

(1991) 03 CAL CK 0003

Calcutta High Court

Case No: Award Case No. 18 of 1990

West Bengal Power
Development Corpn. Ltd.

APPELLANT

Vs

B.B.M. Enterprises

RESPONDENT

Date of Decision: March 6, 1991

Acts Referred:

- Arbitration Act, 1940 - Section 30, 33

Citation: (1991) 2 CALLT 429

Hon'ble Judges: Prabir Kumar Majumdar, J

Bench: Single Bench

Advocate: P.K. Roy and Sandip Ghose, for the Appellant; Bhaskar Gupta and Abhijit Chatterjee, for the Respondent

Final Decision: Dismissed

Judgement

Prabir Kumar Majumdar, J.

This application is taken out on behalf of the West Bengal Power Development Corporation Ltd. for setting aside the award dated 22nd December, 1989 passed by Mr. A. K. Mitra, the Umpire. The petitioner has taken several grounds challenging the said award.

2. At the hearing of the application Mr. P. K. Roy the learned Counsel appearing with Mr. Sandip Ghose for the petitioner has submitted that the impugned award being the award for damages mainly should be set aside inasmuch as no oral evidence has been adduced by the claimant to sustain its claim for damages. The next submission on behalf of the petitioner is that the petitioner had raised a counter-claim and the learned Umpire has not considered the counter-claim and it will not appear from the award whether the learned Umpire has rejected the counter-claim raised by the petitioner. The further submission on behalf of the petitioner is that the learned Umpire has, relied on certain documents in coming to

his conclusion and he has not given an opportunity to the petitioner to lead evidence on the documents. As such, according to the petitioner, the impugned award suffers from perversity. Mr. Roy, the learned Counsel for the petitioner has referred to schedule of claims at page 54 of the petition and he has referred to, in particular the Claim Nos. 3, 4 and 5. The Claim No. 3 is for reimbursement of establishment charges. The Claim No. 4 is for deprivation of the claimants lawful dues arising out of the agreement at 25% of the unexecuted portion of the contract as, according to the claimant, the work under the contract could not be completed by the claimant due to "breach of terms committed by the respondent in allotting the whole of the work site and in making payment of bill in terms of the contract and Claim No. 5 is on damages directly flowing from the contract.

3. Mr. Roy has contended, referring to the said claims, that the learned Umpire has not entertained any evidence in support of the claimant's said claims and he has made an award not on the basis of any evidence and none of the claims raised by the claimant was proved before the Umpire.

Mr. P. K. Roy has also submitted that the award is bad and is liable to be set aside as the learned Umpire has not considered the counter claim raised on behalf of the petitioner before the learned Umpire.

4. Mr. P. K. Roy has relied on a decision of the Supreme Court in the case of [K.V. George Vs. Secretary to Government, Water and Power Department, Trivandrum and Another](#), . It is observed by the Supreme Court that it is the duty of the Arbitrator while considering the claims of the appellant to consider also the counter-claim made on behalf of the respondent and to make the award after considering both the claims and counter claims. The learned Counsel for the petitioner has also referred to another decision of the Supreme Court in the case of [Dandasi Sahu Vs. State of Orissa](#), . The decision of the Supreme Court in this case is that though the arbitrator is not bound to disclose as to what interpretation he has made and what inference he has derived from the documentary evidence, he is bound to refer in the award that he had considered all the documents placed before him, no matter whether he relies on them or discards them from consideration.

5. Mr. Roy, therefore, submits that the learned Umpire has misconducted himself or misconducted proceedings in not sustaining his award by evidence and in not considering the counter claims raised by the petitioner.

6. Mr. Bhaskar Gupta appearing with Mr. Abhijit Chatterjee for the respondent has submitted that the impugned award is a non-speaking award and it is the settled law that unless there is an error of law appearing on the face of the award, the Court cannot interfere with the award and the Court cannot also speculate as to what impelled the Arbitrator to arrive at his conclusion, if reasons are not given in the award. Mr. Gupta has also submitted that it is also the law as settled that it is not misconduct on the part of the arbitrator if the arbitrator makes an erroneous

decision both on facts, and on law. He submits that Arbitrator is the final arbiter on the question of law and facts and his decision is final.

