(2012) 09 CAL CK 0018

Calcutta High Court

Case No: A.P.O. No. 60 of 2012 and A.P. No. 331 of 2004

Afcons Infrastructure Ltd.	APPELLANT
Vs	
State Of West Bengal	RESPONDENT

Date of Decision: Sept. 25, 2012

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 19, 34, 34(4)

Hon'ble Judges: Shukla Kabir Sinha, J; Ashim Kumar Banerjee, J

Bench: Division Bench

Advocate: Jayanta Kumar Mitra, Mr. Moloy Ghosh, Mr. Arijit Banerjee and Mr. Bijon Majumdar, for the Appellant; Anindya Mitra, Advocate General and Mr. Debangshu Basak, for the Respondent

Judgement

ASHIM KUMAR BANERJEE. J.

PREFACE :

1. Disputes between the parties are ordinarily resolved through legal process. The parties are free to approach the Court of law for resolution of dispute. The parties would also be free to resolve their dispute in a domestic forum by adopting the process of alternate dispute resolution. Arbitration is one of the procedures that parties may avail, deciding to resolve the issue through arbitration without approaching the Court of law. Once the parties would decide that they would resolve their dispute through arbitration and would appoint arbitrator the Arbitral Tribunal would rule on its jurisdiction within the scope of the contract under which they are appointed. Any travel beyond the scope would automatically make their award vitiated by illegality. The Tribunal is the Master of its own procedure. The procedural law including the law of evidence is strictly not applicable in the process of arbitration. The Arbitral Tribunal would decide on the dispute in the way they would feel fit and proper. Their decision would be final and binding on the parties. Earlier the award would require to be followed by a rule of Court by passing a formal

decree on the same. With the introduction of Arbitration and Conciliation Act, 1996 the award is final and binding on the parties and is available for execution as a decree through Executing Court after three months of publishing the award. The aggrieved party is entitled to challenge the award. Such challenge is restricted to the limited scope i.e. (a) fundamental policy of Indian law; or (b) the interest of India; or (c) justice or morality, or (d) in addition, if it is patently illegal".

2. When the parties would decide that persons having technical expertise should resolve their dispute, the award published by the experts would not be available for challenge merely because it lacked legal articulation. A passage from Russell on Arbitration (23rd Edition) being apt, is quoted below:

It is difficult to distinguish arbitration from expert determination. One distinction may be found in the type of procedure the parties intend to use to resolve their difference rather than in the nature of the difference itself. For example, parties appoint a valuer to determine a fair price of something. His expert opinion is required rather than an award based on submissions from the parties, although expert determination has expanded into the area of general dispute resolution. His decision cannot be challenged in the same way as the award of an arbitral tribunal. A valuer may however be sued if he provides a negligent valuation.

CONTROVERSY :

3. Afcons Infrastructure Ltd. (hereinafter referred to as ''Afcons'') became successful in obtaining a tender from the Public Works Department, (Road) of the State of West Bengal. Altogether four contracts were awarded being S-8, S-9, S-10 and S-11 for construction of a road between Panagorh-Moregram. The contract stipulated a particular time period, that Afcons could not maintain for various reasons. They prayed for extension of time that was allowed by the State from time to time. Ultimately, the project was completed. The final bill was settled and paid. Afcons however was not satisfied, as according to them, they were entitled to cost of escalation, loss of profit, additional cost for engaging labour force during the period of extension and the cost of idle labour force during the period when they could not work. The dispute arose in respect of S-10 and S-11. They raised claim on six heads. State did not agree, that gave rise to a dispute. Parties referred the dispute to arbitration in accordance with the Arbitration Clause, taking one representative each from either side constituted the Arbitral Tribunal and the third arbitrator appointed by Union of India. All the three arbitrators did have the technical expertise as they were well known in the field of construction as we are told. The Tribunal held separate sittings in the above two matters and published separate awards. We are concerned with the award covered by the contract no. S-10 whereas the other award would relate to S-11.

4. On a close look to the award we find, out of six heads of claim, arbitrator awarded nil award in respect of two claims and allowed the other four claims that too, in part.

