(1992) 03 CAL CK 0024

Calcutta High Court

Case No: Award Case No. 281 of 1991

M/S. Coal India Ltd.		APPELLANT
	Vs	
Associated Coal Agency		RESPONDENT

Date of Decision: March 13, 1992

Acts Referred:

- Arbitration Act, 1940 - Section 12, 20, 30, 33, 8(2)

Citation: 96 CWN 1229

Hon'ble Judges: Prabir Kumar Majumdar, J

Bench: Single Bench

Advocate: P.K. Mallick, for the Appellant;P.K. Ghosh, for the Respondent

Final Decision: Dismissed

Judgement

Prabir Kumar Mazumdar, J.
The petitioner by this application u/s 30 and 33 of the Arbitration Act has challenged an Award dated 30th August, 1990 passed by Sole Arbitrator on several grounds taken in the petition. At the hearing of this application, the Counsel for the petitioner has pressed two grounds as follows :

V) For that the documents and/or papers produced before the learned Arbitrator were not considered at all inasmuch as at least the same does not appear from the impugned award. In the instant case the said impugned award ex-facie does not appear that the learned Arbitrator did not mention that he has referred to or consider the document placed before him in respect of the claim of the respondent herein and on this ground alone the impugned award of the learned Arbitrator dated 30th August, 1990, suffers from non-application of mind thereby amounting to legal misconduct and thus liable to be set aside and/or quashed by this Hon''ble Court.

VIII) For that the supplementary claim made by the claimant is also bad and that the Arbitrator cannot pass award upon the said supplementary claim on that ground that no leave was granted in course of herein, which is very much evident from the minutes of the Arbitration proceedings.

2. The Counsel for the petitioner has submitted that the documents produced before the Arbitrator were not considered at all inasmuch as the same does not appear from the impugned award. It is submitted on behalf of the petitioner that it is imperative that the Arbitrator must mention in the award that he considered all the documents, the learned Counsel for the petitioner contends that though the Arbitrator is not bound to disclose as to what interpretation he has made and what inference he had derived from the documentary evidence, he is bound to mention in the award that he had considered all the documents placed before him. The learned Counsel for the petitioner submits that the impugned award ex-facie does not mention that he referred to or considered the documents (sic) before him in respect of the claim of the respondent herein. Therefore, the impugned award dated 30th August, 1991, as contended on behalf of the petitioner, suffers from non-application of mind amounting to legal misconduct and thus the impugned award is liable to be set aside or quashed.

3. The counsel for the petitioner in support of the aforesaid contention has placed heavy reliance on a decision of the Supreme Court in a case of Dandasi Sahu Vs. State of Orissa, where the Supreme Court has observe, inter alia, 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.

4. The impugned award is as follows :

The Respondent, M/s. Coal India Ltd. Calcutta to pay Rs. 3,11,903/- (Rupees three lakhs eleven thousands nine hundred and three only) to the Claimant M/s. Associated Coal Agency, Calcutta.

5. It is submitted by the counsel for the petitioner that the said impugned award does not contain any recital, and in absence of any recital it is not possible to find out whether the arbitrator has considered all the documents placed before him before making the said award. The counsel submits that it is not possible to find out whether the arbitrator has applied his mind to the disputes referred to him for adjudication and what is the scope of his jurisdiction in the reference.

6. The Counsel for the respondent has submitted that it is not necessary to the validity of the award that there should be any introductory recital. The Counsel submits that the award may be good, although the arbitrator has neglected to set out his authority or to state what is the scope of his authority or what he has considered to support his

conclusion. In support of this the Counsel for the respondent has referred to a passage in Russel on the law of Arbitration, 19th Edition Page 332.

7. The Counsel for the petitioner has submitted that in the instant case whether the arbitrator has applied his mind to the documents or other materials placed before him can be ascertained from the minutes of the sitting of the arbitration proceedings before the arbitrator.