7. Regarding the objection as to non-consideration of counter-claim, Mr. Gupta has referred to the award wherein it is stated that on careful consideration of the argument advanced by both the parties or their learned Counsel to the dispute, and after examining the drawings, copy of measurement and level books, bills and other relevant documents maintained for the work and taking into consideration the claim of the claimant and counter claim of the respondent which are merged hereto, the, learned Umpire makes the award for a sum of Rs. 5,98,500/- in full and final settlement of all their claims. Therefore, according to the learned Counsel for the respondent, it is not correct to say that the learned Umpire has not considered the counter claim of the respondent/petitioner and when there is no award on the counter claim, it is presumed that the same has been rejected. Mr. Gupta in this connection has referred to the observation of the Supreme Court in the case of [Smt. Santa Sila Devi and Another Vs. Dharendra Nath Sen and Others](#), that absence of any provision in regard to a claim is capable only of one interpretation and that is that arbitrator rejected the claim. The Supreme Court has said that it is, therefore, an instance whether the silence of the award is a clear indication, having regard to the adjudication being professedly complete and de-praemisses that the claim in that respect was not upheld. Mr. Gupta has also referred to another decision of the Supreme Court in [Union of India \(UOI\) Vs. Jai Narain Misra](#), . It is observed that when the final award professed to be made on and concerning of the matters referred to him, it must be presumed that in making it the Arbitrator has taken into consideration of the claims and counter claims.

8. In reply to the contention of the learned Counsel on behalf of the petitioner that the learned Umpire has not considered any oral evidence when the impugned award was for damages, the contention of the learned Counsel for the respondent is that, as would appear from the schedule of claims, the claimant has raised several claims starting from Claim No. 1 to Claim No. 6. It appears from the said schedule of claim that the Claim No. 1 relates to claim in respect of the payment for the value of work done and the claim on this account is to the tune of Rs. 4,98,394/- after showing certain deductions and after adjustment of amount paid. Claim No. 2 is for refund of initial deposit is for Rs. 76,210/-. Claim No. 3 is for a sum of Rs. 10,000/- for reimbursement of establishment charges. Claim No. 4 is for Rs. 2,12,465.50p claiming that the claimant was deprived of its dues arising out of the agreement at 25% of the unexecuted portion of the contract, Claim No. 5 is for Rs. 1,00,000/- on account of damages directly flowing from the contract and Claim No. 6 claiming interest. Mr. Gupta submits that claimant has claimed much more than what has been awarded by the learned Umpire. Mr. Gupta has also submitted that it is not clear, from the award whether the Umpire has awarded any sum on account of damages or on account of the claims which, according to the petitioner, rests on the claim for the damages. In this connection, it may be noted that Mr. P. K. Roy in reply

has referred to a, minutes at page 91 of the petition which states that the Claim No. 2 for a sum of Rs. 76,210/- was reduced to Rs. 36,010/-. Mr. Gupta has submitted that even taking that into account it cannot be said that the Umpire has made his award for the said sum of Rs. 5,98,500/- including the claim for damages being Claim Nos. 3, 4 and 5, assuming they are claims on account of damages.

9. On the question of perversity, Mr. Gupta has submitted that when the learned Umpire has not given any reasons and when it is recited in the award that after considering of the documents and other materials, the Umpire has made certain award, it is not open to court to speculate as to why and how the Umpire has come to his conclusion, particularly when there are no reasons in the award. Mr. Gupta has further submitted that unless there is an error appearing on the face of the award, no interference is called for and that error would only be an error of law or any legal proposition set out in the award which can be said to be erroneous. It is his submission that there is no such error of law appearing on the face of the award. It is also his submission that on the facts if the arbitrator has come to a wrong conclusion then that cannot amount to any misconduct on the part of the arbitrator. He has referred to in this connection, a decision in [Food Corporation of India Vs. Joginderpal Mohinderpal](#), .