Afcons accepted the award in both the matters. However, State filed application for setting aside in both the matters that were heard by two different Hon''ble Single Judges. In the present case, the learned Single Judge set aside the award, principally on two counts (i) the Arbitrator exceeded jurisdiction in travelling beyond the contract by not looking to the contemporary record (ii) the arbitrator failed to give reasons.

5. In the other award, the learned Single Judge dismissed the application by holding that the award was not available for judicial scrutiny. The Division Bench intervened with the award by rejecting the claim of loss of profit, however affirmed the decision of the learned Single Judge by upholding the award in respect of other three heads.

6. We heard the above appeal filed by Afcons as against the judgment and order of the learned Single Judge, setting aside the award (S-10).

RIVAL CONTENTIONS :

Appellants:

7. Mr. Moloy Ghosh, learned counsel, appearing for the appellants took us to the award appearing at pages-45 to 80 to contend, it was a reasoned award. The arbitrator gave detailed reasons in support of their ultimate conclusion.

8. Taking over from Mr. Ghosh, Mr. Jayanta Kumar Mitra, learned senior counsel, appearing for the appellant contended that the award would involve technical issues that could best be dealt with by the experts on the subjects. He referred to clauses-53.1, 53.2, 53.3 and 53.4 of the general conditions of contract to say that the arbitrators did consider the aforesaid clauses and observed that the claims made by the contractor were well within the scope of the arbitration. He contended, arbitrators considered voluminous records that were referred to in the award. The arbitrators also considered Auditor''s certificate, appearing at page-552 that would certify expense to the extent of additional fifteen per cent on the overhead expenditure. In any event, in accordance with Section 34(4), the learned Judge could have asked the arbitrators to reconsider any further book, if required, setting aside of the award was not contemplated. He referred to the orders passed by the authority from time to time extending time to perform the contract and contended that each time the reasons to support prayer for extension were considered by the State and time was extended. The work was completed well within the extended period. He further contended that the arbitrators being the members of the Arbitral Tribunal, did not have legal expertise and articulation. Being technical experts, they decided the issue. The legal articulation might be absent in the award. However, that could not be fatal. The procedure laid down under the Evidence Act did not have any role to play as per Section 19 of the said Act of 1996. They assigned reasons as would appear from paragraphs-15 and 18 of the award. They decided as to whom was at fault. They also decided on the quantum of damage and ultimately published an award. He referred to pages-80 to 84 to show that the arbitrators

themselves considered the issue and calculated the damage as per the well-established principles, relating to construction. Such expert decision was not available to the judicial review. He referred to the minutes of the meeting of the Tribunal to show detailed recording of the arguments and counterarguments that would ultimately result to the award. Referring to page-158 of Volume-II Part-II of the paper book to say, the liability was in dispute and not the quantum. On the scope of judicial review and/or the power of the Court, Mr. Mitra would refer to two Apex Court decisions in the case of K.R. Raveendranathan Vs. State of Kerala and Another, and in the case of Himachal Pradesh State Electricity Board Vs. R.J. Shah and Company, . On the technical arbitration and the extent of judicial scrutiny, he referred to four decisions which are as follows:

1. Municipal Corporation of Delhi Vs. Jagan Nath Ashok Kumar and Another, .

2. Mediterranean and Eastern Export Co. Ltd. Vs. Fortress Fabrics (Manchester) Ltd. reported in 1948 2 ELR 186.

3. Himachal Pradesh State Electricity Board Vs. R.J. Shah and Company, .

4. K.R. Raveendranathan Vs. State of Kerala and Another, .

9. On the issue of appreciation of evidence, Mr. Mitra cited two Apex Court decision in the case of Municipal Corporation of Delhi (supra) and in the case of B.V. Radha Krishna Vs. Sponge Iron India Ltd., .

