

Executive Officer, Durgapore Notified Area Authority, City Centre Vs M/s. Emergency Construction and Others

Court: Calcutta High Court

Date of Decision: Oct. 5, 1983

Acts Referred: Arbitration Act, 1940 " Section 15(1), 17, 18, 18(1), 18(1)
Civil Procedure Code, 1908 (CPC) " Order 38 Rule 1, Order 38 Rule 5

Citation: 88 CWN 262

Hon'ble Judges: S.N. Sanyal, J; Anil K. Sen, J

Bench: Division Bench

Advocate: Tarun Chatterjee, for the Appellant; S.P. Roy Chowdhury and Subhra Kumar Mookerjee, for the Respondent

Final Decision: Dismissed

Judgement

Anil K. Sen, J.

Durgapur Notified Area Authority, the respondent in a proceeding u/s 18 of the Arbitration Act (hereinafter referred to as the respondent) is the petitioner before us in this revisional application. The order impugned is the one dated March 8, 1982, passed by the learned

Subordinate Judge, Burdwan in Title Suit No. 137 of 1982 allowing such an application filed by Messrs. Emergency Construction (hereinafter

referred to as the applicant). On May 20, 1980, the applicant entered into a contract in writing with the respondent for the construction of galleries

with ancillary works for Kanu Sidhu Stadium at City Centre Durgapur. Under the agreement the construction was to be completed within 9 months

and the applicant is to be paid on bills submitted from time to time on works done. The estimated cost was more than 34 lakhs and the respondent

was to provide some of the building materials.

According to the applicant on the failure of the respondent to provide designs and building materials which they were to provide, there was no

progress of work and the applicant was constrained to write to them that the applicant would be forced to stop their work unable to hold on idle

labour all the time beyond schedule. Thereupon, the respondent agreed to refer the matter to arbitration in terms of the arbitration agreement

between the parties and also appointed the Civil Engineer (Plant Construction) D.S.P. to be the arbitrator. The respondent on the representation

that the award of the arbitrator would be final requested the applicant not to stop the work of construction but keep it going.

2. Thus the dispute between the parties Was referred to arbitration and the arbitrator made an award. He awarded a sum of Rs. 5,25,000/- to the

applicant for the due fulfilment of contractual obligation and completion of works the said sum being paid in proportion to the work completed. He

further directed the applicant to complete the construction by 31.3.83. and the respondent was directed to arrange and issue structural steel plus a

normal percentage to cover their overhead to enable the contractor to plan and organise the structural work with diligence and speed. The award

was made on July 1, 1982, and was filed in court on July 29, 1982. The respondent appeared on service of notice of filing of the award and on

September 24, 1982, filed an objection u/s 30 praying for setting aside the award. The applicants in their turn not only filed an objection to the said

objection u/s 30 but in their turn filed an application u/s 18 of the Arbitration Act for an order directing the respondent to deposit the awarded

amount in court with liberty to the applicant to withdraw the same on furnishing security.

3. Substance of the case made out by the applicant in this application is that the tender value of the contract had gone up abnormally in view of the

fact that it could not be completed within time due to failure on the part of the respondent to provide for materials and designs and drawings as per

stipulation. In the result the resources of the applicant had been totally consumed and they were left with no fund to proceed further with the work

even if the respondent supplied the materials, designs and drawings. It is further alleged that the award was made practically on consent and the

respondent solely with the object of delaying and defeating the claim of the applicant had filed the objection on false and frivolous grounds. It is

further said that the respondent was trying to delay the payment solely for the purpose of throwing out the applicant from further execution and

completion of the work. This application was strongly contested by the respondent.

4. The learned Subordinate Judge allowed the prayer made in that application in part by the order dated December 2, 1982, when he directed the

respondent to deposit half the awarded money in court. In allowing such a prayer the learned Subordinate Judge observed that the objection u/s

