M/s. Steel Authority of India Ltd., B.S. City, Bokaro Vs M/s. Ispat Engineering and Foundry Works, B.S. City, Bokaro

Against the Original Original Order No. 85 of 1995 (R)

Court: Patna High Court

Date of Decision: July 19, 2000

Acts Referred:
Arbitration Act, 1940 â€" Section 29, 30(c), 8, 8(c)#Civil Procedure Code, 1908 (CPC) â€" Section 107

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

Bench: Single Bench

Advocate: N.K. Prasad, R.K. Marathia, Rajiv Ranjan and Pratyush Kumar, for the Appellant; A.K. Sahani, for the Respondent

Final Decision: Allowed

Judgement

S.K. Katriar, J.
This appeal is directed against the judgment dated 29.4.95, and the consequent decree, passed by Mr. R.B. Rai,

Subordinate Judge 1st, Bokaro at Chas, in Title (Arbitration) Suit No. 20/94 (M/s. Ispat Engineering and Foundry Works vs. M/s. Steel Authority

of India Ltd.), whereby he has made the award of the umpire dated 25.4.94, a rule of the court.

2. The defendant is the appellant. For the purpose of disposal of the present appeal, we shall go by the description of the parties before the court

below. The defendant is a public sector undertaking of the Government of India, entire shares of which are held by the President of India or his

official nominees. It has set up a steel plant at Bokaro City, district Bokaro, in the State of Bihar. The defendant had published a tender notice

bearing no. K-174/154 on 13.5.85, for manufacture and supply of slag notches as per the specified drawing. Various tenders were submitted, the

plaintiff"s tender was accepted and was allotted the work. The total value of the contract was Rs. 2,64,000/- plus excise duty with the stipulation

that the goods shall be delivered on or before 30.11.85. The plaintiff was unable to deliver the goods and the defendant had issued risk purchase

notice to the plaintiff, but on the latter''s request instead extended time up to 21.2.86 for supply of the materials. The plaintiff failed to deliver the

goods within the extended time which compelled the defendant to take procurement action at an excess cost of Rs. 71,400/-, and had accordingly

issued letter dated 21.4.86 to the plaintiff to deposit the risk purchase differential of Rs. 71,400/-. However, once again on the request of the

plaintiff, the defendant extended time for delivery up to 30.6.86. Instead of supplying the goods, the plaintiff wrote letter dated 27.6.86 to the

defendant, requesting to extend time to supply the materials up to 15.8.1986. The defendant acceded to the request and extended time up to

15.8.86 by its letter dated 8.7.96. The plaintiff again failed to deliver the goods, and the plaintiff once again asked for more time to supply the

goods by its letter dated 6.2.87, the defendant again required the plaintiff to pay the risk purchase differential by 16.2.87. However, the plaintiff

again requested for extension of time by its letter dated 3.3.87, which was allowed and time to supply the materials was extended upto 6.4.87,

which was again extended upto 15.4.87. The plaintiff again failed and was informed that the risk purchase differential of Rs. 71,400/- would be

recovered from other pending bills in terms of clause 13 of the agreement. After the plaintiff had finally failed in executing the contract, and after the

threat of recovery of the risk purchase differential became real, the plaintiff came forward with the plea that weight given in the drawing was wrong

and in executable, to which the defendant replied that the order was on piece-rated basis and not on weight basis and adjusted the said sum of Rs.

71,400/- from other pending bills of the plaintiff.

3. This resulted in a dispute and the plaintiff invoked the arbitration clause, appointed one Sri S.P. Tiwary as its arbitrator, and called upon the

defendant to appoint its arbitrator. Accordingly the defendant appointed one Sri V.N. Budhiraj as its arbitrator who was substituted by Sri Rathor

K.P. Singh. The two arbitrators entered into the reference and disagreed as a result of which the same was referred to the umpire, namely, Sri

S.N. Pandey. The umpire gave an ex-parte award to the tune of Rs. 2,76,000/-. The defendant challenged the award before the civil court which

was set aside, and the matter was remitted back to the umpire who resigned because of his ill-health. According to the impugned judgment,

...then on the request of both the parties, this court by its order dated 7.8.92 in Misc. case no. 5 of 1991, appointed Sri (illegible) in place thereof.

