunal, the respondent moved an application under Section 11 of the said Act before this Court for appointment of an arbitrator. On March 4, 1998 the arbitration Court, inter alia, referred the said application before the Hon'ble Chief Justice for naming the arbitrator. On July 10, 1998 the Hon'ble Chief Justice appointed Mr. Satyabrata Mitra, a retired Judge of this Court as the sole arbitrator.

5. The learned arbitrator entered upon the reference and the respondent filed its statements of claim. The petitioner, also, filed their counter statements of claim before the learned arbitrator. The learned arbitrator made and published his award on January 25, 2002.

6. Being aggrieved the petitioner has come up with this application for setting aside of the said award.

7. Mr. Rathindra Nath Das, learned senior advocate, for the petitioner, submits that the appointment of the sole arbitrator was in contradiction to the agreement of the parties. Mr. Das submits that the appointment of a sole and non-departmental arbitrator was without jurisdiction and, therefore, entire arbitral proceedings were without jurisdiction. Mr. Das draws my attention to the arbitration clause and submits that as the claim of the respondent was more than Rs. 5,00,000/-, it was necessary to constitute the arbitral tribunal comprising of two gazetted railway officers, one of them should invariably from the accounts department and before entering upon reference it was incumbent on the said two departmental arbitrators to nominate an Umpire, who should, also, be a Gazetted Railway Officer. Mr. Das submits, further, that such constitution of the arbitral tribunal and the impugned award are in violation of the public policy of India. Mr. Das contends that the learned arbitrator in his award dealt with extraneous matters and excepted matters and, therefore, the learned arbitrator acted without jurisdiction in entertaining such claims as those were excepted matters and beyond the scope of the arbitration. Mr. Das submits that the award is a nullity as the reference itself was void being contrary to the agreement. Mr. Das draws my attention to the said Clause 64 (3)(III) and submits that no person other than railway officers could act as Arbitrators or Umpire and if for any reason, that was not possible the matter was not to be referred to arbitration at all. Mr. Das submits that it is open to the petitioner to challenge the award as the award is a nullity and it cannot be said that the petitioner has waived its right to challenge the jurisdiction of the arbitral tribunal as the petitioner did not raise objection as to the jurisdiction of the arbitral tribunal during the arbitral proceedings nor requested the learned arbitrator to rule on his jurisdiction. Mr. Das submits that although a counter claim was filed by the petitioner before the learned arbitrator, the learned arbitrator did not take into

consideration the counter claim of the petitioner. Finally, it is submitted that the learned arbitrator exceeded his jurisdiction in allowing interest at the rate of 12% per cent. per annum to the claimant on the total sum found due and payable inasmuch as under the agreement no interest was payable on the earnest money and the security deposit.

8. Mr. Pranab Kumar Ray, learned senior advocate, appearing for the respondent, submits that this application is required to be dismissed as the application was not filed within three months from the date of the receipt of the award by the petitioner and the petitioner has failed to give sufficient explanation for filing of this application within the extended period of thirty days. Mr. Ray draws my attention to the order passed by Girish Chandra Gupta, J. dated June 14, 2002 when His Lordship kept the questions of limitation and maintainability open.

9. The award was passed on January 25, 2002 and the present application has been filed on May 24, 2002. In paragraphs 54 to 57 of the present application the petitioner has offered sufficient explanations for not filing the application within the period of three months as contemplated under Sub-section (3) of Section 34 of the said Act. Under proviso to Sub-section (3) of Section 34 of the said Act, the Court can entertain an application within a further period of thirty days if the petitioner satisfies the Court that the petitioner was prevented by sufficient cause from making the application within the said period of three months. The petitioner is the South Eastern Railways. The petitioner required to obtain permission of the department and the ministry of law to file the application for setting aside of the award. In the process, the application could not be filed within the period of three months, but it has been filed within a further period of thirty days, I am satisfied that the petitioner has offered sufficient explanations.