STATE :

10. The learned Advocate General contesting the appeal on behalf of the State, contended, the parties made claims and counter-claims. The Tribunal rejected the counter-claims. State accepted such decision, however, rejection of counter-claims would not ipso facto deserve allowing of the claim. According to him, the arbitrators failed to appreciate the terms of the contract particularly, clauses - 53.1, 53.2, 53.3 and 53.4 Tribunal would be required to give interpretation of the said four clauses that would involve no technical expertise. The Tribunal failed to do so in the present case. The learned Advocate General contended, the contract did not stipulate for additional claims being raised. Hence, consideration of any additional claim beyond the contract was without jurisdiction. In any event, the contractor while applying for extension did not reserve their right to make any claim for additional amount. The contract was for a fixed amount, hence, the additional claims were not sustainable. According to the learned Advocate General, clause-53.1 would involve obligation on the part of the contractor to raise bill for additional work within twenty-eight days of execution, that not being done claim did not have any enforceability in law. As per clause-53, the additional claims could only be considered looking to the contemporary record. The Tribunal failed to do so. He further contended, when the contract was repudiated, the appellant did not make any objection. They did not reserve their claim at the time of making prayer for extension. Referring to the facts,

learned Advocate General contended that there had been inordinate delay in execution of the contract. Even then, the State granted extension for about four years. The contract was kept alive. At no point of time they raised any contemporaneous claim. Hence, the claim was belated and not sustainable.

11. He distinguished the cases cited by Mr. Mitra. He referred to paragraph-28 of the decision in the case of Himachal Pradesh State Electricity Board Vs. R.J. Shah and Company, wherein the Apex Court relied on one of its observations in a precedent, the arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. Relying on such observation the learned Advocate General contended that the Tribunal must travel within the contract, any stepping outside, would make the award vitiated by illegality. The other four decisions cited by Mr. Mitra were not applicable as those cases decided civil action that would make the proposition outside the scope and purview. In the English case, experts did not have the legal background. They decided question involving technical issue whereas in the present context clauses referred to above would require appropriate interpretation that would never depend upon any technical expertise. Citing an example, the learned Advocate General contended, when there was any dispute as to quality of a particular material or equipment that would certainly involve technical expertise. However, a non-legal person would not decide any question of law. The present contract was for a fixed amount and the Tribunal did not have any scope to consider any additional claim. The learned Judge rightly rejected the same. In any case, the additional claim could only be considered, had it been raised contemporaneously so that the State could consider the same taking recourse to the contemporary record. He contended, clause-53.4 was performed in breach. He lastly contended that the award not being in terms of the contract, was not sustainable. In any event, the learned Single Judge set aside the award. In absence of any legal infirmity available in the judgment and order impugned, the Court of appeal would not be competent to set aside the same. Helping the award the Court could not supplement reasons that would be absent in the original award. According to him, the award was bad for not being backed up by reasons, contrary to contract and without looking into contemporary record that were not produced. On the challenge to the award being de hors the contract, he relied on the Calcutta decision in the case of Ramanath Agarwalla Vs. Goenka and Co. and Others, and the Apex Court decision in the case of Hindustan Zinc Ltd. Vs. Friends Coal Carbonisation, . On the unreasoned award he referred to the case of S.N. Mukherjee Vs. Union of India, . On the grounds for setting aside an award he relied on the Apex Court decision in the case of Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., . On the sufficiency of reasons, Mr. Mitra relied on a latest decision of the Apex Court in the case of The Secretary and Curator, Victoria Memorial Hall Vs. Howrah Ganatantrik Nagrik Samity and Others, .

12. He lastly contended that the other decision (S-11) would have no bearing as to the subject matter was different. Form the initial stage it was treated differently. Hence, this Bench would not be in a position to know under what circumstance the

learned Single Judge declined to interfere with the award so affirmed by the Division Bench except a part of it as referred to (supra).

APPELLANT-IN-REPLY :

