(1977) 12 CAL CK 0003

Calcutta High Court

Case No: Matter No. 98 of 1972

Stresscon Engineering Co. (P) Ltd.		APPELLANT
	Vs	
N.K. Roy Chowdhury and Sons		RESPONDENT

Date of Decision: Dec. 6, 1977

Acts Referred:

- Arbitration Act, 1940 - Section 30(a), 43

Citation: 82 CWN 797

Hon'ble Judges: Sabyasachi Mukharji, J

Bench: Single Bench

Advocate: Dipankar Gupta and S. Pal, for the Appellant; P.K. Roy, for the Respondent

Judgement

Sabyasachi Mukharji, J.

The subject matter of challenge in this application under the Arbitration Act, 1940, is an award of the Umpire dated 14th December, 1973. The said award arises out of the two agreements containing arbitration clauses. Both the said agreements are dated 25th July, 1970. It appears that on that date there was a job contract between the petitioner and the respondent. The respondent had entered into a contract with the Government of West Bengal for construction of reinforced concrete pre-stressed bridge over the river Cossayee at Sadargrat, Midnapore in the State of West Bengal in or about 1966. It is the case of the petitioner that inasmuch as the construction of the said bridge involved pre-stressed concrete works and inasmuch as the respondent was not capable of doing pre-stressed concrete works, the respondent had approached the petitioner for the purpose of execution of the said contract relating to and concerning pre-stressed concrete works including design approval of the design by P.W.D. Engineers of the Government of West Bengal, construction of the pre-stressed concrete girders and construction thereof. Prior to 25th July, 1970 there was exchange of correspondence between the parties for doing the pre-stressed concrete works as also for financing the petitioner in the said job, but

no concluded contract had been entered into. It was only on 25th July, 1970 that two contracts were entered into, one for doing pre-stressed concrete works in respect of the contract under P. W. D. and the other was in respect of financing the petitioner for doing the said works. Therefore, the first contract should be considered to be the job contract and the other the financing agreement. Both the contracts contained arbitration clauses. The job contract contained the arbitration clause in Clause 15 which was to the following effect :

15. In course of any dispute between the parties relating to the execution of the job works or the terms and conditions of this agreement or otherwise relating to this agreement the same shall be referred to two Arbitrators, one to be nominated by the Contractors and the other to be nominated by the Employees and such Arbitrators shall be either retired Government Engineers of the Public Works Department, Government of West Bengal, not being below the rank of Superintending Engineers or shall be full corporate members of Institute of Engineers and in case of difference of opinion between the Arbitrators to an Umpire to be nominated by the Arbitrators before proceeding with the arbitration. The arbitration shall be in accordance with the Arbitration Act, 1940 and the statutory modifications thereof.

Similarly, the finance agreement contained an arbitration clause which was to the following effect:

11. In case of any dispute between the parties relating to the execution of the job works or the terms and conditions of this agreement or otherwise relating to this agreement the same shall be referred to two Arbitrators one to be nominated by the Borrower and such Arbitrators shall be either retired Government Engineers of the Public Works Department, Government of West Bengal, not being below the rank of Superintending Engineers or shall be full corporated members of Institute of Engineers and in case of difference of opinion between the Arbitrators to an Umpire to be nominated by the Arbitrators before proceeding with the arbitration. The Arbitration shall be in accordance with the Arbitration Act, 1940 and the statutory modifications thereof.

On or about 4th August 1971 the petitioner wrote to the arbitrators for entering upon the reference with regard to the disputes under the finance agreement. Similarly, they also wrote on that date to arbitrators for entering upon the reference with regard to the disputes under the job contract. On or about 1st September, 1971, the arbitrators entered upon reference and directions were given. Separate statements of claims were filed on 30th November, 1971. The petitioner claimed Rs. 4,21,325.72 under the job contract and Rs. 1,00,600.00 under the finance contract. Similarly, the respondent filed a counter claim for Rs. 4, 08,067.00 under the job contract and Rs. 2.83,630.00 and also Rs. 46,810.00 under the finance agreement. Thereafter separate replies were filed and separate written arguments were submitted. Between 8th January, 1972 and 18th April, 1972 there were several