10. Mr. Ray, learned senior advocate, submits, on merits, that the petitioner did not challenge the order passed by the arbitration Court or the Hon'ble Chief Justice constituting the arbitral tribunal nor the petitioner challenged the jurisdiction of the arbitral tribunal during the pendency of the arbitral proceedings. Therefore, the petitioner waived its right, if any, to challenge the constitution of the arbitral tribunal. Similarly, the petitioner accepted the jurisdiction of the arbitral tribunal by

submitting to its jurisdiction and by filing a counter claim even invited the arbitral tribunal to decide on the counter claim filed by the petitioner. At no stage any challenge was thrown regarding the composition of the arbitral tribunal.

11. Mr. Ray draws my attention to the decision of the Supreme Court of India in the case of *Dhanrajamal Gobindram v. Shamji Kalidas & Company*, reported in : [1961]3SCR1029 and submits that in constituting the arbitral tribunal the powers and the duties of the Court are of two distinct kinds. The first is judicial function, which involves the decision as to the existence and validity of the agreement itself. Then follows a ministerial act of reference to arbitrator or arbitrators. Mr. Ray submits that the order of March 4, 1998 passed by this Court is binding on the parties and it is not open to the petitioner to challenge the composition of the arbitral tribunal. Mr. Ray, further, submits that the objection as to the consideration of the purported expected matters by the arbitral tribunal was not agitated before the learned arbitrator. The petitioner ought to have challenged the jurisdiction of the arbitral tribunal before the submission of statement of defence. Mr. Ray submits that, on the contrary, the petitioner filed a counter claim. Neither in the statement of defence nor in the counter claim any challenge was thrown about the jurisdiction of the arbitral tribunal to decide any issue raised by the claimant before the learned arbitrator. Whether certain claims are excepted matter or not involves interpretation of the clauses of contract and such interpretation is within the exclusive domain of the learned arbitrator. Mr. Ray submits that non-consideration of the counter claim itself cannot be a ground for challenge under Section 34 of the said Act. However, Mr. Ray draws my attention to the award made and published by the learned arbitrator and submits that the learned arbitrator considered the counter claim of the railway administration, but preferred to reject the same. The decision to grant interest to the claimant on the total sum found due and payable by the railway administration is perfectly justified and no objection can be taken in respect of the decision of the learned arbitrator on the question of payment of interest.

12. The Supreme Court of India in the case of *Konkan Railway Corporation Ltd. and Anr. v. Rani Construction Pvt. Ltd.* reported in : [2002]1SCR728 Sic the third bracketed portion. [reported in : [2002]1SCR728] decided the scope of the power

of the Hon'ble Chief Justice or his designate under Section 11 of the said Act. Supreme Court of India observed as under:

'There is nothing in Section 11 that requires the party other than the party making the request to be noticed. It does not contemplate a response from that other party. It does not contemplate a decision by the Chief Justice or his designate on any controversy that the other party may raise, even in regard to its failure to appoint an arbitrator within the period of thirty days. That the Chief Justice or his designate has to make the nomination of an arbitrator only if the period of thirty days is over does not lead to the conclusion that the decision to nominate is adjudicatory. In its request to the Chief Justice to make the appointment the party would aver that this period has passed and, ordinarily, correspondence between the parties would be annexed to bear this out. This is all that the Chief Justice or his designate has to see. That the Chief Justice or his designate has to take into account the qualifications required of the arbitrator by the agreement between the parties (which, ordinarily, would also be annexed to the request) and other considerations likely to secure the nomination of an independent and impartial arbitrator also cannot lead to the conclusion that the Chief Justice or his designate is required to perform an adjudicatory function. That the word 'decision' is used in the matter of the request by a party to nominate an arbitrator does not of itself mean that an adjudicatory decision is contemplated.

As we see it, the only function of the Chief Justice or his designate under Section 11 is to fill the gap left by a party to the arbitration agreement or by the two arbitrators appointed by the parties and nominate an arbitrator. This is to enable the arbitral tribunal to be expeditiously constituted and the arbitration proceedings to commence. The function has been left to the Chief Justice or his designate advisedly, with a view to ensure that the nomination of the arbitrator is made by a person occupying high judicial office or his designate, who would take due care to see that a competent, independent and impartial arbitrator is nominated.'