8. On the decision of Supreme Court, Dandasi Sahu Vs. State of Orissa, relied on by the Counsel for the petitioner, it is the submission of the Counsel for the respondent that in this case the Supreme Court held that award in question suffered on the ground of non-application of mind of the arbitrator, and the supreme Court by referring to the order sheet of the arbitration proceedings agreed with the consulting of the High Court that the award suffered from non-application of mind amounting to legal misconduct.

9. Drawing my attention to the relevant minutes of this arbitration proceedings in the instant case held on 2nd and 3rd April, 1990 (some of which annexed to the petition), the Counsel for the respondent has submitted that the arbitrator has mentioned that claimant and respondent agreed to the issues referred to in the said minutes, framed for arbitration. In the minutes of the sittings held on 17th and 18th August, 1990, it is mentioned "During the sittings of the previous hearing, the parties were advised to submit certain documents and statements. They have submitted them to the extent possible. The Sole Arbitrator examined those documents and statements and obtained necessary clarification. Arguments and counter arguments of the claimant and respondent were heard". In another minutes dated 21st, 22nd and 23rd June, 1990 the arbitrator stated that "arguments counter arguments in respect of all the seven issues had been heard and relevant documents verified. The claimant and respondent were directed to submit additional documents evidences in support of their claims/counter claims filed. The parties made note of further documents to be filed". The counsel for the respondent contends that from the minutes it will clearly appear that the arbitrator had considered all the documents placed, and also had given all reasonable opportunities to the parties to file their respective documents. It is, therefore, the submission on behalf of the respondent that there has-not been and cannot be any non-application of mind of the arbitrator amounting to legal misconduct.

10. I will now deal with the first contention of the petitioner. I have set out above the award which is now under the challenge in this proceeding It is true that the arbitrator in his award does not mention that he has referred to or considered the documents placed before him. The petitioner referring to the decision of Supreme Court in Dandasi Sahu Vs. State of Orissa, contends that the impugned award for such omission is liable to be set aside and should be set aside and quashed.

11. The observation of the Supreme Court in Dandasi Sahu''s case is that "the arbitrator is bound to refer in the award that he had considered all the documents placed before

him no matter whether he relies or discards them from consideration", was made in the context whether there has been any non-application of mind. As appears from paragraph 3 of the judgment (page 1130 of the report), the Supreme Court had looked into the order sheet of the arbitration proceedings in order to find whether the Arbitrator had applied his mind to the documents placed before him.

12: The case before the Supreme Court was that the claimant raised certain disputes and in terms of the arbitration agreement he requested the Chief Engineer to nominate an arbitrator. The Superintendent Engineer was nominated as the Sole Arbitrator to decide the dispute and give the award. The arbitrator entered upon the reference. The claimant filed his statement of claim. The State of Orissa filed a written statement and the arbitration proceedings continued for sometime, but before the arbitrator could make the award, an application before the Subordinate Judge, Bhubaneswar was filed under Sections 8(2) and 12 of the Arbitration Act. The learned Subordinate Judge removed the arbitrator and appointed Chief Engineer Paradip Port as the Sole Arbitrator to decide the disputes between the parties. Since the said Chief Engineer expressed his inability to arbitrate, by another order of court another Superintendent Engineer was appointed as Sole Arbitrator. This arbitrator entered on the reference, got all the relevant records from the previous arbitrator and then continued the hearing.

13. The Supreme Court in considering the award observed that in the award though it refers to getting all the relevant records from the ex-arbitrator, there is no reference to the hearing of the parties or consideration of documents relating to the original claim and further, in the order sheet it had been mentioned that both parties agreed that they have nothing more to add except what had been already given in the respective claim and counter statement and what had been recorded in the deposition already made before the previous arbitrator. The Supreme Court found that the reference to depositions already made was incorrect as it was admitted by both the parties that no deposition was at all recorded before the previous arbitrator nor was there any record of the previous arbitrator showing such oral evidence was recorded by him. In this context, the Supreme Court held 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 relied on them or discards them from consideration.

