

State of West Bengal and Others Vs Sarkar and Sarkar and Another

Court: Calcutta High Court

Date of Decision: Sept. 12, 2005

Acts Referred: Arbitration and Conciliation Act, 1996 " Section 11, 11(6), 12(3), 12(4), 13

Citation: (2006) 2 CALLT 566

Hon'ble Judges: Indira Banerjee, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Indira Banerjee, J.

The Court: This application u/s 34 read with Section 13 and Section 16 of the Arbitration and Conciliation Act, 1996,

hereinafter referred to as the 1996 Act is for setting aside of an award made and published by the learned Arbitrator, Sri Sudhanshu Sekhar

Ganguly, a retired Judge of this Court on 23rd April 2004.

2. Sometime in 1995 the petitioner invited tenders for the construction of the office complex of the Sub Divisional Officer, Bolpur, including the

Treasury. As per the tender notice, the estimated value of the work was Rs. 61, 92, 900/- and the time stipulated for completion of the tender

work was 24 months.

3. The tender submitted by the respondent No. 1 was accepted, the same being the lowest, and the petitioner was awarded the contract for the

construction work. The contract contained an Arbitration Clause, in terms whereof disputes were to be referred to the sole arbitration of the Chief

Engineer of the Department. If the Chief Engineer were, for any reason unwilling or unable to act, the disputes were to be referred to an Arbitrator,

to be appointed by the Chief Engineer.

4. Disputes arose between the Petitioner and the Respondent in connection with the said contract awarded by the Petitioner to the Respondent.

Admittedly, as pleaded in paragraph 9 of the petition, the respondent No. 1, by a letter dated 13th June 1998, addressed to the Chief Engineer,

invoked the Arbitration Clause and called upon the Chief Engineer to enter into reference and/or alternatively to appoint an arbitrator to adjudicate

the disputes.

5. On the face of the averments in the petition, the Chief Engineer did nothing for almost two years. The Chief Engineer neither entered into

reference himself, nor appointed any arbitrator to adjudicate the disputes.

6. By an order dated 10th May, 2000, the learned Judge designated by the Chief Justice accepted the request of the respondent No. 6 u/s 11(6)

of the 1996 Act, for appointment of an arbitrator and directed the matter to be placed before the then Chief Justice for naming an arbitrator. By an

order dated 22nd June, 2000, the then Hon"ble Chief Justice appointed a retired Judge of this Court, Shri Sudhangshu Sekhar Ganguly as sole

Arbitrator.

7. The petitioner filed a SLP in the Supreme Court challenging the aforesaid orders of this Court allowing the request of the Respondent No. 1 u/s

11(6) of the 1996 Act for appointment of an Arbitrator. The SLP was dismissed by an order dated 8th December. 2000.

8. As per the averments in the petition, the learned Arbitrator entered into reference on 22nd July, 2000. Pursuant to the directions of the learned

Arbitrator, the parties filed their respective pleadings before the learned Arbitrator as also documents on which the parties intended to rely. The

respondent No. 1 filed its statement of facts on 17th January, 2001, and the petitioner filed its counter statement thereto on 14th February, 2001.

No objection was taken to the jurisdiction of the learned Arbitrator either in the counter statement or otherwise. About 43 sittings took place

before the learned Arbitrator. The petitioner appears to have participated in the proceedings without protest.

9. After giving the parties extensive hearing and after considering the materials on record, the learned Arbitrator made and published his award,

which is impugned in this application. The operative part of the impugned award is extracted herein below:

Accordingly, the claimant will get the following sums:

(1) On account of claim Nos. 1 and 2 : Rs. 32,90,000.00

(2) On account of interest on Rs. 32, 90,000/- : Rs. 1,64,500.00

(3) On account of claim No. 3 : Rs. 88,200.00

(4) On account of costs or the present : Rs. 2, 17,000.00

Total : Rs. 37,59,700.00

Over and above the amount mentioned above the claimant is also entitled to get interest at the rate of 12% per annum on the amount of Rs.

32,90,000/- plus Rs. 8, 200/- with effect from 16.04.98 till the date of realization.

The respondents are, therefore, directed to pay to the claimant the above awarded sums, i.e. Rs. 37,59,700/- plus 12% interest per annum on Rs.

32, 90,000/- + Rs. 88, 200/- from 16.04.98 till the date of realization.

The respondents are also directed to pay to the claimant the above awarded sums within 45 (forty five) days from the date of receipt of this award.

This is my award.

