Indian Aluminium Cables Ltd. Vs State Elect. Board and Others

Court: Delhi High Court

Date of Decision: Sept. 1, 1995

Acts Referred: Arbitration Act, 1940 â€" Section 11, 2, 5

Citation: (1995) 34 DRJ 697

Hon'ble Judges: S.K. Mahajan, J

Bench: Single Bench

Advocate: B. Mohan Adv, for the Appellant; R.P. Kathuria, for the Respondent

Final Decision: Dismissed

Judgement

S.K. Mahajan, J.
M/s. Indian Aluminium Cable Limited, the petitioner herein, had offered to supply ACSR conductors "Panther" size

30/7 3.00 mm conforming to IS : 398/1961 with latest amendment thereof in quantity 490 kilometers at the rate of Rs. 4,390 per kilometer

exclusive of excise duty and central sales tax totaling Rs. 21,77,440/-. This offer was confirmed by the Superintending Engineer/Design for Chief

Engineer(P&C), Haryana Slate Electricity Board, Chandigarh on 4.8.1972 vide its purchase order No. 170/9999/T-349. Under this purchase

order certain disputes had arisen between the parties which, as per the arbitration agreement contained in the purchase order, were liable to be

referred to arbitration. One arbitrator each was to be appointed by the respective parties and the third was to be appointed by the President of the

Institute of Engineers. The respondent No. 1 by notice dated 26th July, 1976 called upon the petitioner to make payment of Rs. 37,61,465.60

paise which was stated to be the amount allegedly due to the said respondent from the petitioner under the contract. It was stated that in case the

petitioner disputed the liability to pay this amount, it should appoint an arbitrator of its choice within 15 days of the receipt of the said notice to the

respondent No. 1. By the said letter, the respondent No. 1 had appointed Shri V.P. Luthra, Superintending Engineer(Operation Circle), Haryana

Stale Electricity Board as its arbitrator. It appears that subsequently the Haryana State Electricity Board had appointed Mr. J.K. Bahri as its

arbitrator. Under what circumstances, Mr. V.P. Luthra was replaced by Mr. J.K. Bahri as arbitrator of respondent No. 1 is not clear from the

record. However, that is not a point in controversy in the present petition.

2. The petitioner appointed Mr. C.M. Lodha as its arbitrator and Mr. O.P. Puri was appointed as an arbitrator by the Institute of Engineers.

Respondent No. 1 filed its statement of claim before the arbitrators. In the statement of claim, the respondent has claimed a sum of Rs.

39,26,365.75 paise being the total price difference for 496 kilometers for Panther conductors. Besides the said amount, penalty at the rate of 10%

of the contract price amounting to Rs. 2,17,744/- was also claimed. The respondent also claimed interest at the rate of 12% per annum from

1.7.1974 to 1.3.1991 thus making a total claim of Rs. 1,25,98,091/- allegedly payable by the petitioner to the said respondent No. 1.

3. Instead of filing a reply to the said statement of claim, the petitioner filed an application u/s 151 of the CPC before the arbitrators alleging, inter

alia, that by letter dated 26th July, 1976, respondent No. 1 had sought reference of disputes for arbitration claiming a sum of Rs. 37,6l,465.60

paise and, consequently, the said respondent could not prefer a claim of Rs. 1,25,91,091/-. The petitioner, Therefore, wanted the arbitrators to

hold that proceedings pursuant to the said claim of the respondent No. 1 were without jurisdiction, incompetent and invalid in law. It wanted an

order to be passed by the arbitrators holding that the claims were beyond the subject matter of reference and, as such, without jurisdiction,

incompetent and not maintainable.

4. By Order dated 26.10.91, the arbitrators rejected the said application of the petitioner holding as under:-

Now the dispute which has arisen between the parties is as to which party has committed breach of contract and if so whether it is entitled to get

any damages and to what extent. HSEB in its claim has alleged that IACL has committed breach of contract. The IACL has not filed its reply. We

have, Therefore, yet to see what reply the said IACL have to give in this connection. It is specially mentioned even in the notice that the IACL have

committed breach of contract. Thus, it has become a point of dispute between the parties and the same has been referred to arbitration. True it is,

in the notice dated 26.7.76, HSEB put forth a claim for Rs. 37,61,465/- based on the contract with M/s Industrial Cables for purchase of

conductors, whereas in the claim filed by HSEB, the allegation is that they made the purchase from JJH Industries and were put to a loss of Rs.

1,25,09,091/-. The question whether HSEB are entitled to get any damages is a matter of evidence which cannot be decided at this stage. No

doubt, there is inconsistency or difference between the claim made in the notice and the claim filed before us. As to what is the effect of this will

have to be decided on merits. But, for that reason, it cannot be said that the claim made by HSEB is unsustainable and wholly beyond the scope of

arbitration clause or the reference to arbitration so as to oust the jurisdiction of arbitrators. The result is that we dismiss the preliminary objection.