13. Mr. Mitra while replying, distinguished the Calcutta decision in the case of Ramanath Agarwalla Vs. Goenka and Co. and Others, by contending that a particular method was prescribed in the contract that could not be taken in isolation. The arbitrator considered the clauses and accordingly decided the issue that would not be available for judicial scrutiny. On the contemporary records, Mr. Mitra relied on pages-168-169 to contend that the Tribunal did consider the relevant records, pertaining to the contract that would be apparent from their detailed calculation given in the award. According to him, the Arbitral Tribunal got unfettered power under the contract and the additional cost so claimed by Afcons, would squarely come within the scope and ambit of arbitration. He contended that the claim was made on completion of the project. In fact it was made on the 8th day of completion. The Tribunal considered the contemporaneous record and the learned Judge erred in observing otherwise. He contended, the claim was made in respect of fifty-five months whereas arbitrators allowed only twenty-eight months cost. The claim was not allowed in toto. He referred to correspondence expressing satisfaction with regard to completion of the work. According to him, the counterclaim was rejected by the arbitrators that was based upon delay in execution that would absorb Afcons from any liability. The State accepted the said decision. Hence, they were precluded from questioning the propriety of the additional cost. According to Mr. Mitra, the additional cost was nothing but compensation and/or damage, cost due to the inordinate delay in execution of the contract. Each time Afcons explained the reason for delay. The authority accepted their contentions and extended the period. Afcons completed the work within the extended period. Hence, they would be entitled to consequential relief as to additional cost for the additional period. He contended, once the Tribunal assigned reasons insufficiency, if any, on that score, would not be fatal, warranting cancellation of the award. He contended, the Tribunal heard the parties and thereafter held internal sittings and ultimately came with a unanimous decision that would not be available for judicial scrutiny. He distinguished the decision in the case of H.P. State Electricity Board (supra) by contending that the arbitrator published a reasoned award by considering the available records.

14. Hence, the plea of unreasoned award would be of no consequence. In any event the decision was had under the old arbitration law that would be different from the present one. The decision in the case of Oil & Natural Gas Corporation Ltd. (supra) was a settled principle on the field that would not come in conflict with the present award. On the other decision (S-11), Mr. Mitra contended, the Division Bench upheld the decision of the learned Single Judge on the selfsame issue. We should follow such decision of a Coordinate Bench in ordinary circumstance. In this regard, he

referred to the decision in the case of Safiya Bee Vs. Mohd. Vajahath Hussain alias Fasi, .

APPELLANTS : DEALING WITH CASES CITED-IN-REPLY :

15. Mr. Debangshu Basak, learned counsel also appearing for the State contended, State filed SLP as against the judgment and order of the other Division Bench. Hence, the said decision did not reach finality. In any event, that would involve a complete separate award and would not have any binding effect on us. He contended, the Auditor''s certificate appearing at page-552 could not be construed as contemporary record.

CASES CITED :

M/s. A.T. Brij Paul Singh & Bros. (supra) :

16. Mr. Mitra cited the decision while giving reply to support his contention that the same issue was decided by the other Bench on the additional cost. We should ordinarily follow the same.

Municipal Corporation of Delhi (supra) :

17. Mr. Mitra relied on paragraph-4 to contend, the arbitrators acted on their personal knowledge and experience that would not be available for judicial scrutiny.

B.V. Radha Krishna Vs. Sponge Iron Ltd. (supra) :

18. Mr. Mitra cited this decision on appreciation of evidence. The Apex Court held, "It would be evident that the High Court has substituted its own view in place of the Arbitrator''s view as if it was dealing with an appeal. That is exactly what is forbidden by the decision of this Court."

Mediterranean and Eastern Export Co. Ltd. (supra) :

19. Mr. Mitra cited this English decision wherein the King''s Bench held, "the arbitrator, having been appointed because of his knowledge and experience of the trade, was entitled to fix the damages without hearing expert evidence thereon."

Ramanath Agarwalla Vs. Messrs. Goenka and Co. (supra)

20. A Full Bench decision of this Court relied on by the learned Advocate General decided the scope of judicial review. The Full Bench observed, the arbitration agreement laid down a particular method of resolution of dispute. The arbitrator must follow the same. Ignoring such method would vitiate the award.

S.N. Mukherjee Vs. Union of India (supra) :

21. The Five-Judge Bench of the Apex Court held that non-disclosure of reasons would amount to violation of principle of natural justice. The Apex Court also expressed the same view in the case of Secretary and Curator, Victoria Memorial

Hall (supra).

H.P. State Electricity Board (supra) :

22. Mr. Mitra cited this decision to contend that the arbitration clause was widely worded that would cover all disputes arising out of the contract.

Hindustan Zinc Ltd. (supra) :

23. The learned Advocate General relied on this decision particularly paragraph 13 and 14, to contend, any travel beyond the contract would vitiate the award. In paragraph-13, the Apex Court relied on its own decision in Oil & Natural Gas Corporation Ltd. (supra) particularly paragraph-31 that would include extract quoted above.

