(1951) 05 CAL CK 0021

Calcutta High Court

Case No: Arbitration Case No. 321 of 1950

S.K. Roy and Co. Ltd. — APPELLANT

Vs

Union of India (UOI) — RESPONDENT

Date of Decision: May 11, 1951

Acts Referred:

- Arbitration Act, 1940 - Section 43

Citation: (1952) 2 ILR (Cal) 235

Hon'ble Judges: Bachawat, J

Bench: Single Bench

Advocate: G.K. Dutt, for the Appellant;A.N. Ray, for the Respondent

Final Decision: Dismissed

Judgement

Bachawat, J.
This is an application for setting aside an award made by one C.P. Mallick, Superintending Engineer.

2. By a contract, dated February 4, 1943, the Petitioners S.K, Roy & Co., Ltd., agreed to supply ten lakhs cubic feet of shingles to the Respondent Union of India. The supply was, to be made within a period of three months from the date of the contract, that is to say, by May 5, 1943, and, in default, the contractor was liable to pay a fine. The contract contained'' an arbitration clause under which the dispute between the parties was to be referred to the arbitration of the Superintending Engineer of the Circle for the time being.

3. It is admitted that only a part of the supplies under the contract was made. There is a dispute between the parties about the reason why full supply was not made. According to the Petitioner, it was told by the representatives of the Respondent to stop supply. This is denied by the Respondent. On April 29, 1943, a letter was written to the Petitioner on behalf of the Respondent asking it to show cause why it should not be penalised for supplying only half a lakh cubic feet of shingles and why its

name should not be removed from the list of contractors. It appears that a penalty of the sum of Rs. 26,000 was imposed by the Respondent on the Petitioner and this was deducted from the security deposit of ,the Petitioner lying with the Respondent. The Petitioner claimed refund of this sum of Rs. 26,000 and the dispute was referred to the arbitration of Mr. Agarwal, Superintending Engineer, but as Mr. Agarwal was unable to act, the dispute was eventually referred to the arbitration of Mr. C.P. Mallick.

4. There were proceedings before the arbitrator and eventually the arbitrator made an award on June 30, 1950. The award is a very short one and does not give any reasons. It is to the effect that there is no justification in the claim of Messrs. S.K. Roy and Co., Ltd., for the refund of the amount deducted by the Central Public Works Department as penalty and the claim be dismissed.

5. The main ground upon which the award is attacked is contained in para. 13 of the petition. It is said that the arbitrator was guilty of misconduct in not calling as witness one Mr. Endlaw who was the Engineer-in-charge at the time; of performance of the contract. It is said that Mr. Endlaw made a report on March 20, 1944 that in May, 1943, Mr. A.C. Browne (then S.E.E.A.C.I.) decided not to take any more shingles. There is an endorsement on the report by one Mr. McMinn, the Superintending Engineer, where Mr. McMinn wrote that he had referred the contractor''s report to Mr. Endlaw and that Mr. Endlaw reported that the contractor was told to stop the supply in May, 1943. There is no doubt that Mr. Endlaw was a material witness. It appears that on May 15, 1950, the arbitrator wrote to both parties fixing May 29, 1950, as the date on which the arbitration would be held and requesting the parties to come with all relevant documents and to bring their witnesses. In answer to this letter the Petitioner wrote to the arbitrator stating that it would send its representative on May 29, 1950, as desired and adding--

We wish that Mr. D.N. Endlaw, the then Executive Engineer, C.P.W.D., Gouripur, now Deputy Technical Adviser to the Government of India, Ministry of Rehabilitation, be please examined on that day as a witness in the above case.

6. The letter is a request to the arbitrator to examine Mr. Endlaw as a witness. It does not purport to be a request to the Arbitrator suo motu to call any witness. It is admitted that Mr. Endlaw was not called as a witness on behalf of the Petitioner on the date on which the arbitration was held. I also find that no adjournment was asked for on that date in order to enable the Petitioner to produce Mr. Endlaw as a witness. It is alleged in the affidavit in reply that such adjournment was asked for. But I disbelieve this affidavit. Had an adjournment been asked for and refused, a complaint on that account would have distinctly been made in the petition. From the minutes of the arbitration proceedings held on May 29, 1950, it appears that it was agreed by the Petitioner that the calling of Mr. D.N. Endlaw to give evidence was no more necessary. I do not believe the Petitioner''s suggestion that these minutes have been fabricated. There is one very noticeable fact that no complaint is made

either orally or in writing after May 29, 1943 that the arbitrator had misconduct himself or his proceedings. There is no'' complaint that he failed to call any witness or that any adjournment was asked for. If Mr. Endlaw was not willing to come as a witness, the plain duty of the Applicant was to request the arbitrator to certify that the arbitrator desired, to call him as witness so that an application could be made to this Court u/s 43 of the Indian Arbitration Act for the issue of a process. If in spite of such request the arbitrator unreasonably did not desire to examine such witness, it might be that the arbitrator was guilty of misconduct. No such request has been made m this case. It has even been held that even where the arbitrator refuses to examine a witness the witness must be distinctly tendered before the arbitrator if it is desired to Impeach the award on this ground. Manindra Nath Mandal v. Mahananda Roy (1911) 15 S.L.J. 360, 366. The arbitrator is, therefore, not guilty of misconduct in not examining Mr. Endlaw.

7. Paragraph 13 of the petition also suggests that the arbitrator was guilty of misconduct in not calling Mr. McMinn. Mr. Dutt, appearing on behalf of the Petitioner, gave up this ground of attack and I think wisely.

8. In para. 12 of the petition it is complained that the arbitrator was guilty of misconduct in not calling upon the department to produce certain reports. This ground is entirely without substance. No request was made by the Petitioner to the arbitrator to call for any report. Further, I believe the evidence on behalf of the Respondent that in fact such reports were produced.

9. The next complaint is made in para. 14 of the petition. It is urged that the arbitrator misconduct himself in not deciding an issue which was specifically raised by the Petitioner. It is said that a specific issue was raised in the statement, dated April 11, 1950, that at the beginning of May 1943, the Superintendent Engineer visited the place for inspection and the Executive Engineer according to his direction gave orders to stop further collection and deliver the stock in hand at that time. The arbitrator has made an award dismissing the claim of the Petitioner and this dismissal necessarily involves a finding on this issue against the Petitioner. It is settled law, as was pointed out by Lord Macnaghten in Ghulam Khan v. Muhammad Hassan (1901) ILR 29 Cal. 167 : L.R. 29 IndAp 51, 60, that the arbitrator is not bound to give an award on each point; he may award on the whole case. It does not also appear that at any point of time the arbitrator was asked to decide a specific issue separately. There is, therefore, no substance in this ground of attack also.

10. No other ground has been urged before me for setting aside the award. The application must, therefore, be dismissed with costs.