

The Executive Engineer Vs. Jagdish Chand Gupta

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Court : Himachal Pradesh

Decided On : May-30-2008

Reported in : 2008(2)ShimLC158

Judge : V.K. Ahuja, J.

Appellant : The Executive Engineer

Respondent : Jagdish Chand Gupta

Disposition : Petition allowed

Judgement :

V.K. Ahuja, J.

1. This judgment shall dispose of the objections filed under Section 34(3) of the Arbitration and Reconciliation Act, 1996 by the Executive Engineer, HPPWD, Joginder Nagar, against the award made by the Arbitrator Shri B.S. Parmar on 6.5.2002.

2. Briefly stated the facts of the case are that the work for the construction of 25.80 Mtrs. effective span bridge over Khanni Nallah was awarded to the respondent vide letter dated 20.2.1991. Time limit for completion of the work was one year for lump sum cost of Rs. 67.98 Lacs. The work was started by the respondent on 5.3.1991 and was to be completed by 5.3.1992, but it was completed by the

respondent/contractor on 27.12.1992. It was further alleged by the objector that due to fault on the contractor, the work was not completed in time. Therefore, the respondent was not entitled to payment of any final bill. The respondent applied for extension of time for completion of work vide his application dated 4.3.1993, conditional extension was given to the respondent with clear stipulation that he shall not be entitled for any escalation for any extended period.

3. It was further alleged that after lapse of about three years, the respondent raised a dispute by making reference to the Chief Engineer (NH), Shimla, for referring the matter for adjudication. It was alleged that the claim of the respondent was hopelessly time barred and was not sustainable in the eyes of law. The matter was referred to the Arbitrator vide letter dated 6.12.1996, who fixed eight hearings of the case but the respondent attended only one hearing. The case was closed by the Arbitrator by observing that the respondent was reluctant in agitating the case and, therefore, the case was closed by him. After the closure of the proceedings by the Arbitrator respondent again requested the Chief Engineer (NH), Shimla for the appointment of Arbitrator afresh vide his letter dated 30.9.1997. On request of the respondent, the Chief Engineer (NH), Shimla, again appointed another Arbitrator i.e. Superintending Engineer, Solan, vide his letter dated 16.2.1998 as an Arbitrator. The said Arbitrator entered into reference and the department contested the claim by filing detailed reply and the award was announced on 6.5.2002. The said award was challenged by the objector/petitioner by filing the present objections on the grounds that it was against public policy and that the Arbitrator had traveled beyond jurisdiction by making an award in favour of the respondent and the reasons given by the Arbitrator do not satisfy the test laid down on the following grounds:

- (i) that the award was against public policy since the extension of time was granted to the contractor which was conditional for one year;
- (ii) that he was not entitled for exclamation charges after the actual date of completion of work;
- (iii) that the award passed was beyond the terms of the contract; and

(iv) that the claim of the respondent was hopelessly time barred and, therefore, the Arbitrator had no jurisdiction to adjudicate upon the claim.

4. Reply to the petition was filed.

5. On the pleadings of the parties, the following issues were framed by this Court on 28.4.2003:

1. Whether the award in question is against the Public Policy of India as alleged?
...OPO

2. Whether in making the award in question, the arbitrator has exceeded his jurisdiction and has acted contrary to the terms and conditions of the agreement?
...OPO

3. Whether the arbitrator has failed to give reasons for the award as required under the law, if so, its effect? ...OPO

4. Whether the objection petition is not maintainable? ...OPR

5. Relief.

6. In support of these issues, the evidence in the form of affidavits was filed by the parties.

On 10.1.2007 the following two additional issues were framed by this Court which are as under:

4(A) Whether the reference to the Arbitrator was beyond time and as such, the award is bad? ...OPO

4(B) Whether the appointment of second Arbitrator was not in accordance with law, if so its effect? ...OPO

7. I have heard the learned Counsel for the parties and have gone through the record.

8. My findings on these issues framed on 28.4.2003 and 10.1.2007 are as under:

Issue No. 4 (A):

9. It was submitted by the learned Law Officer that according to Clause 25 of the Agreement, no dispute could be raised by the contractor beyond a period of 90 days from final payment. It was submitted that final payment was made to the respondent on 13.3.1993 and he received the payment without protest. However, no objections were filed within a period of 90 days as per the agreement, but these were not even filed within three years from the date of receipt of payment and since these were filed on 6.12.1996 beyond a period of three years. Even in the alternative, the limitation is considered under Section 113 of the Limitation Act as three years, claim preferred by the respondent was time barred.

10. The submissions made by the learned Counsel for the respondent were that objection, if any, in regard to the limitation was required to be raised before the Arbitrator by filing the reply and taking a plea during the course of arguments which was not done and, therefore, in view of provisions of Section 4 of the Arbitration Act, 1996, the petitioner was debarred from raising this plea before this Court. In support, he had relied upon *Jai Chand Bhasin v. Union of India and Anr.* : AIR1983 Delhi508 . A perusal of this decision shows that an application under Section 20 of Arbitration Act, 1940, was filed for making reference to arbitration. There was a clause in arbitration agreement that if demand for arbitration was not made by the contractor within stated time his claim would be deemed as waived and it was not void. The question whether claim was barred under aforesaid clause is to be decided not by Court by making reference before it but by Arbitrator.