It further appears that the said learned umpire after hearing both the parties and considering the claim and counter-claim of the parties and the

documents available on the arbitration proceeding, made and published the award on 25.4.94 which is the subject matter of the instant

proceeding...

(para 4 of the impugned judgment).

4. As stated above, the umpire has given his award dated 25.4.94, which is set out herein below for the facility of quick reference:

2. The parties relied on those records in support of their respective cases, and also for rebuttal of the case of the other.

3. Three disputes were formulated for adjudication:

(a) Whether the claim of the claimants that as there was no concluded contract between the parties, the reference was invalid;

(b) Whether the claimants were entitled to their claim;

(c) Whether the respondents were entitled to claim any amount from the claimants.

4. The learned Subordinate Judge, 1st, Chas, Bokaro, was pleased to extend the period for publishing the award up to 2.6.1994.

5. After hearing the parties at length and scrutinising the records, the disputes are answered as follows:

(a) Given up by the claimants during the course of hearing and stated so in writing.

(b) the claimants are entitled to Rs. 2,44,000/- (Rupees two lacs forty four thousand) from the respondents,

(c) the respondents are not entitled to claim any amount from the claimants.

I, therefore, do hereby award and determine that the respondents shall pay to claimants a sum of Rs. 2,44,000/- (Rupees two lacs forty four

thousand) only.

Dated : 25th April, 1994.

Sd/- Illegible

25.4.94

It is thus manifest that the award proceeds on the footing that there was a concluded contract between the parties, the plaintiff is entitled to a sum

of Rs. 2,44,000/- without interest, and the claim of the defendant has been rejected.

5. Steps were thereafter taken before the civil court for the award to be made a rule of the court. The proceeding was registered as Title

(Arbitration) Suit no. 20/94 in the court of Sub-Judge 1st, Bokaro, who has by the impugned judgment dated 29.4.95 made the award a rule of

the court, and in addition granted interest to the plaintiff in the following terms:

Ordered

that the objection petition dated 3.6.94 is hereby rejected and the Award is hereby made a rule of the Court on contest with cost. Further it is also

Ordered that the plaintiff/claimant is also entitled for three categories of interest i.e. for pre-reference period starting from 6.9.85 to 23.9.87,

pendente lite interest starting from 24.9.87 to 29.4.95 and future till actual payment is made against the principal sum of Rs. 2,44,000.00 at the

rate of prevailing in Nationalised Bank from time to time.

6. While assailing the validity of the impugned judgment, Mr. N.K. Prasad, senior Advocate, appearing for the defendant-appellant, submits that

appointment of the umpire is bad in law. He has advanced detailed arguments in this connection and has, inter alia, submitted that it is manifest from

the terms of the agreement and the provisions of the Arbitration Act 1940 (hereinafter referred to as ""the Act""), that the arbitrator including the

umpire are creations of the agreement between the parties, can be appointed only after the parties have failed to appoint, and must be appointed

with the consent of the parties. I am unable to accede to the submission in view of the provisions contained in Section 8 of the Act. Section 8 lays

down the power of court to appoint arbitrator or umpire, and section 8(c) of the Act provides that the court can appoint arbitrator or umpire

where the parties or the arbitrators are required to appoint an umpire, and do not appoint him. As is manifest from paragraph 4 of the judgment

and set out hereinabove, the learned Subordinate Judge appointed the umpire on the request of the parties by its order dated 7.8.92, which is

clearly permissible in terms of section 8(c) of the Act. I thus hold and conclude that the umpire was validly appointed.