Safiya Bee (supra) :

24. Mr. Mitra cited this decision, particularly paragraph-27 to 30, to support his contention, one Division Bench should ordinarily follow the decision of the other Coordinate Bench on the self-same issue. The Apex Court observed, "pronouncement of law by a Division Bench of this Court is binding on a Division Bench of the same or a smaller number of Judges, and in order that such decision be binding, it is not necessary that it should be a decision rendered by the Full Court or a Constitution Bench of this Court".

OUR VIEW :

25. We have considered the rival contentions. We have closely examined the award. It would not be proper for us to say, it was an unreasoned one. It is settled law, insufficiency of reason would not be a guiding factor in an application u/s 34. The decisions cited by the parties referred to (supra) were based upon settled principles of law. However, the decision in the case of Oil & Natural Gas Corporation Ltd. (supra) dealt with the issue covering all aspects that would guide an application for setting aside u/s 34. Paragraph-31 would observe,

The result would be- award could be set aside if it is contrary to: (a) fundamental policy of Indian law; or (b) the interest of India; or (c) justice or morality, or (d) in addition, if it is patently illegal.

26. Coming back to the present context, we find that the contract would provide clauses including clause-53 that would deal with procedure for claims. Clause-53.1 would stipulate, if contractor intends to claim any additional payment, he would give notice of his intention within twenty-eight days after the event giving rise to the claim. Clause-53.2 would guide the State to verify and consider the claim, if any, made under clause-53.1 by inspecting contemporary record. Clause-53.3 would require the contractor to send to the Engineer, an account giving detailed particulars of such claim whereas clause-53.4 would debar any such claim, if not made as per the earlier clauses. In the instant case, the State extended the period of

completion from time to time by accepting the reasons so advanced by the contractor. State did not reserve any claim for such delay. In any event their counter-claim was rejected. State accepted such situation. The contractor made the claim on the 8th day of completion of the work. It is true, during the period of work they did not make any claim. Mr. Mitra would say, unless the work was completed, it would not be possible for the contractor to raise a definite claim. We are not in a position to decide on the issue. The work was highly technical. Three arbitrators considered all records and ultimately held in favour of the contractor. The Arbitral Tribunal allowed the claim to the extent found justified, as per their calculation. We are unable to examine the veracity of the same having no technical expertise on the subject. The learned Advocate General would say, the issue would depend upon legal interpretation of clause-53. As observed hereinbefore, the subject clauses were clear and unambiguous and would require no further special interpretation and in any event on a combined reading of the aforesaid clauses the procedure is clear that to be followed in case of additional claim. The Tribunal could not stop there. They would have to decide on the quantum after being satisfied that such cost was justified. This process could never be had except through persons having technical expertise on the subject. The Tribunal would have one representative each from both sides having the third one appointed by the Central Government. They considered the records. They made calculations and ultimately rejected two out of six claims. The other four claims were allowed partially that would not, in our view, be available for judicial scrutiny, particularly, three out of four.

27. On the loss of profit, we have gone through the decision of the Division Bench in the other case. We do not find any scope of disagreement. We are told, Special Leave Petitions are pending from both sides. We, however, intend to rely on the said Division Bench decision and apply the ratio in the present case and set aside the award on Claim No. 5 being loss of opportunity cost. Relying on the decision of the Apex Court on the subject, particularly the case of Numaligarh Refinery Ltd. Vs. Daelim Industrial Company Ltd., , the Division Bench ultimately held that such claim was unjustified and absurd. Relying on the said decision we also set aside the Claim No. 5.

RESULT :

28. The award is thus modified to the extent that the claim on account of overhead expense, equipment charges and additional cost being Claim Nos. 1, 2 and 4 to the extent allowed by the Tribunal are upheld. The other three claims being Claim Nos. 3, 5 and 6 would stand rejected.

29. The appeal is accordingly disposed of without any order as to costs.

30. Urgent certified copy of this judgment, if applied for, be given to the parties on their usual undertaking.

Shukla Kabir Sinha, J.

I agree.