13. The Supreme Court of India in the case of *State of Orissa and Ors. v. Gokulananda Jena* reported in 2003 (2) Arbitration Law Reporter 700 observed that in view of the decision in *Konkan Railway Corporation Ltd.* (supra) there has

been hardly any area of dispute, which could not be decided by the arbitrator appointed by the Chief Justice or his designate. It has been reiterated that order made under Section 11 of the said Act is not an order in which the designated judge adjudicates party's rights and hence, it is in the nature of an administrative order.

14. In view of such decisions of the Apex Court, I am unable to accept the contentions of Mr. Ray, learned senior advocate, appearing for the respondent, that the order of the learned designated judge was an adjudicatory order. The decision in Dhanrajamal Gobindram (supra) cannot be applied inasmuch as that was a decision on Section 20 of the Arbitration Act, 1940.

15. However, I am not inclined to accept the contentions of Mr. Rathindra Nath Das, learned senior advocate, for the petitioner, that the petitioner can challenge the award of the learned arbitrator on the ground of lack of jurisdiction although the petitioner choose not to raise the plea of jurisdiction before the tribunal itself.

16. In Narayan Prasad Lohia v. Nikunj Kumar Lohia and Ors. reported in : [2002]1SCR1136 while interpreting the relevant provisions of the [Arbitration and Conciliation Act, 1996](#) Supreme Court of India, inter alia, observed that when objection to the composition of the arbitral tribunal, as provided in Section 16 of the said Act, has not been raised before the arbitral tribunal, it must be deemed that such objection has been waived.

17. Section 16 of the said Act contemplates that arbitral tribunal is competent to rule on its own jurisdiction including ruling on any objection with respect to the existence or validity of the arbitration agreement. However, such plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. The plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

18. Admittedly, in the case in hand, neither in the statement of defence nor in the counter claim the petitioner took the plea that the constitution of the arbitral tribunal was not valid nor the petitioner raised the plea, during the arbitral

proceedings, that the learned arbitrator was exceeding the scope of his authority in considering certain excepted matters.

19. The Supreme Court of India in *Prasun Roy v. Calcutta Metropolitan Development Authority and Anr.*, reported in : [1987]3SCR569 observed as under:

'The principle is that a party shall not be allowed to blow hot and cold simultaneously. Long participation and acquiescence in the proceedings preclude such a party from contending that the proceedings were without jurisdiction.'

20. The petitioner ungrudgingly participated in the arbitral proceedings and when the award has been passed against the petitioner, the petitioner has come with this application contending, inter alia, that the constitution of the tribunal was void and the arbitral tribunal exceeded its jurisdiction in deciding certain excepted matters. The petitioner not having raised such pleas before the arbitral tribunal and in not requesting the tribunal to rule on its own jurisdiction during the arbitral proceedings, in my view, the petitioner waived its right to challenge the award on the ground that the constitution of the arbitral tribunal was void or the arbitral tribunal exceeded its jurisdiction in considering certain matters.

21. Mr. Rathindra Nath Das, learned senior advocate, cites an unreported decision of Girish Chandra Gupta, J. in A. P. No. 397 of 1997 (*Union of India v. Krishna Kumar*). His Lordship decided that as the attention of the Hon'ble Chief Justice was not drawn as to the qualification required of the arbitrators by the agreement of the parties and the learned arbitrator having deliberately refused to take notice of the same when an application under Section 12(3)(h) of the said Act was moved before the learned arbitrator, the award could not be sustained. The said decision is, however, distinguishable on facts. The petitioner in the said case challenged the jurisdiction of the learned arbitrator and requested the learned arbitrator to rule on his own jurisdiction. As the learned arbitrator refused to take any cognizance of such prayer, in view of the language of Sub-section (5) of Section 16, the learned arbitrator continued with the arbitral proceedings and made and published an arbitral award. Therefore, in view of the provisions of Sub-section (6) of Section 16 of the said Act, the petitioner in the said case was within its right to pray for setting aside of such an arbitral award in accordance with Section 34 of the said Act.

22. I am unable to accept the contentions of Mr. Das that the learned arbitrator did not consider the counter claim of the petitioner filed before the learned arbitrator. The learned arbitrator considered the counter claim of the railway administration in details, but rejected such counter claim holding, inter alia, that such counter claim was not sustainable in law. Therefore, the contentions of the petitioner that the learned arbitrator did not consider the counter claim are not factually correct.