hearings regarding the disputes under the job contract. Similarly between 18th April, 1972 and 29th April, 1972 hearings took place before the Jt. Arbitrators regarding disputes under finance agreement. It is alleged that on or about 29th August, 1972 Mr. H. C. Mukherjee, one of the Jt. Arbitrators published two separate awards. Mr. K. N. Bose, the other Arbitrator disagreed and there was a reference accordingly to Mr. R. N. Mukherjee, Umpire. The respondent thereupon moved an application on 22nd November, 1972 for removal of Mr. R. N. Mukherjee. By consent of the parties, on 7th February, 1973 by an order of this Court Mr. R. N. Mukherjee was removed and in his place Mr. S. K. Laha was appointed as the Umpire. On 4th April, 1973, the Umpire. Mr. S.K. Laha gave directions. On 7th April, 1973 a letter was written by the petitioner requesting the Umpire to call upon the respondent to produce certain documents. In view of some of the contentions raised, it may be necessary to refer to the said letter. The petitioner wrote to the Umpire as follows :

For proper adjudication of the above cases, it is necessary that the following particulars should be produced before you by the respondent.

1. Copies of all Running Bills as paid by P. W. D. to the respondent for the construction of Super structure of Cosseye bridge at Midnapore with details of recovery statement of materials and money.

2. Copies of all Hand Receipts of respondent for monies received as secured advance against materials and for refund of security deposits.

3. Copy of the Final Bill with all connected Supplementary Bills as paid by P.W.D. to respondent.

In spite of our repeated requests the respondent is not producing the above bills and Hand Receipts and have exhibited only a few of them to suit their advantage. They had taken the plea that the documents are not available with them and we should apply to the Court for ordering P. W. D. to produce the documents to arbitrators.

In this connection we beg to refer to page 287, Russel on Arbitration, 12th Edition, Case Law Penrive vs. William (1893) 23 Ch. 203 where it has been held that the Court cannot make an order for discovery or inspection of documents after the matter is referred to Arbitration. The Arbitrator is fully empowered to order for the discovery of the above papers.

If the respondent do not produce the above papers then it is submitted that the few Running Bills as also the accounts of money and materials produced by them should not be accepted as correct as we deny their correctness or otherwise.

We are prepared to co-operate with them by going to the office of Executive Engineer, P. W. D. Midnapore and copying out the above bills, hand receipts etc. if if they arrange necessary inspection for us from P.W.D. authorities, who will not show those documents to us otherwise.

2. On 7th April, 1973 the first meeting of the Umpire was held. In that meeting the aforesaid letter was placed and the Umpire after considering the matter observed as follows as it appears from the minutes of that date :

After hearing both parties, Umpire mentioned that due notice will be taken by him on the points raised. After he has closely and carefully examined the records, contract documents, etc he will give his ruling.

3. It is the case of the petitioner that this ruling on the production of the documents, referred to in the letter dated 7th April 1973, had not been given. On 9th October 1973 there was a reminder by the petitioner and in the letter of that date, the petitioner, inter alia, wrote as follows :

(c) Copies of all P.W.D. running bills with the Statement of recoveries for materials, machinery hire charges, penalty, if any, are necessary as corrections, and or refunds might have been made by the P.W.D. in the different bills including the last P.W.D. bill which we understand had been paid by the P.W.D. towards the end of last year or beginning of this year. As running bills are paid by P.W.D. by way of advances only and are always subject to adjustment it is absolutely necessary to examine all the bills including the final bill. N. K. Roy Chowdhury & Sons had alleged that Rs. 12,500|00 had been deducted for alleged bad workmenship by us. We want to verify this from the bills.

4. At the meeting held subsequently on 12th October, 1973 it is recorded as follows :

Before proceeding with items of agenda, Sri Velu mentioned about their written objection as per Stresseon''s letter dated 10|10|73. Umpire referred to the ruling given at the previous meeting as mentioned in proceedings. Umpire did not think it necessary to re-open the matter. Umpire stated that the letter quoted have been kept in record.