5. Not satisfied with the said decision of the arbitrators, the petitioner has filed the present application under Sections 14, 17, 30 & 33 of the

Arbitration Act for setting aside and/or determining the validity of the said order dated 26.10.1991. In the alternative, an order for revocation of

authority/removal of the arbitrator under Sections 5, 11 & 12 of the arbitration Act has been claimed. Preliminary objection to the maintainability of

this petition was raised stating that the order passed by the arbitrations was only an interlocutory order and was not an award which could be set

aside under Sections 30 and 33 of the Arbitration Act.

6. I have heard the learned counsel for the parties both on the question as to whether this order can be said to be an award which requires to be

filed in Court and whether any case has been made out for revocation of authority/removal of the arbitrators.

7. The argument of Mr. B. Mohan, appearing for the petitioner, is that any order passed by the arbitrators by which-liability of a party is

determined is an award within the meaning of Section 2(b) of the Arbitration Act. The contention is that it is not only the final determination of the

disputes between the parties which can be said to be an award within the meaning of the said Section but an order which declares that the

arbitrator had the jurisdiction to go into a particular dispute will also be an award within the meaning of the said Section. I am afraid, the argument

of learned counsel for the petitioner cannot be accepted. The learned counsel for the petitioner argues that it is an interim award and, as such, there

cannot be any difficulty in filing the same in Court and further proceedings taken in accordance with the Arbitration Act. It is contended that in Seth

Thawardas Pherumal Vs. The Union of India (UOI), it has been held that:-

A reference requires the assent of both sides. If one side is not prepared to submit a given matter to arbitration when there is an agreement

between them that it should be referred, then recourse must be had to the Court u/s 20 of the Act and the recalcitrant party can then be compelled

to submit the matter under Sub-section(4). In the absence of either, agreement by both sides about the terms of reference, or an order of the Court

u/s 20(4) compelling a reference, the arbitrator is not vested with the necessary exclusive jurisdiction. Therefore, when a question of a law is the

point at issue, unless both sides specially agree to refer it and agree to be bound by the arbitrar"s decision, the jurisdiction of the Courts to set an

arbitration right when the error is apparent on the fact of the award is not ousted. The mere fact that both parties submit incidental agreements

about a point of law in the course of the proceedings is not enough. 1933 AC 592, Rel. on.

8. He has also referred to The Baranagore Jute Factory Co. Ltd. Vs. Hulaschand Rupchand, to press this point that any award given by an

arbitrator on a point which had not been referred to him will be beyond the scope of reference and the arbitrator will have no jurisdiction to decide

the same. The authorities mentioned above have been referred by him to press the point that the arbitrators, in the present case, will not have any

jurisdiction to entertain any claim beyond Rs. 37,61,465.60 paisa which was referred to them by notice dated 26th July, 1976 by respondent No.

1 as the same would be beyond the scope of reference.

9. In my opinion, the arguments of learned counsel for the petitioner has no basis. In the judgments referred by him, the point in dispute was

whether the award given by the arbitrator in respect of any point which has not been referred to him could be sustained or not. The question before

the Court was not as to whether any interim order passed by the arbitrators could be said to be an interim award within the meaning of Section 27

of the Arbitration Act. All that the arbitrators have done in the present case is that they have held that, at this stage, it may not be possible for them

to decide as to whether respondent No. 1 would be entitled to the amount claimed by it in its statement of claim and what will be the effect of that

claim will be decided on merits. No decision whatsoever has been given on any other point by the arbitrators. The petitioner has not even filed

reply to the statement of claim and it is only at the time of final adjudication of the disputes that the arbitrators will go into this question as to

whether the petitioner can be entitled to any amount more than what had been claimed in notice dated 26th July, 1976.

10. It is beyond comprehension as to how the Order dated 26.10.1991 passed by the arbitrators can be an interim award. Any award which is

passed by the arbitrators, whether interim or final, can be filed in Court u/s 14 of the Arbitration Act and after the same is filed, the Court has

power to either modify the same u/s 15 of the Act or to remit it u/s 16. Where the Court sees no reason to remit the award, or any of the matters

referred to arbitration, for reconsideration or to set aside or modify the award, the Court has no option but to pronounce judgment according to

the award and upon the judgment so pronounced, a decree shall follow. Decree can be pronounced either on the basis of interim award or on the

basis of the final award. In my opinion, no decree can follow in case the said order dated 26.10.1991 passed by the arbitrators is held to be an

award. In case no decree can follow, to my mind, by no stretch of imagination this order can be said to be an interim award. I, Therefore, reject

the contention of the petitioner that the order dated 26.10.1991 is an interim award.

11. It is next contended, by Mr. B. Mohan that as the arbitrators are deciding the disputes which are beyond the scope of the reference, they are

committing legal misconduct and it is, Therefore, a fit case for revoking the authority of the appointed arbitrators. The submission is that the

arbitrators have committed legal misconduct and have, thus, rendered themselves unfit to continue to be arbitrators. To appreciate the contention

of the petitioner, it will be useful to refer to Sections 5 and 11 of the Arbitration Act which are the only two Sections which give powers to the

Court to revoke the authority of the arbitrators or to remove them under certain circumstances.