14. On a perusal of this decision of the Supreme Court, it appears to me that Supreme Court did not intend to lay down this proposition that if there is any omission as to the recording of consideration of documents in the award Itself. then the award was liable to be set aside. If it appears to Court with reference to the minutes or the order sheet, as the case may be, that the arbitrator had entertained the documents submitted by the respective parties and considered them before making an award, then. In my view, it cannot be said that mere omission to mention in the award that the arbitrator considered all documents would be a ground for setting aside the award.

15. In the facts of this case. I have already referred to the relevant minutes. It will appear from the minutes of the first sitting, that the claimant a respondent accepted for admission by the arbitrator the photocopies of certain documents annexed with claimants statement and counter statement. Claimant agreed to furnish clear copies of certain documents which were not legible. It was further agreed by both the parties that during the course of arbitration proceedings additional documents, if any, required will also be submitted with the consent of the other party. In the minutes of the meeting held on 21st, 22nd and 23rd June, 1990 the Arbitrator has stated that argument and counter arguments in respect of the seven issues had been heard and relevant documents verified. The claimant and respondent were directed to submit, some additional documents/evidences in support of their claim/counter claims. The parties have made note of the further documents etc., to be filed. In the last minutes of the meeting held on 17th and 18th August. 1990 it has been stated that during the sitting of the previous hearing, parties were advised to submit certain documents and statements. The Sole Arbitrator examined those documents and statements and obtained necessary clarifications. Arguments and counter arguments of the claimants and respondents were heard. The Sole Arbitrator informed the parties that no further sittings are required and that the award will be issued in due course.

16. All the aforesaid minutes were duly signed by the parties. It will appear therefrom that the arbitrator has given sufficient opportunity to the parties to adduce the documents in support of their respective claims, the arbitrator examined those documents and got the documents verified before making the impugned award. It also appears from the petition, paragraph 23 thereof, that the arbitrator examined the documents and necessary papers which were filed by the respective parties and the arbitrator (sic) the arguments of the claimant and the respondent. Therefore, it Cannot be said that the documents or papers produced before the arbitrator were not considered at all, as at least the same does not appear from the impugned award, as sought to be argued on behalf of the petitioner. It is true that the award ex-facie does not mention that the arbitrator had considered the documents placed before him. I am, however, unable to hold that for such omission the award is vitiated or for such omission, the award is liable to be set aside. In my opinion, this is not the proposition of law sought to be laid down by the Supreme Court in the said decision of Dandasi Sahu Vs. State of Orissa, It is true that no recitals are there in award and it is not possible to find whether the arbitrator has considered those documents. It would further be clear with reference to the minutes referred to above that the arbitrator had considered the documents, examined them before making his award. As observed by Russel, it is not necessary to the validity of the award that there should be any introductory recital. The award may be good, although the arbitrator has neglected to set out his authority or fails to recite that he has taken a view of the premises where a view was enjoined before proceeding in reference. (Russel on the Law of Arbitration 19th Edition page 332). The author has. however, made an observation that though recitals are not essential, it is advisable that they should be made in order to explain the award. But omission of recital is also not a ground for setting aside the award or that such omission is an instance of legal misconduct on the part of the arbitrator.

17. I, therefore, do not accept this contention of the petitioner that for this ground the impugned award suffers from non-application of mind amounting to legal misconduct and for such legal misconduct this award is liable to set aside.

18. The next contention of the petitioner is that the claimant filed a supplementary claim before the arbitrator which was not within the scope of the reference and the Arbitrator cannot pass an award upon the said supplementary claim. It will appear from the minutes referred to above that during the hearing the claimant mentioned that an additional claim was to be made in respect of the fixed expenses for which the claimant would submit a supplementary claim before 16th April, 1990 with a copy to the respondent. The respondent (the petitioner herein) stated before the arbitrator that this additional claim would have to be examined in all its aspects as and when the res pendent. (the petitioner) received the supplementary claim and the respondent (the petitioner) wanted time upto 30th April, 1990 for submitting comments/ counter statement thereof. It also appears from the another minutes of the meeting held on 21st, 22nd and 23rd June that the claimant submitted a supplementary claimant''s statement and it may be noted that the respondent had not filed counter statement although the respondent requested time upto 30th April. It is also noted that the respondent did not seek any extension of time for filing comments or statements.