7. Learned counsel for the appellant submits that the impugned award is perverse, it is impossible to reach the conclusion arrived at therein, and is

fit to be set aside. The provisions of section 30(c) of the Act, inter alia, lays down to the effect that the award can be set aside if the same is

otherwise invalid"". He submits that an arbitrator can adjudicate only the arbitrable disputes. In otherwords, he can arbitrate only the disputes Qua

the contract, and not De Horse the contract. He relies on the judgment of the Supreme Court reported in 1997 S.C. 1376 (Tamil Nadu Electricity

Board vs. M/s. Bridge Tunnel Constructions).

8. Learned counsel for the respondent submits that it is permissible for the arbitrator or the umpire to pass a non-speaking order. The award itself

shows that the umpire has considered all the materials on record, the claim was for a higher amount and a much smaller amount has been awarded.

He further submits that the defendant''s contention relating to perversity of the award has not been raised before the court below. He lastly submits

that the plaintiff had set up a factory to supply the materials in question, and it was precluded from doing so on account of the defective design of

the product indicated in the tender notice.

9. Having considered the rival submissions, I am of the view that the contention advanced on behalf of the defendant-appellant ought to be up-

held. It is manifest from the chronology of events indicated hereinabove that one of the important conditions of the tender notice was that the goods

had to be supplied on or before 30.11.85, and the defendant had on the request of the plaintiff granted atleast five extensions to supply the goods

extending it up to 15.4.87. This court takes judicial notice of the position that the defendant is engaged in the manufacture and production of steel

which is a continuous process and such breach of promise as has happened in the present case at the instance of the plaintiff may as a result upset

the working of the steel plant with its heavy commitments within the country and outside. It is further relevant to state that the plaintiff had been

obtaining extension after extension and the defendant had relented in enforcing the clause in the agreement whereby it was entitled to the risk

purchase differential amounting to Rs. 71,400/-. It was only after the last extension went in vain and the defendant decided to realise the risk

purchase differential amounting of Rs. 71,400/-, that the plaintiff took a somersault and took a false and most mischievous plea that the drawing

was wrong to which the defendant had replied that the very basis of the objection was wrong because the work was on piece-rated basis and not

on weight basis, apart from being an abnormally belated objection, all of which in its entirety is reeking with Mala fides. At this stage, the defendant

deducted the said sum of Rs. 71,400/- from the other bills of the claimant, which gave rise to the dispute and the arbitration proceeding. The

relevant clause of the agreement where under the defendant deducted the sum of Rs. 71,400/- from other bills of the plaintiff, is set out herein

below for the facility of quick reference:

Recovery of Sums Due

Whenever under this contract any sum of money is recoverable from any payable by the Contractor, the Purchaser shall be entitled to recover such

sum by appropriating, in part or whole the security deposited by the Contractor, if a security is taken against the contract. In the event of the

security, being insufficient or if no security has been taken from the contractor, then the balance or the total sum recoverable, as the case may be,

shall be deducted from any sum then due or which at any time thereafter may become due to the contractor under this or any other contract with

the Purchaser should this sum be not sufficient to cover the full amount.

9.1. Paragraph 30 of the aforesaid judgment of the Supreme Court in Tamil Nadu Electricity Board (supra), is set out herein below for the facility

of quick reference:

30. In para 37 thereof, this court emphasised the need to make a speaking award and the terms in the contract should postulate such a need where

the contract is entered into by the State or its instrumentalities. It was held thus:

The trappings of a body which discharges judicial functions and is required to act in accordance with law with their concomitant obligations for

reasoned decision, are not attracted to private adjudication of the nature of arbitration as the latter, as we have noticed earlier, is not supposed to

exert the State''s sovereign judicial power. But arbitral awards in disputes to which the State and its instrumentalities are parties affect public

interest and the matter of the manner in which Government and its instrumentalities allow their interest to be affected by such arbitral adjudications

involve larger questions of policy and public interest. Government and its instrumentalities cannot simply allow large financial interests of the State

to be prejudicially affected by non-reviewable except in the limited way allowed by the stature-non speaking arbitral awards. Indeed, this branch

of the system of dispute resolution has, of late, acquired a certain degree of notoriety by the manner in which in many cases the financial interests of

Government have come to suffer by awards which have raised eye-brows by doubts as to their rectitude and propriety. It will not be justifiable for

Governments of their instrumentalities to enter into arbitration agreements which do not expressly stipulate the rendering of reasoned and speaking

awards. Governments and their instrumentalities should, as a matter of policy and public interest-if not as a compulsion of law-ensure that wherever

they enter into agreements for resolution of disputes by resort to private arbitrations, the requirement of speaking awards is expressly stipulated

and ensured.

