

State of West Bengal and Others Vs. Eskay Engineering Concern.

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Court : Kolkata

Decided On : Sep-19-2012

Judge : Prasenjit Mandal

Appeal No. : C.O. No. 3087 of 2009

Appellant : State of West Bengal and Others

Respondent : Eskay Engineering Concern.

Judgement :

Prasenjit Mandal, J.

Challenge is to the Order No.28 dated June 8, 2009, Order No.29 dated July 9, 2009, Order No.30 dated July 24, 2009 and the decree passed by the learned Civil Judge (Senior Division), 2nd Court, Barasat in Misc. Case No.34 of 2004.

An arbitral award is the subject-matter of dispute.

At present, we are concerned with the arbitral award dated October 31, 2004 filed by the sole Arbitrator Sri Pravir Bose, retired Secretary of I and W. Dte. After filling the said award before the learned Judge under the provisions of Arbitration Act, 1940, the learned Judge issued notice upon the opposite party of the Misc. Case No.34 of 2004. Thereafter, the opposite party of the Misc. Case filed a written objection to the said proceeding being Misc. Case No.34 of 2004. The award was accepted on contests by the learned Trial Judge and accordingly, the decree was

passed.

Now, the question is whether the impugned orders should be sustained.

Having heard the learned Counsel for the parties and on going through the materials-on-record, I find that the said Misc. Case No.34 of 2004 was lodged under Section 17 read with Section 14(2) of the Arbitration Act, 1940 on December 17, 2004 praying for a decree in favour of the petitioner/opposite party herein. Thereafter, notices were issued by Registered Post with A/D as well as through the process server of the Court. Notices were duly served in both ways upon the opposite party of the Misc. Case. Since the opposite party/petitioner herein did not appear, the said Misc. Case was fixed for ex party hearing on June 18, 2005. Then, on that day, i.e., on June 18, 2005, the opposite party/petitioner herein filed an application for vacating the said ex party order of hearing.

Thereafter, the petitioner herein filed an application before the learned Trial Judge that the said Misc. Case No.34 of 2004 should be governed by the provisions of the Arbitration and Conciliation Act, 1996. That application was rejected by the learned Trial Judge holding that the arbitration proceeding was maintainable under the old Act, i.e., Arbitration Act, 1940. Being aggrieved by such order, dated November 18, 2006, the petitioner moved the Hon'ble Court by filing a revisional application being C.O. No.67 of 2007. That revisional application was rejected by this Hon'ble Court thereby supporting the order dated November 18, 2006 passed by the learned Trial Judge. So, it is now settled position that the provisions of the Arbitration Act, 1940 would govern the matter.

Thereafter, the petitioner herein filed an application under Sections 30 and 33 of the Arbitration Act, 1940 along with an application under Section 5 of the Limitation Act for condonation of delay against the award dated October 31, 2004. By an Order dated July 25, 2008, the application for condonation of delay was rejected and in consequence, the application under Sections 30 and 33 of the Arbitration Act also stood dismissed.

The petitioner preferred another Civil Revision being C.O. No.3368 of 2008. By an Order dated February 16, 2009, the said revisional application being C.O. No.3368

of 2008 was also dismissed holding that revision did not lie. Thereafter, on hearing both the sides, the award dated October 31, 2004 was accepted by the order dated June 8, 2009 and the Misc. Case was allowed. Decree had been drawn up accordingly by the learned Trial Judge.

The decree-holder moved the learned Trial Judge for transferring the decree to the Registrar Original Side, High Court, Calcutta for execution and the said decree was transferred and the Execution Case being M. Execution Case No.1 of 2010 was started on September 4, 2010.

Mr. Ashoke Kumar Banerjee, learned Senior Advocate for the petitioners, has contended that the award dated October 31, 2004 should not have been accepted by the learned Trial Judge on three grounds, namely,

(i) That the interest was awarded at the rate of 18 per cent per annum from the date of decree till realization. Interest granted was high and could not be supported;

(ii) That the Arbitrator did not comply with the Clauses of 2 and 3 of the arbitration agreement; and

(iii) That the Arbitrator was not justified to grant interest at the rate of 18 per cent per annum from September 1, 1991 till payment.

Mr. Banerjee has also contended that this revisional application is quite maintainable against the decree in view of the decision of AIR 1926 Cal 1018. He has also contended that a revision even lies if no notice of submission of the award by the Arbitrator had been served. Thus, Mr. Banerjee has contended that the learned Trial Judge should not have accepted the award. So, the decree passed by him should be set aside.