5. In order to complete the chronology of dates it may be mentioned that after 7th April, 1973, on or about 12th September, 1973 a direction was given by the Umpire at the meeting on 15th September 1973 and the agenda and comparative chart of accounts were prepared by the Umpire. On 11th September, 1973 the respondent wrote to the Umpire about certain allegations against the petitioner. Thereafter, on 11th September, 1973 the respondent wrote a letter to the Umpire referring to certain letters which will give full picture. The Umpire was requested to examine and it appears that both the petitioner and the respondent were not satisfied with abstract of accounts prepared by the Umpire. On 17th September, 1973 there was a letter from the petitioner regarding proceedings of the first meeting on 7th September, 1973 and stating that the letter of respondent dated 12th September, 1973 should be rejected. On that date again the petitioner wrote three letters to respondent. On 22nd September, 1973 there was a letter from the petitioner to the Umpire regarding abstract of accounts. At the meeting before the Umpire held on 29th September, 1973 the Umpire disallowed discussion on three letters dated 17th

September, 1973 written by the petitioner. The Umpire said that the observations in the remarks column in the abstract of accounts should be ignored and if there was any mixing up between the job contract and the finance contract the same would be sorted out later on. On this, there was a request for de novo hearing which was turned down by the Umpire. The Umpire pointed out that he would hear parties on points which he felt necessary. Thereafter, on 10th October, 1973 there was a letter regarding proceedings held on 29th September, 1973. On 12th October, 1973 the third meeting was held and attention of the Umpire was drawn to the letter dated 10th October, 1973. On 29th November, 1973 the respondent wrote a letter enclosing corrected figures of the petitioner''s statement. On 14th December, 1973 the impugned award was made. The said award of the Umpire is the subject matter of challenge in this case.

6. The first ground of attack to this award is that the Umpire mis-conducted the proceedings by not hearing the matter de novo. At the second meeting held on 29th September, 1973, the minutes recorded that Mr. Sanyal for the petitioner had made a submission for consideration of all facts de novo relating to the disputes including going through all the accounts right from the beginning till the date. To this, as recorded in the minutes the Umpire observed as follows :

Umpire observed that as per orders of the Hon''ble High Court, Umpire will function as Umpire for disputes considered by the Jt. Arbitrators and he has entered into reference from 14.4.73 as Umpire. Umpire further reiterated that he does not feel it necessary to take up any new matter other than the various statements already placed before Arbitrators and considered by the two arbitrators which are all in the record. It was not necessary for the Umpire to go through the hearing of dispute ''de novo''. Umpire will particularly deal the point and statements on which he feels further clarification is necessary.

Umpire mentioned that all the points raised in Accounts matter have been raised before Arbitrators and the Umpire is not inclined to go on these points all over again. In the present sitting he (Umpire) will consider the disputed part of the accounts and try to find the reason of difference between the parties, as appearing from the papers filed. As such, prayer of Sri Sanyal cannot be entertained.

7. There was no hearing, as such, de novo, by the Umpire. Now, the question is, has the Umpire committed any error in not doing so ? What the Umpire stated would appear from what is recorded in the minutes, as mentioned hereinbefore. He stated that he did not feel it necessary to take up any new matter other than various statements already placed before the Arbitrators and considered by the Arbitrators. The Umpire was justified in not considering any new matter. But the Umpire observed that all the points raised in the accounts had been raised before the Arbitrators and the Umpire was not inclined to go into these points all over again. He further said that in that sitting he would consider the disputed parts of the accounts and try to find out the reason of difference. Therefore, according to the

Umpire, he would not go over again the points which had been gone over by the Arbitrators but he would only consider the disputed points and give his ruling on the disputed parts. The question is whether the Umpire was justified in following such a procedure.

8. It has been noted in Russel on Arbitration, 18th Edition, at page 201 that the powers and duties of an Umpire who is called upon to act are, in general, the same as those of the Arbitrators. The Umpire must hear the evidence of the parties and their witnesses if application is made to him to do so by either party notwithstanding the same evidence had already been adduced before the Arbitrators. The Umpire is not justified in the face of objection of other party in taking any part of the evidence from the notes of the Arbitrators unless there is a special provision in the submission permitting him to do so.

