
(2001) 05 CAL CK 0037

Calcutta High Court

Case No: G.A. No. 2352 of 2000 and A.P. No. 56 of 1999

Union of India

APPELLANT

Vs

The City Builders

RESPONDENT

Date of Decision: May 22, 2001

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 11, 2(9), 34

Citation: 106 CWN 1127

Hon'ble Judges: Amitava Lala, J

Bench: Single Bench

Advocate: Biswanath Somadder, for the Appellant; H. Dutta and Bijan Majumder, for the Respondent

Final Decision: Dismissed

Judgement

Amitava Lala, J.

This is an application u/s 34 of the Arbitration and Conciliation Act, 1996 presented on 16th June, 2000 being aggrieved by and/or dissatisfied with an award passed on 27th March, 2000 by Mr. Kalyan Kumar Bose, a retired District Judge duly appointed as sole arbitrator by the Hon'ble Chief Justice of this High Court under an order dated 10th July 1998. It appears that the award is a reasoned award. Consequently upon presentation of this application, -his court was pleased to direct the parties to exchange their respective affidavits which was accordingly done.

2. The moot point of challenge is that the claims of the respondent are barred by Clause 25 of the contract while adjudicating such a claim, the arbitrator has committed a jurisdictional error. He further committed error by superseding scope of the Clause 13 of the general conditions of the contract. The arbitrator erred in law in awarding pendente lite interest and interest upon interest. Question of arbitrability of the claim as agitated by them (at the time of hearing application) u/s 11 of the Act, was not considered by the Arbitrator. The claim is otherwise barred by

law of limitation. The award is bad in law and liable to be set aside.

3. It appears from the order dated 17th June, 1998 passed by a Single Bench of the court that the application u/s 11 of the Arbitration and Conciliation Act, 1996 was disposed of by a Single Bench of this court leaving aside naming the Arbitrator by the Hon"ble Chief Justice. Such order is as follows:

The Court" : This is an application u/s 11 of the Arbitration & Conciliation Act, 1996, for reference of the disputes mentioned in Annexure A" to the petition.

4. In opposing the present application various points have been taken on behalf of the respondent, the Department of Telecommunication. The grounds urged in opposition to the present application are matters, which, in my opinion, should be left to be adjudicated upon by the Arbitrator. The only other ground that was taken is that the petitioner had accepted the payment of the final bill in full and final settlement of its claim. An opportunity was given to the Department of Tele-communication to produce the said final bill for inspection of this court. The said bill was accordingly produced. It does not appear from the said final bill that there; is any endorsement by the petitioner that he has accepted the payment of the said bill in full and final settlement of its claim.

5. The claim of the petitioner is referred to in Annexure "A" to the petition are covered by the Arbitration agreement entered into by and between the parties. It is necessary, therefore, that an Arbitrator should be appointed to adjudicate upon the said disputes u/s 11 of the aforesaid Act.

6. It is stated, however, on behalf of the respondent, Department of Tele-communication, that the Arbitrator has already been appointed to adjudicate upon the disputes raised by the petitioner. It appears that appointment of the said Arbitrator was made after the filing of the affidavit-in-opposition by the respondent. It is well-settled that after the court assumes jurisdiction under the aforesaid Act, the appointing authority has no power to appoint an Arbitrator. I, therefore, hold that the appointment of the said Arbitrator by the appointing authority noted in the arbitration agreement is invalid and of no effect and he is hereby removed. The respondent, Department of Tele-communication, will be entitled to file its Counter Claim before the Arbitrator to be appointed herein but the same should be limited upto the date of this order. In its Counter-claim the said respondent shall be entitled to take other grounds urged in its affidavit-in-opposition for adjudication by the Arbitrator. If such Counter-claim is filed, then, in that event, the Arbitrator shall make a composite award taking into account the claims of the petitioner and the counter-claim of the respondent.

7. Let this application, therefore, be placed before the Hon"ble the Chief Justice for appointment of an Arbitrator In terms of Section 11 of the aforesaid Act.