9.2 I have thus no manner of doubt that it is not possible in the given situation to reach the conclusion that the claimant is entitled to any sum.

10. Learned counsel for the appellant rightly submitted that the court has not considered the question of arbitral claims in contra-distinction to non-

arbitrable claims which could or could not have been entertained by the umpire. He has taken me through the list of claims appended to the written

statement of the claimant in the arbitration proceeding. The Supreme Court has in the aforesaid judgment laid down that the arbitrator or the

umpire can adjudicate only the arbitable claims. In other words, he can adjudicate disputes Qua the contract, and not De Horse the contract. For

example, item no. 4 of the list of said claims appended to the claimant''s written statement reads as follows:

4. Loss of mental peace, mental torture and loss of good name: Rs. 1,00,000.00

The claim is De Horse the contract and could not have been adjudicated by the umpire. It is not possible to discern as to what extent this item, or

for that matter any such other item De Horse the contract, was taken into account by the umpire. The umpire has clearly exceeded his jurisdiction

which invalidates the award. Paragraphs 36, 37, 38 and 39 of the aforesaid judgment in Tamil Nadu Electricity Board (supra), are relevant in the

present context and set out herein below for the facility of quick reference:

36. It is well settled that in the matter of challenge to the award there are two distinct and different grounds viz., that there is an error apparent on

the face of the record and that the arbitrator has exceeded his jurisdiction, in the later case, the court can look into the arbitration agreement but

under the former it cannot do so unless the agreement was incorporated or cited in the award of evidence was made part of the agreement. In the

case of jurisdictional error, there is no embargo on the power of the Court to admit the contract into evidence and to consider whether or not the

umpire had exceeded the jurisdiction because the nature of the dispute is something which has to be determined, outside the award, whatever

might be said about it in the award or by the arbitrator. In the case of non-speaking award, it is not open to the Court to go into the merits. Only in

a speaking award the Court can look into the reasoning in the award and correct wrong proposition of law or error of law. It is not open to the

Court to probe the mental process of the arbitrator and speculate, when no reasons have been given by the arbitrator, as to what impelled the

arbitrator to arrive at his conclusion. But in the later case the Court, with reference to the terms of the contract/arbitration agreement, would

consider whether or not the arbitrator/umpire has exceeded his jurisdiction in awarding or refusing to award the sum of money awarded or omitted

a consolidated lumpsum.

37. In fact, in G.S. Atwal & Co."s case, (AIR 1996 SCW 1180), having noticed that the arbitrator had exceeded his jurisdiction to grant amount

de horse the terms of the contract and being a non-speaking award, the Court was unable to speculate as to what extent the award was within the

terms of the contract or claims made and to what extent the amount awarded was in respect of non-arbitrable dispute. Accordingly, the order of

the civil Court was set aside reversing the judgment of the Division Bench of the Calcutta High Court.

38. Thus considered, we hold that the arbitrator, having been invested with the jurisdiction to decide the arbitrability of certain claims, has

committed error of jurisdiction in not considering the arbitrability of the claims and passed a non-speaking award, awarding a sum of Rs. 70.83

lakhs and odd. It is difficult to ascertain as to what extent he has awarded the claims within the contract or the claims outside the contract, of a total

claim of Rs. 2.10 crores. Under those circumstances we are constrained to hold that it is difficult to give acceptance to the award made by the

umpire as upheld by the Courts below. Equally we find it difficult to accept the contention that out of a claim of Rs. 2.10 crores, only a sum of the

Rs. 70.83 (sic-lakhs ?) and odd was awarded. So it is not a fit case for interference on the basis of the mere fact that a lesser sum than was

claimed has been awarded. An illegal award cannot be upheld to be valid or within jurisdiction.