9. Now, in this case, there was no special provision permitting the Umpire to rely on the notes or on the records or evidence or the arguments submitted before the Arbitrators. It was a fresh hearing on the points of accounts urged before the Arbitrators. There was perhaps no question of examining any witnesses either before the Arbitrators or before the Umpire, as such, but there was the question of examining the accounts both before the Arbitrators and afresh before the Umpire. This fresh examination of the detailed accounts was not allowed by the Umpire. There was a demand for the same and there was no special provision in the Arbitration Agreement which permitted the Umpire to rely on the submissions made before the Arbitrators as such. This position is admitted in the affidavit-in-opposition. The petitioner was entitled to a de novo hearing in the facts and circumstances of this case.

10. Reliance in this connection may be placed on the observations of the Supreme Court in the case of The Kalyan People''s Co-operative Bank Vs. Dulhanbibi Aqual Aminsaheb Patil, at page 1073. In the case of State vs. R. J. Shah N Co. AIR 1969 Mys 237 it was observed that the Umpire had to hear the evidence de novo if the application was made to him to do so by either party, notwithstanding that the same evidence had already been adduced before the Arbitrators and the Umpire could make his award on the notes of the evidence taken by the arbitrators only if no party objected. In the case of The Industrial Gases Ltd. Vs. The Ganesh Flour Mills Co., Ltd., , a similar view was expressed by a learned single judge of the Allahabad High Court. In this case having regard to the nature of the disputes between the parties and when there was a specific demand for de novo hearing as such, by the refusal of the Umpire there has been a legal misconduct of the proceeding and the award resulting therefrom has got vitiated thereby.

11. The next challenge to the award was that the Umpire misconducted himself by confining the case to the abstract of accounts. The Umpire had prepared certain abstract of accounts as it appears from pages 98 and 99. There were certain mistakes in the said abstract of accounts which were pointed out by the petitioner.

The respondent also was not happy with the said abstract of accounts. The Umpire recorded in the minutes later on that the mistakes would be corrected and the remark portion should be ignored. On behalf of the petitioner it was contended that the Umpire had confined himself only to certain items in the preparation of the abstract of accounts and this showed non-application of mind. I am, however, unable to accept this criticism of the procedure followed. It appears that the Umpire had prepared an abstract and the Umpire had given notice of that abstract to the parties and discussed the abstract and any error in the said abstract, which was pointed out to him, the Umpire had decided to ignore. Having regard to this procedure it appears to me that the Umpire had treated this abstract as a tentative abstract and had invited submissions on the same. In following this procedure the Umpire was not doing anything improper behind the back of the parties. In the aforesaid view of the matter there was no illegality or impropriety in the procedure followed by the Umpire. Reliance in this connection may be placed on the observations of the Punjab High Court in the case of National Electric Supply and Trading Corporation Private Ltd. Vs. Punjab State and Another, . I am, therefore, unable to accept this challenge to the award of the Umpire.

12. The next challenge to the award is on the ground of the violation of the principle of natural justice. It was alleged that the petitioner was not given an opportunity to prove the amounts that the respondent had received from the P.W.D. It is apparent from the facts of the case that the respondent had a contract with the P.W.D. and the petitioner was entitled to a proportion of the amount received by the respondent. The petitioner wanted all the running bill''s as well as the final bill. That is apparent from the documents which I have referred to hereinbefore. It appears that copies of the running bills had been produced. As a matter of fact from Ext. Z before the Umpire and which has been sent to this Court, it appears that abstract of the particulars of all running bills were available. But it still does not appear that the final bill was produced or the contents of the final bill were made known to the Umpire. The same might not have been in possession of the respondent, but the Umpire, by use of the powers conferred u/s 43 of the Arbitration Act could have directed the parties to move the Court for production of such final bill. Moreover in the letter the petitioner had indicated the fact that the petitioner was willing to go to the office, of the P.W.D. along with the respondent for taking copies of such final bill. Such prayer of the petitioner was not acceded to. Therefore, in my opinion, there has been ignoring of material documents In the case of K.P. Poulose Vs. State of Kerala and Another, , the Supreme Court observed that misconduct u/s 30(a) of the Arbitration Act, 1940, did not have a connotation of moral lapse. It comprised legal misconduct which was complete if the Arbitrator on the face of the award had arrived at an inconsistent conclusion even on his own finding or arrived at a decision by ignoring very material documents which throw abundant light on the controversy to arrive at a just and fair decision. It is apparent from the minutes, therefore, that the final bill which was considered to be very material by the petitioner and which

might have thrown a lot of light on the controversy, was not caused to be produced and no effort was made to have the document produce by the provisions of section 43 of the Arbitration Act, 1940. In so conducting the arbitration proceedings, in my opinion, the Umpire misconducted the said proceedings.