8. Costs cost in the arbitration proceedings.

9. All parties are to act on a signed Xerox copy of this dictated order on usual undertaking.

10. Subsequently by the order dated 10th July, 1998 the then Hon"ble Chief Justice was pleased to pass the following order in appointing the arbitrator :

This Court: Heard learned Counsel and perused the order dated 17th June, 1998 passed by S.K. Sinha, (J). Let Mr. Kalyan Kumar Bose a retired District Judge be appointed as the sole arbitrator. Parties may file their claims and counter claims before him within 3 (three) weeks of the service of the order of the appointment of the Arbitrator and he shall fix in course of the hearing the remuneration payable to him and decide in respect of the cost of the proceedings and complete the proceeding within a period of 4 (four) months from date. If need be to extend the proceeding, the Arbitrator may do so with the consent of the parties.

Arbitrator and all parties to act on a signed copy of the minutes of this order on the usual undertaking.

11. From the order of the Single Bench it is crystal clear that the court left all the grounds taken by the petitioner in their affidavit-in-opposition in the application u/s 11 of the Act for the purpose of adjudication by the Arbitrator. Similarly the court was not impressed about the acceptance of payment of the final bill in full and final settlement of the claim of the respondent/contractor. The court also held that the claim of the respondent/contractor being petitioner in Annexure A" of the petition therein are covered by the arbitration agreement. Therefore, the Arbitrator should be appointed to adjudicate upon the said disputes. The court ignored appointment of departmental nominee by holding that it is well settled that after the court assumes jurisdiction, appointing authority has no power to appoint an Arbitrator. The court further held that the Arbitrator appointed with the intervention of the court will be entitled to consider the claim and counter-claim upto the date of the order by making a composite award. The petitioner herein did not prefer an appeal from such order. On the other hand, he has accepted the appointment of an independent Arbitrator by the then Hon"ble Chief Justice of the High Court and acted upon the order by way of participation in the entire award-making process. After about 27 sittings the petitioner being the respondent before the Arbitrator raised the point as follows :

(1) Whether the claimant is entitled to seek arbitration in view of clear bar in Clause 25 of the agreement in question which inter alia lays down "if the contractor does not make any demand for arbitration in respect of any claim in writing within 90 days of receiving the intimation from the government that the final bill is ready for payment the claim of the contractor shall be deemed to have been waived and absolutely barred and the government shall be discharged and released of all liabilities under the contract in respect of the claim". The respondent contended that the letter addressed to the Executive Engineer intimating the claim and expressing

the desire to invoke clause 25 of the agreement, did not constitute demand for arbitration as claimed by the Claimant contractor in terms of clause 25 of the agreement. The claimant's letter dated 5.8.96 furnished as Exhibit-C-15A of the statement of facts could not be construed as demand for Arbitration in terms of arbitration Clause (25) of the agreement.

(2) The second point raised by the respondent is that the claimant having received final bill without any protest or demur, he has no subsisting claim and whatever claim he could have raised should be deemed to have been waived in view of acceptance of final payment in respect of the final bill.

So far as the second point is concerned it was rightly observed by the Arbitrator that the High Court in disposing the application u/s 11 of the Act, already observed that the respondent has not accepted the payment of the said bill as full and final settlement of his claim. As such, I do not find any erring material in interfering with the same at this belated stage. However the Arbitrator has considered at length even on the basis of the various High Courts and Supreme Court judgements. Therefore, even I think that the discussion as regards the matter before the arbitrator in this respect is yet open, but the decision of Arbitrator is an exclusive mental process which cannot be interfered with by the court in hearing the application u/s 34 of the Act as if court is sitting in appeal. The scope and ambit of Section 34 of the Act is much more rigid than the repealing Act i.e. the Arbitration Act, 1940.

12. So far as the first point is concerned as to whether the claim is barred under Clause 25 of the agreement or not, the same is also considered by the Arbitrator and he came to a definite finding in favour of the respondent. However barring general principle applicable in respect of setting aside the award as prevailing, I think that this part requires a little discussion for the purpose of satisfaction of the parties before the court.