30 of the Arbitration Act was prompted by a motive of delaying and / or obstructing the execution of the decree to be passed on the award and

further on the ground that such an objection had not been filed within the time prescribed by section 30. Since such an order was passed without

considering the objection raised by the respondent, this court suspended the operation of the order and directed the learned Subordinate Judge to

dispose of the objection to that application raised by the respondent. By the order impugned, the learned Subordinate Judge has overruled those

objections and reaffirmed the earlier order made by him. The learned Subordinate Judge this time found that the applicant's allegation that the

respondent was trying to delay and defeat their claim was admitted by the respondent and it was further found that the award related to the work

already done. Hence, there is no reason why the application u/s 18(1) of the Act should not succeed. Feeling aggrieved the respondent has now

preferred the present revisional application. Mr. Chatterjee appearing on behalf of the respondent has seriously assailed the order so passed by the

learned Judge. According to Mr. Chatterjee, section 18 of the Arbitration Act is a provision similar to Order 38 Rule 1 of the CPC and the court

must insist upon strict fulfilment of the requirement before any order is made. Mr. Chatterjee contends that merely pleading the terms of the section

is not sufficient. One must plead and prove some overt act by the person against whom an award has been made to show that by such act the said

person is trying to delay, defeat or obstruct the execution of any decree that may be passed upon the award. In the present case, according to Mr.

Chatterjee, the respondent has not done anything which can show that the respondent is intending or attempting to delay defeat or obstruct any

such decree that may be passed upon award. According to Mr. Chatterjee, the learned Judge was in error in thinking that the respondent by filing

an objection u/s 30 of the Arbitration Act for setting aside the award made themselves liable to suffer an order u/s 18 of the said Act.

5. Mr. Roy Chowdhury appearing on behalf of the applicant, on the other hand, has contended that the terms of section 18 of the Arbitration Act

is much wider than Order 38 Rule 1 of the Code. u/s 18 the Court can pass any interim order and the Court is not restricted to passing a particular

order as contemplated by Rule 1 or Rule 5 of Order 38 of the Code. Secondly, it has been pointed out by Mr. Roy Chowdhury that unlike Order

38 Rule 1 or Rule 5 of the Code, here the Court's jurisdiction is not limited to making of an order only on an establishment of some acts as

specified in Order 38 Rule 1 or Rule 5 of the Code having been committed by the party. Lastly, it has been contended by Mr. Roy Chowdhury

that section 18 of the Arbitration Act is much wider in its scope. The Court is vested with jurisdiction to make any appropriate interim order which

may be necessary not only to prevent and attempt at delaying, defeating or obstructing the decree that may be passed upon the award but also to

assure speedy execution of the award itself as and when the facts of a particular case so demands and renders making of such an interim order just

and necessary. The last of the aforesaid contentions of Mr. Roy Chowdhury has been contested by Mr. Chatterjee. According to Mr. Chatterjee,

an award is not executable until a decree is passed upon the award. It is inconceivable, according to Mr. Chatterjee, that the Court by an interim

order would execute an award when the proceeding for setting aside the award itself is still pending and no decree has yet been passed upon the

award.

6. We have considered the rival contentions that have been put forward before us by Mr. Chatterjee and Mr. Roy Chowdhury. There was no

provision like section 18 of the present Act in the Arbitration Act of 1899. Under that Act there was no express bar to the Court executing an

award even before the Court had pronounced its judgment on the award that a decree to follow. As a matter of fact, some of the High Courts had

held as such on the interpretation of section 15(1) of the old Act. The legislature intervened and changed the entire scheme. u/s 17 of the present

Act the Court will have first to pronounce a judgment in accordance with the award and upon the judgment so pronounced a decree shall follow. It

is then only that the decree becomes executable. Having imposed such a bar to the executability of the award itself before a judgment is

pronounced thereon, the legislature thought it necessary to provide for interim safeguard to the person in whose favour an award has been made.

That provision is section 18 of the present Act which may be set out as hereunder.

Section 18 (1) Notwithstanding anything contained in section 17, at any time after the filing of the award, whether notice of the filing has been

served or not, upon being satisfied by affidavit or otherwise that a party has taken or is about to take steps to defeat, delay or obstruct the

execution of any decree that may be passed upon the award, or that speedy execution of the award is just and necessary, the Court may pass such

interim order as it deems necessary.

(2) Any person against whom such interim orders have been passed may show cause against such orders, and the Court, after hearing the parties,

may pass such further orders as it deems necessary and just.

7. On the terms of this section it is quite clear that it is not so restricted as is the case with Order 38 Rules 1 and 5 of the Code of Civil Procedure.

In our view, Mr. Roy Chowdhury is right in contending that this section empowers the Court to choose an interim order in any form and the

exercise of such jurisdiction is again not strictly restricted to eventualities specified in Rule 1 or Rule 5 of Order 38 of the Code.

8. It is apparent on its terms that this section contemplates two situations in which the Court may be called upon to make an interim order. The first

of such a situation is to prevent any attempt on the part of the person against whom the award has been made to delay, defeat or obstruct

execution of the decree that may be passed upon the award. When the power u/s 18 is to be exercised for this purpose, we agree with Mr.