10. Mr. Roy Chowdhury appearing on behalf of the petitioner submitted that the impugned award was liable to be set aside since the learned

Arbitrator had no jurisdiction to proceed with the reference and/or make and publish the impugned award.

11. Mr. Roy Chowdhury argued that in terms of Clause 25 of the agreement there was a named Arbitrator, namely the Chief Engineer of the

Department and all disputes were to be referred to the arbitration of the Chief Engineer of the Department. There being a named Arbitrator, the

Hon"ble Chief Justice could not have appointed any person other than the named Arbitrator.

12. On the face of the averments in the petition, there was no fixed arbitrator named in the agreement. The disputes were to be referred to the

Chief Engineer of the Department. The Chief Engineer could either arbitrate the disputes himself or in the event of his unwillingness or inability for

any reason, whatsoever, to do so, appoint another Arbitrator. In the circumstances, it cannot be said that there was a named Arbitrator, The

Arbitrator could either be the Chief Engineer himself or some other person appointed the Chief Engineer.

13. The petitioner by its letter dated 13th June 1998 referred the disputes to the Chief Engineer and requested the Chief Engineer to enter into

reference or alternatively to appoint an arbitrator. The failure of the Chief Engineer to enter into reference for almost two years in itself reveals, if

not unwillingness, the inability of the Chief Engineer to act as Arbitrator. Yet the Chief Engineer did not appoint any other arbitrator as requested

vide the aforesaid letter dated 13th June 1998.

14. The request of the respondent No. 1 to the Chief Justice and/or His Designate for appointment of an Arbitrator was rightly allowed. As held

by the Supreme Court in the case of Datar Switchgears Ltd. Vs. Tata Finance Ltd. and Another, , cited by Mr. Dutt appearing on behalf of the

respondent award holder, once a party requests the Chief Justice to appoint an arbitrator by making an application u/s 11(6) of the 1996 Act, the

right of the authority named in the agreement to appoint an arbitrator ceases.

15. The requisite conditions precedent for appointment of an Arbitrator by the Chief Justice and/or His Designate u/s 11(6) of the 1996 Act

existed and as such the petitioner had no legally sustainable grounds to oppose the same. The Arbitration clause had admittedly been invoked but

the Chief Engineer had not responded. It is nobody's case that the request to the Chief Justice u/s 11(6) of the 1996 Act for appointment of an

independent Arbitrator was made before expiry of 30 days from the date of invocation of the Arbitration clause. Moreover, a SLP filed by the

petitioner in the Supreme Court against the orders of the Chief Justice and His Designate appointing an independent arbitrator was dismissed. In

my view Shri Sudhanshu Sekhar Ganguly was appointed Arbitrator by the Chief Justice in accordance with law and had Jurisdiction to proceed

with the reference.

16. In any event an arbitrator can only be challenged on the grounds specified in Section 12(3) of the 1996 Act extracted hereinbelow:

12(3) An arbitrator may be challenged only if-

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) he does not possess the qualifications agreed to by the parties.

17. None of the grounds of challenge exist in the instant case. Nobody has questioned the independence or impartiality of the learned arbitrator.

The arbitration agreement did not provide for any specific qualifications for appointment of an arbitrator.

18. Even assuming that the petitioner was entitled to challenge the Arbitrator, the petitioner was obliged to do so by sending a written statement of

the reasons for challenge to the Arbitrator at the earliest, within 15 days of becoming aware of the appointment of the Arbitrator or may be within

15 days from the date of dismissal of the Special Leave Petition, when the appointment assumed finality. Objection, if any, to the composition of

the Arbitral Tribunal could have been raised in the first statement of defence or, before submission thereof, which had admittedly not been done.

The plea of want of jurisdiction could not have been raised after submission of the counter statement. Having participated in the arbitration

proceedings without questioning the authority of the Arbitrator at any stage, in course of the arbitration proceedings the petitioner acquiesced in the

appointment of the Arbitrator.

19. Mr. Roy Chowdhury strongly argued that inherent want of jurisdiction of an adjudicating authority could never be cured by acquiescence.

There can be no doubt that inherent want of jurisdiction of an adjudicating authority is incurable. The principle, however, applies in the case of

adjudicating authorities set up by Statute.