13. It appears from the annexure to the application u/s 34 of the Act that the date of Payment of final bill is 1st June, 1995 as addressed on 5th August, 1996 to the Chief Engineer (Civil) of the concerned Department of Telecommunications, Calcutta for invoking Clause 25 of the agreement. It also appears from the annexed minute of the meeting of the arbitrator dated 28th January, 1999 that the petitioner herein being respondent therein drew attention of the arbitrator in respect of a letter dated 18th August, 1995 addressing the concerned Executive Engineer to show that the respondent called upon the Executive Engineer to request the Chief Engineer to appoint a sole arbitrator. It further appears that by a previous letter dated 27th June, 1995 addressed to the Executive Engineer, with a copy to Superintendent Engineer, the respondent/contractor being claimant raised a specific dispute by saying that it is glaringly inconclusive from the final bill payment dated 1st June, 1995 that certain payments lawfully due to them and ultimately informed that if the claim is not settled within 30 days from the date of receipt of the letter or by 31st

July, 1995 whichever is earlier, they shall conclude that the petitioner herein is denying the legal liability and in that event they shall have no option left but to invoke Clause 25 of the agreement. Therefore, it is abundantly clear that the dispute as regard claim was not finally settled. Clause 25 does not prescribe anything more than the referability of the matter to the Arbitrator. It does not prescribe who will refer the matter to the Arbitrator. Therefore, it cannot be said that the respondent/contractor invoked the Clause 25 of the agreement wrongly by addressing the letter to the concerned Chief Engineer only on 5th August, 1996. Both the contracting parties are equally responsible to refer the matter to authority about appointment of Arbitrator. Therefore letter written to Executive Engineer or Superintending Engineer cannot nullify the claim of the respondent. Such authority are mere parties to the Contract and should behave like that instead of behaving like nominee as Arbitrator. It also cannot be construed as one way traffic being obligatory upon the respondent/contractor alone. In most of the Clause therein enormous power is given to the engineer-in-charge. As per Clause 2(e) of such conditions of contract "Engineer-in-Charge" means the Divisional Officer who shall supervise and be in charge of the work and shall sign the contract on behalf of the President of India. Such contract shall be signed by the concerned Executive Engineer. Therefore, if there is any dispute as regards such conditions of contract and if it has come to the notice of the Parties, either of the parties is entitled to refer the dispute to the Chief Engineer. There is no explanation why the matter was not referred to the Chief Engineer by the Executive Engineer of the petitioner when he was called upon to do so within the prescribed period of 90 days as provided under Clause 25 of the conditions of contract. As per Clause 25 itself, 90 days period is fixed for making demand for arbitration and not for invocation of Clause 25 which is the wrong interpretation of the petitioner herein either before the arbitrator or before the court. Therefore, as soon as such demand is made within the prescribed period, and a reference to the sole arbitrator cannot be construed as a reference by the respondent/contractor alone, no question of waiver and absolute bar in realizing the claim by the respondent/contractor be applied. There is a gulf of difference about making demand for arbitration within 90 days and referring the matter to the sole arbitrator to be appointed by the concerned Chief Engineer or the concerned administrative head whatsoever is responsible for the same. As and when a demand is made within 90 days and the matter is referred to the concerned Chief Engineer or the administrative head beyond such period by invoking Clause 25 of the same it will be impliedly construed as discharge of all liabilities by the respondent/contractor. It is not insignificant to note that the reference to sole arbitration will only be made by the concerned Chief Engineer alone but also by the concerned administrative head in absence of Chief Engineer. Hence it was an additional duty of the concerned Executive Engineer of the petitioner who has informed by the respondent/contractor within the prescribed period of 90 days to communicate whether he has referred the matter to the Chief Engineer or in absence to any administrative head or not. A government authority cannot act as a

silent spectator and allow the time to expire. Since the respondent/contractor has made a demand for arbitration at the time of invocation of Clause 25 independently in the year 1986 it cannot be regarded as a barred claim at all. When the claim cannot be waived by the terms and conditions of the contract in view of the aforesaid explanation, the law of limitation will come into play to fill up the vacuum. The problem with the governmental authorities is that in most of the cases they wake up belatedly and try to make a defence by hook or by crook to protect the interest of the responsible officers or their subordinates at the cost of citizen being forgetful about their obligation about fair play.

14. Under such circumstances, the explanation as given by the Arbitrator, be it very clear or be it little sketchy but the same cannot hold me to take any contrary stand against the respondent/contractor.