19. It would thus appear that the respondent-petitioner did not raise any objection to the filing of the supplementary claim but on the contrary agreed to additional issues being raised on the basis of the additional claim. Having fully participated in the arbitration proceedings without raising any objection as to the submission of the said supplementary claim, the petitioner should not be allowed to raise such objection when it is found that the award has gone against the petitioner.

20. The arbitration is in pursuance to the order of Court. The parties may enlarge the scope of reference by inclusion of a fresh claim of dispute and when the claimant put forward some additional claims covered by the agreement, it would be competent to the arbitrator to entertain and decide the dispute. It cannot be said that there is want of initial jurisdiction in entertain such fresh claim. It is a case of feeding the existing jurisdiction by enlargement of the scope of the reference. The respondent has relied on a passage in the case of Raja Bahadur Giriwar Prasad Narain Singh Vs. Dukhu Lal Das and Others, The Counsel for the respondent has relied in a passage at page 98 of the Report being paragraph 23 of the judgment. It has been observed by the Supreme Court that it was open to the parties to enlarge the scope of a reference by inclusion of a fresh dispute, and it was not an instance of lack of initial jurisdiction, but a feeding of existing jurisdiction by an enlargement of the scope of the reference.

21. In the Present case the claimant raised certain additional claim which according to the claimant was covered by the original reference and the petitioner was asked to consider the said claim and petitioner in fact asked for time to file statement or comments on the said additional claim of the claimant Petitioner, however, did not file any statement of

claim on the additional claim, but the petitioner allowed the issues to be raised on those additional claim and made its submission thereon.

22. In the facts of the case, I cannot hold that the arbitrator in entertaining such additional claim acted beyond the scope of the reference or that he had no jurisdiction to entertain such claim. The parties made their respective submissions on the additional claim and allowed the arbitrator to consider the documents in respect of such claim and now the petitioner can not be allowed to challenge the award for lack of jurisdiction. The petitioner invited the arbitrator to consider such claim and also submitted before the arbitrator that petitioner would submit its comments and counter statement on the question of additional claim but for some reason or other the petitioner did not file any counter statement on the additional claim but fully participated in the proceedings, made submission on the issues pertaining to additional claim. I do not see that the arbitrator lacked in initial jurisdiction to entertain such additional claim and there (sic) bar to the parties enlarging the scope of the reference before the arbitrator, it may, however, be said that if the reference is made on an application u/s 20 of the Arbitration Act referring the disputes annexed in the petition, then the arbitrator cannot enlarge the scope of reference and entertain fresh claim without further order of reference from the Court. In the present case there is no reference u/s 20 of the Arbitration Act.

23. I, therefore, find that there has been no instance of legal misconduct on the part of the arbitrator, the arbitrator has taken into consideration all the relevant documents placed before him, heard the parties, and after considering all aspects of the case, as would appear from the minutes of the meeting of the arbitration referred to above, the arbitrator has made his award. Since this impugned award is unreasoned award and no legal proposition was made as the basis of the award, this award cannot be interfered with.

24. The contentions raised by the petitioner fail. Several grounds have been taken in the petition but as stated above, the petitioner has only pressed those two grounds as mentioned above.

25. I do not find any infirmity in the award nor do I find that the arbitrator is guilty of any legal misconduct nor that he misconducted himself or the proceedings. I am also of the view that the arbitrator had not exceeded his jurisdiction and he acted within the scope of the reference.

26. For the aforesaid reasons, this application for setting aside the award fails and is dismissed. Interim order, if any, is vacated. No order as to cost. Learned Advocate for the petitioner asked for stay of the operation of this judgment and order and such prayer is refused.