20. The jurisdiction of an Arbitral Tribunal cannot be equated with the jurisdiction of a Court or Tribunal set up by and/or under statute, for an

Arbitral Tribunal does not derive jurisdiction from any statute but from agreement between the parties. If the parties can refer their disputes to

arbitration by agreement, appoint an arbitrator by agreement, determine the procedure of appointment of the arbitrator and the qualifications of the

arbitrator by agreement, I see no reason why the parties cannot by their conduct relax any of the conditions agreed to in relation to the

appointment of an arbitrator. The Judgment in the case of The United Commercial Bank Ltd. Vs. Their Workmen, cited by Mr. Roy Chowdhury

pertains to inherent want of jurisdiction of a Court of law.

21. In the case of arbitrations statute provides that participation without objection would amount to waiver of the right to object. Section 4 of the

1996 Act, provides as follows:

4. Waiver of right to object.-A party who knows that-

(a) any provision of this part from which the parties may derogate, or

(b) 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.

22. In the case of Narayan Prasad Lohia Vs. Nikunj Kumar Lohia and Others, relied upon by Mr. Dutt, the Supreme Court held that where the

applicants for setting aside of an award had not raised any objection to the composition of the Arbitral Tribunal they must be deemed to have

waived their right to object to the same.

23. Section 34(2)(v) of the 1996 Act which empowers the Court to set aside an award, on the ground of the composition of the Arbitral Tribunal

or the arbitral procedure not being in accordance with the agreement of the parties, is to be read not in isolation, but in harmony with the other

provisions of the said Act and in particular Sections 4 5 12(3) 12(4) 13(4) 13(5) 16(2) 16(3) and 16(6) thereof.

24. An award might, therefore, be set aside on the ground of the composition of the Arbitral Tribunal not being in accordance with agreement, only

where such objection is taken before the Arbitral Tribunal and not otherwise. There can be no question of an award being set aside on the ground

of the agreed procedure for appointment of the Arbitral Tribunal being followed, when the appointment is made by the Chief Justice or His

Designate in accordance with Section 11 of the 1996 Act.

25. Mr. Roy Chowdhury next submitted, that the Chief Justice had, by his order dated 22nd June, 2000 directed that the arbitrator to make his

award within 4 months from the date of filing of the Claim and the Counter Claim. The counter claim in the instant case had been filed on 4th

February, 2001. The award had, therefore, to be published within 3rd June, 2001. The learned arbitrator lost his authority to proceed with the

arbitration after 3rd June, 2001. According to Mr. Roy Chowdhury, the learned arbitrator took 3 years and 4 months time to publish his award,

without having the stipulated period of 4 months extended, which the learned arbitrator could not have done. The award is liable to be set aside,

the arbitrator having become functus officio.

26. Unlike the Arbitration Act 1940, which provided a specific time limit for conclusion of arbitration proceedings and also specific provisions for

extension of time to make and publish an award, the 1996 Act neither sets any time limit for completion of the arbitration proceedings nor contains

any provision for extension of time by Court for completion of the arbitration proceedings.

27. The Petitioner has been taking inconsistent and contradictory stands. On the otherhand, it is contended that the order of the Chief Justice u/s

11 is administrative in nature and on the other hand the award is challenged on the ground of the learned arbitrator having become functus officio.

It is difficult to appreciate how failure to conform to the time limit stipulated in an administrative order could invalidate an award, in the absence of

any statutory provision in the 1996 Act empowering the Chief Justice to fix the time limit for completion of the arbitration proceedings. The

petitioner did not raise any dispute with regard to the authority of the learned arbitrator to proceed with the arbitration after 3rd June, 2001. The

petitioner did not apply to Court for a declaration that the mandate of the arbitrator had terminated. On the other hand, the Petitioner chose to

proceed with the reference before the learned arbitrator without objection even after the time fixed by the Hon"ble Chief Justice for completion of

the reference expired. Admittedly, as pleaded in paragraph 19 of the petition, sittings were held till 8th November, 2003 and both the parties were

heard. By necessary implication, the Petitioner and the Respondent consented to the extension of time granted to the learned Arbitrator to

conclude the arbitration proceedings and to make and publish his award.

28. Even assuming that the time limit set by the Chief Justice was mandatory and not Just directory and that extension of time had to be obtained

from Court, it is open to this Court to extend the time with retrospective effect. This Court is not inclined to set aside an award on the ground of

the same having been made and published beyond the stipulated time, where both the parties had participated in proceedings before the learned

Arbitrator without protest, knowing fully well that the time for making of the award had expired. This Court would exercise its inherent power to

extend the time for making and publishing the award with retrospective effect.

29. It was next argued that some of the claims raised before the learned arbitrator and in particular. Claims No. 1 for a sum of Rs. 7,48,750/- was

beyond the scope of submission to arbitration.