Per contra, Mr. Amitava Ghosh, learned Counsel appearing on behalf of the opposite party, has submitted that the decree had been rightly passed under the provisions of the Arbitration Act, 1940. Previously, the petitioner herein filed application for rejection of the award on two occasions. The matter went up to the Hon'ble Court and it had been decided that the provisions of the Arbitration and

Conciliation Act, 1996 would not apply, inasmuch as, the Arbitrator was appointed under the provisions of the old Act of 1940. Under the circumstances, though the award was passed in the year 2004, such award should be governed by the provisions of the Arbitration Act, 1940 and as such, decree had been rightly passed by the learned Trial Judge on contests. The civil revision preferred by the petitioner herein had been dismissed by the Hon'ble Court. So, it is now a settled position that the Misc. Case was properly lodged under the provisions of the 1940 Act and the same had been rightly allowed on contests.

Mr. Ghosh has also contended that the decision of AIR 1926 Calcutta 1018 will not be applicable in the instant case because at that time, there was no Arbitration Act of 1940 and the provisions of the CPC governed the mode of adjudication. So, after the enactment of the 1940 Act, the provisions have been made therein as to how the arbitration matter should proceed and the procedure laid down in the said Act had been followed in the instant case and So, the decision of AIR 1926 Calcutta 1018 will not be applicable in the instant case.

In that respect, I hold that Mr. Ghosh has rightly pointed out that after the enactment of the Arbitration Act, 1940, the decision of AIR 1926 Calcutta 1018 will not be taken into consideration to decide whether an appeal or revision shall lie. The fact that no revision lies under Article 227 of the Constitution of India has been decided in the decision of C.O. No.3368 of 2008 passed by a Single Judge of this Hon'ble Court.

Mr. Ghosh has also referred to the decision of Nilkantha Sidramappa Ningashetti v. Kashinath Somanna Ningas and ors. Reported in AIR 1962 Supreme Court 666 and thus, he has submitted that the period of limitation for an application to set aside an award under Section 14(2) of the Arbitration Act, 1940 begins to run "from the date of service of notice of the filing of the award".

It is pertinent to mention herein that in the instant case, as per record, immediately after filing of the award, the sole Arbitrator served notices upon both parties to the award. Thereafter, the opposite party took prompt action for passing a decree as per provisions of Section 17 read with Section 14(2) of the Arbitration Act, 1940. In the instant case, since the petitioner did not file any application for setting aside

the award within the period of limitation as per Article 158 of the Limitation Act and his subsequent prayer in the said Misc. Case for setting aside the award under Sections 30 and 33 of the 1940 Act having been rejected, I am of the view that the learned Trial Judge has rightly passed the decree under the provisions of the Arbitration Act, 1940.

Mr. Ghosh has also referred to the decision of Bharat Coking Coal Ltd. v. C.K. Ahuja and anr. reported in 1995 Supp (1) Supreme Court Cases 744 particularly the Paragraph No.6 and thus, he has submitted that after passing of the decree, no revision lies but appeal lies on limited ground as embodied in Section 17 of the Arbitration Act, 1940.

For convenience, the provisions of Section 17 of the Arbitration Act, 1940 is quoted below:-

S.17. JUDGMENT IN TERMS OF AWARD.-Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the Court shall, after the time for making an application to set aside the award has expired, or such application having been made, after refusing it, proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow and no appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accordance with, the award.

Thus, in view of the provisions of Section 17 and the decision of Bharat Coking Coal Ltd.(supra), it is clear that when a judgment is pronounced according to the award and decree has been passed thereafter, no appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accordance with, the award. Therefore, only on limited ground, an appeal lies against the decree passed by the learned Trial Judge. The revisional application is not maintainable.

It is pertinent to mention here that immediately after passing of the decree by the learned Trial Judge, this revisional application was not filed. The opposite party herein took step for transfer of the decree for execution and accordingly, the

decree was transferred to the Registrar, Original Side, High Court, Calcutta and M Execution Case No.1 of 2010 had been started. In Execution Case No.257 of 2011 one of the Judges of this Hon'ble Court has directed the State to deposit Rs.40 lakh within four weeks from date, i.e. on September 13, 2011 with advocate-on-record representing the State who was directed to invest the money in a short-term deposit with a Nationalized Bank.

In that view of the matter, without discussing more about the materials-on-record and the contentions as submitted by Mr. Banerjee, I am of the opinion that this application is not maintainable. Accordingly, the application is dismissed.

Considering the circumstances, there will be no order as to costs.

Urgent xerox certified copy of this order, if applied for, be supplied to the learned Advocates for the parties on their usual undertaking.

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