10. After setting out the recital, the operative portion of the impugned award is as follows :

"Now I, Sri A. K. Mitra, Umpire, having taken upon myself the burden of the said reference and having perused and studied the statement of facts and counter statement of facts and all the documents relied upon by the Respective Parties including the documented minutes of the thirty two meetings and all arguments as filed with the minutes before the Joint Arbitrators relied upon by the Respective Parties and on careful consideration of the arguments advanced by both the parties or their Learned Counsels to the dispute, and after examining the drawings, copy of measurement and level books, bills and other relevant documents maintained for the work and taking into consideration the claim of the Claimant and the Counter claim of the Respondent which are merged hereto :-

Now I, Shri A. K. Mitra, Umpire publish my first and final award and declare the following:-

1. The Respondent, The West Bengal State Electricity Board (hereinafter called as the West Bengal Power Development Corporation Ltd.) shall pay to the Claimant, Messrs. B.B.M. Enterprises a sum of Rs. 5,98,500/- (Rupees five lakh ninety eight thousand five hundred) only on full and final settlement of all their claims.

2. The Respondent, the West Bengal State Electricity Board (hereinafter called as the West Bengal Power Development Corporation Ltd.) shall pay interest @ 10% (Ten per cent) only per annum on the said amount of Rs. 5,98,500/- with effect from the completion of 90 (ninety) days of declaration of this Award till the date of payment

or decree whichever is earlier.

3. NOW WHEREAS the Claimant M/s. B.B.M. Enterprises shall pay the cost of all non-Judicial Stamp papers.

4. NOW WHEREAS both the parties shall bear their respective cost of Arbitration.

I, Shri A. K. Mitra, have signed and declare this Award on this day the 22nd December, 1989 in my capacity as an Umpire

Sd/-

(A.K. Mitra)

Umpire,

Dated : Calcutta,

the 22nd December, 1989

Retd. Chief Engineer

Government of West Bengal

Irrigation and Waterways Directorate

11. As stated above, it will appear from the said award that the learned Umpire has taken into consideration both the claims of the claimant and counter claim of the respondent and thereafter he made his award as above. It will also appear from the award that having perused and studied the statement of facts and counter statement of facts and all the documents relied upon by the respective parties including the documented minutes of the thirty two meetings and all arguments as filed with the minutes before the Joint Arbitrators relied upon by the respective parties and on careful consideration of the argument advanced by both the parties or their learned Counsel to the dispute, and after examining the drawings, copy of measurement and level books, bills and other relevant documents maintained for the work and taking into consideration the claim of the claimant and the counter claim of the respondent which are merged, the learned Umpire made the said award. Therefore, I do not find any reason to hold that the learned Umpire has refused to consider the counter claim of the respondent or has not at all considered the counter claim raised by the respondent. The Supreme Court in the Santa Sila Devi's case as also Jainarayan Mishra's case referred to above clearly indicated that when the final award professed to be made on and concerning of the matters referred to him, it must be presumed that in making it the Arbitrator has taken into consideration of the claims and counter claims.

12. It has also been contended on behalf of the petitioner that the learned Umpire has not taken into consideration any oral evidence while considering the claimant's claim for damages. I have set out the award above and it is very difficult to find from the award itself that whether the learned Umpire has at all taken into consideration the claims for damages or whether he has awarded the same without having any supporting evidence. It has been clearly and in no uncertain term mentioned in the award that the learned Umpire has taken into consideration the documents relied upon by the respective parties and all other materials including the claim" of the

claimant and counter claim of the respondent while making the award. Therefore, to my mind, it is not open to the court to probe the mind of the learned Umpire so as to find out whether there is any sufficient evidence in, support of the conclusion arrived at by the learned Umpire or whether on such evidence, the learned Umpire could have taken such conclusion as has been taken in the said award. This is not at all within the jurisdiction of this Court while examining an award in a proceeding Under Sections 30 and 33 of the Arbitration Act.

13. I, therefore, do not find any infirmity in the award, not do I find any material to hold that the learned Umpire has misconducted himself or misconducted the proceedings.

14. At the hearing of this application, the learned Counsel for the petitioner has challenged the award only on the grounds set out above and the ground taken in the petition are also in substance the grounds as urged by the learned Counsel for the petitioner.

15. For the reasons aforesaid, this application for setting aside the award is dismissed with costs. Interim order, if any, is vacated.

Learned Advocate for the petitioner prayed for stay of operation of this Judgment and order, such prayer is refused.