39. The question then is : what procedure should be adopted in this behalf? The contention of Shri Poti is that it may be remitted to the umpire for

fresh consideration. On the other hand, the contention of Shri V.R. Reddy. is that in the event of the conclusion that the arbitrator has exceeded his

jurisdiction, the entire award would become invalid and it has to be set at naught. Having given due consideration to the respective contentions, we

find force in the contention of Mr. V.R. Reddy. Mr. Poti has stated that though it is found that the award is not valid in law, the party cannot be

made to suffer on account of the illegality committed by the umpire. We find no force in the contention. Once a finding recorded that the

umpire/arbitrator has committed error of jurisdiction, as stated earlier, two courses are open. viz., either to remit the award to the umpire for

reconsideration or to set aside the award in toto. We think that the latter course would be appropriate in the facts and circumstances in this case.

10.1 Paragraph 622, page 330, Vol. 2, of Halsbury"s Laws of England (Fourth Edition, the Hailsham Edition) states as to what constitutes

misconduct. The expression includes on the one hand that which is misconduct by any standard, such as being bribed or corrupt, and on the other

hand mere technical misconduct such as making a mere mistake as to the scope of the authority conferred by the agreement of reference. That

does not mean that every work or procedure amounts to misconduct but misconduct occurs for example, (i) if the arbitrator or umpire fails to

decide all the matters which were referred to him; (ii) if by his award the arbitrator or umpire purports to decide matters which has not in fact been

included in the agreement of reference; for example, where the arbitrator construed the lease (wrongly), instead of determining the rental and the

value of building to be maintained on the land etc. It is thus manifest in the present case that item like the loss of mental peace, mental torture, and

loss of good name were clearly beyond the terms of the agreement and, therefore not arbitrable. In the technical sense, the umpire has in the

present case really misconducted himself.

11. On a thoughtful consideration of the matter, I reach the conclusion that it was not possible for the umpire in the given situation to award any

amount at all to the plaintiff. On the other hand, the defendant was undoubtedly entitled to a sum of Rs. 71,400/- by way of risk purchase

differential, because the plaintiff inspite or repeated extensions had failed to deliver the goods compelling the defendant to purchase the materials at

a higher price from elsewhere. Learned counsel for the appellant is, therefore, right in his submission that the impugned award amounts to putting a

premium on dishonesty, and rewards the plaintiff who is responsible for repeated breaches of the contract for mala fide reasons. I am, therefore,

unable to uphold the award, and is fit to be set aside, being an ""...otherwise invalid"" award in terms of section 30(c) of the Act.

12. Learned counsel for the appellant lastly submitted that it was open to the umpire to award any amount of interest for the period that he found fit

in the facts and circumstances of the case, but the arbitrator chose not to award any interest. In that view of the matter, the power of the court to

grant interest is circumscribed by the provisions of section 29 of the Act which provides that the court may grant interest from the date of the

decree at such rate as the court deems reasonable, to be paid on the principal sum as adjudged by the award and confirmed by the decree. He,

therefore, submits without prejudice to his other contentions that the court could have granted interest at the rate deemed fit and proper by the

court w.e.f. 29.4.95, being the date of the decree. He, however, submits with his usual fairness that in view of the provisions of section 107 of the

Code of Civil Procedure, the powers of the appellate court are plenary and would not be circumscribed by the provisions of section 29 of the Act

which applies only to the court dealing with award whether or not the same should be made a rule of the court. The appellate court can pass any

order with respect to payment of interest provided there are circumstances for the sake of equity and justice, justifying payment of further interest.

There is, however, no need to decide this question in view of the discussion above and the ultimate order which is being passed in this appeal.

13. In the result, this appeal is allowed. The impugned judgment dated 29.4.95, passed by Mr. R.B. Rai, Sub-Judge, Bokaro at Chas, in Title

(Arbitration) Suit no. 20/94, as well as the award dated 25.4.94, passed by the umpire, are hereby set aside.