23. The learned arbitrator decided to award interest in favour of the claimant on the total sum found due and payable at the rate of 12% per cent. per annum from April 19, 1994 till the date of the award and, thereafter, at the same rate of 12% per cent. per annum till payment.

24. Mr. Das argues that the claimant was not entitled to interest on the security deposit and the earnest money.

25. There is an effective answer to Mr. Das's contentions in the observations of the Division Bench of the Andhra Pradesh High Court in N.G. Gunani v. Union of India, rep. by its Chief Engineer, (Construction), South Central Railway, Secunderabad and Anr. reported in 1996(4) Andhra Law Times 1046:

'The learned Subordinate Judge has held, as is also strenuously supported by the learned counsel for the respondent, that the arbitrator had no jurisdiction to grant interest in respect of amounts payable to the appellant. Clause 16(2) of the Standard General Conditions of Contract is as follows:

'No interest will be payable upon the earnest money or the security deposit or amounts payable to the contractor under the contract, but Government Securities deposited in terms of Sub-clause (1) of this clause will be repayable (with) interest accrued thereon.'It is the submission of the learned counsel for the appellant, who admits that the clause forms part of the contract, that the restriction stipulated therein is only for the departmental officers but does not bind the arbitrator, whereas it is the submission of the learned counsel for the respondent that the terms being general and applicable to the contracts between the parties, they are to be applied without exception for which reason no interest is at all payable to the contractor.

A closer analysis of the provision does not show as if the power of the arbitrator has been taken away to grant interest upon the determination of the amounts payable to the contractor. What the provision means, in the context, that where certain amounts are payable to the contractor but are not paid in time by the department and are released after lapse of time, the department would not pay interest for the delayed payment. It is a restriction on the power of the departmental officers to allow interest because of late payment. But such a provision does not restrict the power of the adjudicator to determine and direct payment of interest. A simple example would expose the fallacy of the submission. No doubt the contract provides Clause 64 as the arbitration clause under which the disputes between the parties would be referred to arbitration but in a hypothetical case, say, where Clause 64 is absent, the disputes between the parties are to be determined by the Civil Court only. In such a case where a civil suit is filed by the contractor claiming all the unpaid dues and also claiming interest, it could not be said that the power of the Court to grant interest is denied because of Clause 16(2). Similarly the power of the arbitrator also cannot be denied to grant interest as the arbitrator is to go into the entire question of the disputes between the parties, weigh all aspects of it, find out the respective rights and liabilities and determine the amount that was actually payable to the contractor and hence may find the necessity also of awarding interest as the amount having remained unpaid in spite of the efforts of the contractor.'

26. In *N. G. Gunani (supra)* the Division Bench of the Andhra Pradesh High Court relied upon a decision of the Apex Court in *Board of Trustees for the Port of Calcutta v. Engineers-De-Space-Age* reported in : AIR 1996 SC2853 .

27. The Supreme Court of India in the case of *Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa v. N.C. Budharaj (Dead) by LRs.* reported in : [2001]1SCR264 held that the arbitrator has jurisdiction to award interest on the sum found due and payable.

28. The arbitration Court cannot interfere with the award on the ground that the decision is erroneous if the award is otherwise proper. The award of the learned arbitrator is ordinarily final and conclusive. Wrong or right the decision of the

learned arbitrator is final and binding if it is reached fairly after giving adequate opportunities to the parties to place their grievances during the arbitral proceedings. It is not necessary for arbitration Court to examine the merits of the award with reference to the materials produced before the learned arbitrator. The arbitration Court cannot sit in appeal over the views of the learned arbitrator by re-examining and re-assessing the materials produced before the learned arbitrator. The factual determination of the learned arbitrator cannot again be re-appreciated. Overall approach of the learned arbitrator is neither capricious nor arbitrary. It is not open to the arbitration Court to re-appreciate reasonableness of reasons in the arbitral award.

29. I, therefore, do not find any merit in the application under Section 34 of the said Act which is, accordingly, rejected.

30.1, however, make no order as to costs.

31. All parties are to act on a signed xerox copy of this judgment on usual undertaking.

Subhro Kamal Mukherjee, J.

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