12. Sections 5 & 11 of the Arbitration Act are as under:-

Section 5

The authority of an appointed arbitrator or umpire shall not be revocable except with the leave of the Court, unless a contrary intention is

expressed in the arbitration agreement.

Section 11

The court may, on the application of any party to a reference, remove an arbitrator or umpire who fails to use all reasonable dispatch in entering on

and proceeding with the reference and making an award.

The Court may remove an arbitrator or umpire who has misconducted himself or the proceedings.

Where an arbitrator or the umpire is removed under this section, he shall not be entitled to receive any remuneration in his services.

For the purposes of this section the expression ""proceeding with the reference"" includes, in a case where reference to the umpire becomes

necessary, giving notice of that fact to the parties and to the umpire.

13. Reference has been made by the learned counsel for the petitioner to V.V. Pushpakaran Vs. P.K. Sarojini, in support of his contention that the

authority of the appointed arbitrators can be revoked in case legal misconduct is committed by them. In Madura Mills Co. Ltd. Vs. N.M.S.

Krishna Ayyar, the point which had arisen for consideration was that the arbitration proceedings had been unduly delayed and that the arbitrators

had no jurisdiction to entertain this submission to arbitration and, consequently, the petitioner, in that case, wanted the authority of the appointed

arbitrator to be revoked. In that case, a shareholder of a company had sought to refer certain disputes to arbitration under Article 113 of Articles

of Association of the Company. The Court, while dealing with the said point, held that apart from Article 113, the shareholder did not have any

power to compel a submission of arbitration of a dispute arising out of the affairs of the company. Section 152 of the Companies Act empowered

a company to refer to arbitration an existing difference between itself and any other company or person. But a shareholder of a company had no

such right against the company. The Court, Therefore, held that the shareholder"s submission to arbitration was ultra virus Article 113 and as the

arbitrator had continued to arbitrate upon this matter upon which he had no jurisdiction, the company was entitled to have the reference revoked.

To my mind, this judgment is not applicable to the present case as arbitrators in the present case have themselves held that the question as to

whether the petitioner will be entitled to the amount claimed in its statement of claim is a question which can be decided only on merits. They have

not taken any decision. The said judgment, Therefore, is not of any help to the petitioner. In all other judgments cited above by the learned counsel

for the petitioner, it was only at the stage of final award that the Courts had held that as the decision given by the arbitrators was beyond the scope

of their reference, award was liable to be set aside. In none of the cases question involved was as to whether the authority of the arbitrator could

be revoked because he had proceeded with the reference for adjudication of the disputes submitted to him by one of the parties. The learned

counsel for the petitioner has also drawn my attention to Page 153 of 20th Edition of Russell on Arbitration. Russell while dealing with the question

as to on what ground leave to revoke the authority can be given has stated that leave may be given under the following terms :-

1. Excess or refusal of jurisdiction.

2. Misconduct of arbitrator.

3. Disqualification of arbitrator.

4. Exceptional cases.

14. To my mind, none of these grounds are available to the petitioner in the present case. In my opinion, the arbitrators have not exceeded their

jurisdiction, nor they have committed any legal misconduct in passing order dated 26.10.1991. It was only a procedural order and no rights of the

parties have been determined by the said order. There was, Therefore, no question of the arbitrators exceeding their jurisdiction. A party to a

contract should not be permitted to wriggle out of the contract easily. The leave to revoke the authority of the appointed arbitrator is granted

sparingly and in cautious manner. It will be contrary to justice to give leave to revoke reference to a party, who has agreed to submit any dispute,

whether of law or of fact, to arbitration, when he finds that the case is going against him. Unless substantial miscarriage of justice will take place in

the event of leave to revoke being refused, the leave should not be given. Revocation of power u/s 5 is not the rule but only the exception. Merely

because the arbitrators have not passed the order in favor of the petitioner and have passed the order dated 26.10.1991 holding that it will be

decided by them only on merits as to whether the respondent No. 1 was entitled to the amount claimed in its statement of claim, it will not give any

right to the petitioner to move any application for leave to revoke the authority of the arbitrators. In the words of Russell :-

Before the court exercises its discretion ""to give leave to revoke an arbitrator''s authority"" it should be satisfied that a substantial miscarriage of

justice will take place in the event of its refusal.

That procedure is so awkward in form, so injurious if regarded as one to be generally adopted, and introduces so great a change into a highly

useful and important branch of the law, that I feel there is the strongest possible objection to it in any case which does not imperatively call for it.

To induce us to grant leave to revoke, a very strong case should be made out."" ""An application for leave to revoke a submission is one to be

granted with great caution.

The original purpose of the section was to impede and not promote the removal of arbitrators... it remains a remedy of last resort, and the Court

should not intervene with a well-established reference unless convinced that is the only right course to take.

15. To my mind, there is absolutely no case for the grant of leave to revoke the authority of the appointed arbitrators. I am of the opinion that

neither the order dated 26.10.1991 is an interim award which is required to be filed in Court and proceedings taken thereafter in accordance with

the Arbitration Act nor any case has been made for revocation of authority or removal of the arbitrators. In my opinion, the petition has no merits.

16. The petition is, accordingly, dismissed with costs.