30. In this context, reliance has been placed on Clause 12 of the agreement, which provides that in the event of any dispute regarding rates,

determined on analysis for an altered additional or substituted work under the said clause, the decision of the superintending engineer of the circle

would be final.

31. A perusal of the pleadings before the learned arbitrator and in particular the pleadings in paragraph 9 of the Statement of Claim and paragraph

27 of the Counter Statement dealing with paragraph 9 of the State of claim, makes it clear that the dispute is not with regard to the rate fixed by the

Superintending Engineer or any other authority. The entitlement of the petitioner to payment for extra work has been disputed. Claim No. 1 is not

patently barred by Clause 12 of the agreement.

32. Mr. Roy Chowdhury cited the case of Food Corporation of India Vs. Surendra, Devendra and Mahendra Transport Co., the Supreme Court

where held that an award in respect of claims specifically barred by agreement would amount to an award in excess of the jurisdiction of the

arbitrator.

33. Mr. Roy Chowdhury also cited the Judgment of the Supreme Court in the case of Viswanath Sood v. Union of India reported in 1989(1) A

LR 357 and the Judgment of a Division Bench of this Court in the case of CMDA v. Nikunja Behari Haldar reported in 1994 (1) A LR138, where

the imposition of penalty was held to be an excepted matter beyond the scope of submission to arbitration. In Viswanath Sood's case, and in

Nikunja Behari Haldar's case, the arbitration clause itself excluded from the scope of submission to arbitration, matters which were provided for

elsewhere in the contract. The Judgments are distinguishable inasmuch as none of the claims in the instant case are patently barred by any provision

of the agreement.

34. In any case, the petitioner did not, Lake objection to adjudication of the aforesaid claim by the learned arbitrator. Not having done so, the

petitioner is estopped from challenging the award on the ground of claim No. 1 being beyond the scope of submission to arbitration.

35. In an application u/s 34 of the 1996 Act, this Court does not sit in appeal over an award made by an Arbitral Tribunal. It is not for this Court

to judge the correctness of the quantum awarded by the learned arbitrator in respect of the various claims provided of course, the claims are within

the scope of submission to arbitration in terms of the agreement. It is not for this Court to reappraise the evidence on record. The scope of

interference is limited.

36. There can be no doubt that the learned arbitrator being a creature of agreement is bound by the agreement between the parties. The learned

arbitrator cannot ignore the agreement or traverse beyond the agreement or make an award which is ex facie, contrary to any provision of the

agreement.

37. At the same time, it is not for this Court to analyze the various provisions of the contract to judge the correctness of the findings of the learned

arbitrator in respect of each claim, for this would amount to sitting in appeal over the award, which this Court cannot do.

38. If any provision of the agreement is capable of two or more interpretations and the arbitrator expressly or by necessary implication has

accepted one interpretation, the award cannot be interfered with, just because this Court finds the other interpretation more acceptable.

39. It is only when an award is made notwithstanding an express unequivocal bar in the agreement either with regard to authority of the arbitrator

to adjudicate the claim or with regard to the admissibility of the claim, that this Court might interfere. This Court might also interfere if the claim is

patently contrary to an express provision of the agreement.

40. In the instant case, vague assertions have been made against the learned arbitrator of having ignored contractual provisions and having allowed

claims notwithstanding insufficiency of evidence on record.

41. Unfortunately, it is not for this Court to weigh the sufficiency of the evidence on record. It is not the case of the petitioner that the award is

totally perverse, the same not being based on any evidence and/or materials on record.

42. Mr. Roy Chowdhury finally argued that the award is not backed by sufficient reasons as required in Clause 25 of the agreement, In support of

his argument Mr. Roy Chowdhury cited the case of Jajodia (Overseas) Pvt. Ltd. Vs. Industrial Development Corporation of Orissa Ltd., the

Supreme Court observed that a speaking or a reasoned award was one which discussed the reasons which led the arbitrator to make the award.

In the instant case, the learned arbitrator has discussed the reasons which led the learned arbitrator to make his award in respect of the various

claims. The award is apparently a long and reasoned one.

43. An arbitral award is required to be backed by intelligible reasons that would give an indication of the factors which weighed with the arbitrator

in making his the award. It is not necessary for the arbitrator to give detailed reasons discussing each and every, document and each and every

averment in the respective pleadings of the parties.

The scope of interference with an award under 1996 Act is limited. An award can only be interfered with on the grounds specified u/s 34 of the

1996 Act. No grounds have been made out for interference with the impugned award.

The application is, therefore, dismissed without any order, as to costs.