Chatterjee that the Court must satisfy itself that having regard to some overt act on the part of the person against whom the award has been made,

he is trying to delay, defeat or obstruct the execution of the anticipated decree that may be passed upon the award. Mere quoting terms of the

section or merely alleging that filing of an objection to set aside the award is itself a ground for exercise of powers u/s 18 cannot be a ground on

which the Court can proceed to exercise its powers under the first part of this section. If the objection against the award is false and frivolous it is

open to the Court to reject it as such and then pass a judgment on the award. Not having done so it would not be just and proper to hold that filing

of such an objection is itself an Act of attempt to delay, defeat or obstruct the anticipated decree that may be passed upon the award. Therefore, in

our view, the order impugned in the present revisional application cannot be sustained in so far the applicant invoked the Court's power under the

first part of section 18.

9. But the section expressly provides making of such an interim order in another situation, namely when it is so necessary for speedy and

expeditious execution of the award itself. It may seem anomalous that the act having expressly provided a scheme where execution in respect of an

award can be made only when a decree is passed upon the award, it would still empower execution of an award by the interim order even before,

the judgment is passed on the same. But, in our view, the legislature reserved in Court such a power necessarily to be exercised very sparingly and

only in exceptional cases. The Court's power to enforce an award even before a judgment is delivered thereon leave being obtained therefore

from the Court on such terms as it may consider just was not unknown and was recognised by law (See Redman on Arbitration 5th Edition page

210 and R.S.C. Order 42 Rule 5). Some Courts did interpret section 15(1) of the Act of 1899 to vest with courts such a power. It is in that

background that the legislature intervened to take away such a power generally on the new scheme introduced by section 17, but at the same time

providing an exception in section 18. It should be instructive to note that section 18 starts with a non-obstinate clause "notwithstanding anything

contained in section. 17" Why was the legislature overriding section 17 Obviously it was so doing to empower the Court contrary to the scheme

introduced by section 17 to enforce an award even before the judgment is passed thereon in exceptional cases. In this view we feel inclined to

accept the contention of Mr. Roy Chowdhury that the scheme of section 18 is much too wider than those of Rule 1 or 5 of Order 38 of the Code

and in exceptional cases by an interim order the Court has the power to direct enforcement of an award or a part thereof even before any

judgment is passed on such an award. Such a power only has to be exercised with circumspection and care and can be made only in exceptional

cases which makes it necessary for the court to do so.

10. Turning now to the facts of the present case it appears to us that the applicant really made out a case under the second part of section 18. We

have pointed out hereinbefore that under the contract the respondent was bound to make payment as the works proceed proportionate to the

work completed. A dispute having been raised on behalf of the applicant that due to the failure on the part of the respondent to provide materials,

designs and drawings they were unable to proceed with the work according to the schedule resulting in the damages suffered by them by way of

escalation of costs and idle labour. The respondent in a manner conceding such a default on their part made a reference to an arbitrator appointed

by them. The arbitrator made an award as we have indicated hereinbefore, Not only did the arbitrator award a sum of Rs. 5,25,000/- but fixed up

a new time schedule for completion of the work by the applicant. He " further directed that the awarded amount be disbursed proportionately to

the work done quite consistently with the original contract. Upon the finding of the learned trial Judge a part of the work had already been

completed. In completing the work of construction, the original value whereof is more than Rs. 34,0000/-, it cannot be expected that the

contractor would proceed with the work except on payment proportionate to work done and that too agreed on the terms of the contract. In such

a situation it was pointed out by the applicant in their application u/s 18 that unless the amount awarded be paid to them forthwith subject to such

terms as the Court may deem fit and proper it would be impossible for them to fulfil the other obligations imposed on them by the arbitrator to

complete the construction within the time schedule prescribed. If in such a situation the learned trial Judge thought it fit to direct the respondent to

deposit half the awarded amount in Court with a view to disburse the said amount upon proper security in favour of the applicant as has been

directed by him we are not in a position to hold that such an order was passed beyond the power of the Court u/s 18 of the Arbitration Act or that

it was so passed on irregular or illegal exercise of judicial discretion. In this view we uphold the order passed by the learned Judge in the court

below and dismiss the revisional application on contest. The opposite party will be entitled to costs-hearing fee being assessed at ten gold mohurs.

Let the order be communicated to the Court below.

S.N. Sanyal, J.

I agree.