15 The best part of the submissions of Mrs. U.B. Mukherjee, learned Senior counselably assisted by Mr. Biswanath Samaddar Learned Counsel appearing for the petitioner are (a) acquiescence cannot confer jurisdiction: (b) Order of reference is not within the scope and purview of Section 11 of the Act. According to me, when an arbitrator is appointed by the court it is a common dispute whether he should proceed with the reference by the court or with the agreement. This is because when a dispute come to the court it is arising out of an agreement but when it goes out of the court it is arising out of reference. Therefore when court appoints the Arbitrator it obviously proceed on the basis of reference. When the parties agree such terms before the court then the parties agreeing with the terms formulated before the Court, which has to be construed as reference. It may be more exhaustive than the original claim or it may be less than the same but the parties will have to be governed by the same. For an example, the petitioner as a respondent in the earlier application u/s 11 of the Act called upon the court to pass an order appointing Arbitrator but such Arbitrator will be directed to decide issues in connection with grievances too under the affidavit-in-opposition as counter claim. Counter-claim can be regarded as a separate claim for the purpose of administration of justice. But for judicial decision the Counter-claim has to be regarded as a claim arising out of the original grievances made by the other. Moreover, when the court assumes jurisdiction in respect of the claim and counter-claim and parties make their submissions and act on the basis of the order by way of participation in the arbitration proceedings acquisitions will have a prevailing effect over and in respect of the plea of the petitioner whether the court will proceed on the basis of the reference or agreement. Jurisdiction of the arbitration has been conferred by the court and not by the authority under the agreement when the Arbitrator was appointed with the intervention of the court. Moreover, Section 2(9) of the Act defines that the claim under the Act includes counter-claim. The Arbitrator has rightly considered the question of law on the basis of the factual matrix in respect of escalation under Clause 10 CC of the Contract by holding that the petitioner being respondent therein was unable to hand over the

site by obtaining permission of the municipal and police authorities till 19th March, 1994 while the stipulated date of completion expired on 24th October, 1991 and after considering the four corners of the claim came to a definite conclusion by giving an award by reducing the small amount as regards the claim. The petitioner being the respondent therein did not raise any dispute as regards the calculation. Factually, I agree with the submission of Mr. Hiranmoy Dutta, Learned Counsel appealing on behalf of the respondent as regards acceptance and rejection of the claims. Out of the 8 claims only 4 claims were allowed and out of which major claim as regards escalation was Rs. 2,04,123/- which was reduced to a sum of Rs. 2,03,123/-. But additional claim of 30% enhancement of the quoted rate was rejected. Claim of 15 percent compensation for loss of profit being value of the work was granted for a sum of Rs. 64,550/-. The extra expenditure on account of idle establishment charges or for loss of profit was disallowed and for this principal sum the interest was allowed for a sum of Rs. 1,24,467/- @ 18% reducing the original claim of Rs. 2,67,673/-. Leaving aside such original claim interest, pendents lite interest and costs were partially allowed. According to me, in view of the new Act, the sum directed to be paid under an Arbitrator's award may carry interest for the period between the date on which the cause of action arose and the date on which the award was made. But a sum directed to be paid by an Arbitrator's award shall, unless the award otherwise directs carry interest @ 18% per annum from the date of the award \ up to the date of payment and also cost which is fixed by the Arbitrator. Therefore, although it is discretionary for the Arbitrator to award interest from the date of the cause of action to the date of the award but it is mandatory that award so passed will carry interest @ 18% per annum from the date of the award to the date of the payment. Although the Supreme Court and different High Courts held, in disposing of various matters under the Arbitration Act 1940, that the court has power to grant pendente lite interest but nowhere it has held that the Arbitrator is disentitled in allowing pendente lite interest. Therefore what is not positively applied cannot be held to be negatively applicable. So far as the new Act is concerned, such part of granting pendente lite interest even with a quantified rate of interest is fixed to be given by the Arbitrator for the obvious reason that such award is as good as a decree. This basic difference of granting pendente lite interest has missed the link of argument on the part of the petitioner herein as a result whereof it was questioned that grant of pendente lite interest by the Arbitrator cannot also be sustainable so as to costs. Similarly, so far as the grant of interest along with the Arbitrator's award is concerned the same is the discretion of the Arbitrator. Therefore, taking into totality the submission, I do not think that the cause of the petitioner is sustainable which requires interference of the court in the award.

16. Therefore, the application for setting the award stands dismissed.

17. However, no further order of costs has been granted. Xerox certified copies of this judgment will be supplied to the parties within seven days from the date of putting requisities for drawing up and completion of the judgement and order as

well as be certified copies.

All parties are to act on a signed copy minute of the operative part of this judgment on the usual understanding and subject to satisfaction of the officer of the court in respect as above.