11. A perusal of Section 4 of the Arbitration and Conciliation Act, 1996, shows that if a party knows that any requirement under the arbitration agreement, has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object.

12. On the other hand, the learned Law Officer for the objector/petitioner had relied upon the decision of Apex Court as under:

13. In *Steel Authority of India Ltd. v. J.C. Budharaja, Government and Mining Contractor* : AIR 1999 SC3275 , it was held that the claim before the Arbitrator in November-December, 1985, was barred by period of limitation since the contractor not seeking any reference within three years from the date when the cause of action arose, that is, from 29.8.1979. It was observed that the letter written in 1983 by the appellant repudiating the respondent's claim on account of damages or losses sustained by him would not give a fresh cause of action as on that date the cause of action for recovering the said amount was barred by period of three years prescribed under Article 137 of the Limitation Act, 1963. It was held that under Section 3 of the Limitation Act, it was the duty of the Arbitrator to reject the claim as it was on the face of it, barred by the period of limitation.

14. Thus, the above decision clearly applies to the present facts. Either the claim could have been preferred within 90 days of final payment or within three years of date of final payment, but as mentioned above, the claim was preferred after more than three years of the final payment and, therefore, the claim preferred was time barred and the Arbitrator could not have adjudicated upon the dispute. It was required of the Arbitrator to have considered this question since it pertained to his jurisdiction and once the question was not considered by the Arbitrator, in view of the above decision of the Apex Court, this Court is not precluded from taking a decision on the plea of limitation raised for which a specific issue was framed. Therefore, it is held that the claim preferred by the Arbitrator was beyond time and as such, this issue is accordingly decided in favour of the objector/petitioner and as against the respondent.

Issue No. 4(B):

15. The facts of the case are clear that firstly the Arbitrator was appointed. Out of eight hearings fixed by the Arbitrator, on the seven hearings the contractor/respondent did not put up appearance and the claim was closed by the Arbitrator as unarbitrated vide his letter dated 8.7.1997. Once the arbitration proceedings had been closed by the Arbitrator, no reasons have been given for the appointment of fresh Arbitrator by the Chief Engineer, Shimla and there was no occasion for the appointment of fresh Arbitrator when the proceedings had

been closed by the previous Arbitrator due to the act of the respondent himself. It was urged by the learned Law Officer that it may be correct that the respondent was looking for an Arbitrator convenient to him. Accordingly, when the matter was closed by the previous Arbitrator, he applied for fresh appointment of Arbitrator which request was acceded to by the Chief Engineer. In case that was so, he could have sent back the case to the same Arbitrator for giving his findings but a fresh Arbitrator was appointed, for which no reasons have come on record.

A perusal of Section 14 of the Arbitration and Conciliation Act, 1996, shows that the circumstances under which the mandate of an arbitrator shall terminate, namely, he becomes de jure or de facto unable to perform his function and he withdraws from his office or the parties agree to the termination of his mandate. Section 15 of the Act provides for termination of mandate and substitution of arbitrator. It lays down that in addition to the circumstances referred to in Section 13 or Section 14, the mandate of an arbitrator shall terminate, where he withdraws from office for any reason or by or pursuant to agreement of the parties or where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced. A perusal of the order passed by the Chief Engineer appointing a fresh arbitrator does not show that any of the conditions laid down in Sections 14 or 15 of the Act were attracted calling for an appointment of fresh arbitrator. The Chief Engineer was holding a public office in which the interest of the State was also involved and he should have passed the orders only under the provisions of the Act and the powers vested in him and not arbitrarily. The facts of the case show that the Chief Engineer passed the order of appointment of fresh Arbitrator without considering the question if he had the powers to appoint a fresh Arbitrator or whether the provisions of Sections 14 or 15 of the Act were attracted or not and also keeping in view the fact that the arbitration proceedings had been closed by the previous Arbitrator due to the act of the respondent who did not put up appearance before the Arbitrator.

16. The appointment of second Arbitrator in the facts of the case can be said to be against public policy and principle of natural justice since it was the respondent himself who was liable for the closure of the proceedings by the previous Arbitrator

and, therefore, the appointment of second Arbitrator cannot be said to be in accordance with law and the award made by him is liable to be set aside since he had no jurisdiction to arbitrate upon the matter. This issue is also, therefore, decided in favour of the objector/petitioner and as against the respondent.

Issues No. 1 to 4:

17. No findings are being given under these issues since they have become redundant in view of my findings on Issues No. 4(A) and 4(B) being in favour of the objector/petitioner and as against the respondent.

Relief:

18. In view of my above findings, the objection petition filed by the objector/petitioner is allowed and the award passed by the Arbitrator is set aside. There is no order as to costs.

19. In view of the disposal of the main petition, all the pending Misc. Applications, if any, shall also stand disposed of.

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