13. It was contended that in relying on the abstract of accounts the Umpire had indicated a biased mind. This criticism I am, however, unable to accept for the reasons already mentioned by me.

14. It was, then, contended that the Umpire was in error in making one award in respect of two separate references. It was submitted that there were two separate contracts containing two separate arbitration clauses. According to the petitioner, two separate sets of arguments had been filed. Therefore, the Umpire was in error in making a composite award. On the other hand, it appears that the order of the Court which appointed the Umpire was one order in respect of two agreements. Though there were two different agreements, the agreements were closely connected and the disputes were closely inter-linked. In the background, in my opinion, there was no error in making one award in the facts and circumstances of the case by the Umpire. Reliance in this connection may be placed on the observations of Mr. Justice Bachawat in the case of Murli Tahilram v. T. Asoomal & Co. 59 C.W.N. 715. Reliance was also placed on certain observations in the case of Prabartak Commercial Corporation Vs. Ramsahaimull More Ltd., . The facts of that case were however different. In the instant case, as I have mentioned before, two references were closely interlinked and the disputes were closely connected. Furthermore, the reference and the appointment of the Umpire was by one order. Several other decisions were referred to me. But in the view I have taken it is not necessary for me to deal with the said decisions in detail.

15. The other ground on which the award was challenged was that there was non-application of mind because the Umpire had observed in the recital portion of the award as follows :--

Before the learned Arbitrators, Stresscon Engineering Co. (P) Ltd. filed a claim of Rs. 2,90,981.26 (Rupees two lakhs ninety-eight thousand nine hundred eighty one paise twenty six) against Job Contract and Rs. 1,20,600.00 (Rupees one lakh twenty thousand six hundred) against the Finance Agreement. In the counter claim, M|s. N. K. Roy Chowdhury & Sons, filed a claim of Rs. 4,01,189.00 (Rupees four lakhs one thousand one hundred eighty nine) against Job Contract and Rs. 3,86,368.72 (Rupees three lakhs eighty six thousand three hundred sixty eight and paise seventy two) against Finance Agreement.

It was submitted that the Umpire had committed error in not taking the proper view of the matter and completely ignored certain claims. The petitioner had filed a claim of Rs. 4,21,325.72 against the Job Contract and not for Rs. 2,98,981.26 as stated in the said recital. Similarly, the petitioner had claimed a sum of Rs. 1,00,000.00 against

the said Finance Agreement and not Rs. 1,20,600.00 as alleged in the said award. The respondent had filed a claim of Rs. 4,08,067.00 against the Job Contract and Rs. 2,83,630.00 and Rs. 46,810.00 against the Finance Agreement and not Rs. 4,81,000.00 against the Job Contract or Rs. 3,86,368.00 against the Finance Agreement. On behalf of the respondent it was, however, urged that the sums mentioned in the award of the Umpire were the sums in respect of which the petitioner had maintained its claim before the arbitrators. On a careful scrutiny, the said amounts also do not tally. But quite apart from that the Umpire, in my opinion, should not have in its award or in its proceeding indicate any figure which leads to the possibility of the view that the Umpire had not taken the correct figures into consideration. After all in all judicial and quasi judicial proceeding it is vital not only to do justice but also to conduct the proceedings in such manner that justice appears to have been done. Both these are vital. If the procedure or the conduct of the authorities indicate that justice does not appear to have been done, such a proceeding becomes vulnerable to attack. Having regard to this aspect of the matter in conjunction with the failure of the Umpire to allow production of the documents u/s 43 of the Act that is, the final account bill and the refusal of the Umpire to hear de novo, though asked for, in my opinion, the proceeding before the Umpire was irregular and such an award resulting from such a proceeding is liable to be set aside.

In the premises, the award is set aside. In the facts and circumstances of the case, each party will pay and bear its own costs.