(2000) 08 CAL CK 0039

Calcutta High Court

Case No: Award Case No. 25 of 1995, Order No. 137 of 2000, A.P.O.T. No. 671 of 1999 and A. P. O. No. 561 of 1999

Rashtriya Pariyojona Nirman Nigam Ltd.		APPELLANT
	Vs	
Industrial Associates Industrial Associates Vs Rashtriya Pariyojona Nirman Nigam Ltd.		RESPONDENT

Date of Decision: Aug. 21, 2000

Acts Referred:

- Arbitration Act, 1940 - Section 17, 30, 39

Citation: 105 CWN 55

Hon'ble Judges: V.K. Gupta, J; Arunabha Barua, J

Bench: Division Bench

Judgement

V.K. Gupta, J.

This Appeal u/s 39 of the Arbitration Act 1940 is directed against a Judgment dated 20th May, 1999 passed by the learned Single Judge of this court in GA No. 3367 of 1998 whereby the learned Single Judge, while dealing with an application filed by the Respondent Rashtriya Pariyajana Nirman Nigam Ltd. for setting aside the Arbitration Award, has upheld a part of the Award and set aside a part thereof. The Appellant Industrial Associates is aggrieved by that part of the Judgement of the learned Single Judge whereby he has set aside the Award to the extent of claims 2, 3 and 5 and has filed the present Appeal challenging the Judgement to that extent. The other connected Appeal filed by Rashtriya Pariyajana Nirman Nigam Ltd. similarly challenges that part of the Judgement of the learned Single Judge whereby the Award has been upheld to the extent it allows claims 1 and 4, thus refusing to set aside the Award to that extent. This common Judgement was therefore disposed of both the aforesaid Appeals.

2. Brief facts leading to the filing of the Appeals are that Rashtriya Pariyajana Nirman Nigam Ltd. (RPNNL, for short) sent an invitation to offer to the appellant Industiral Associates (I.A. for short), for supply of fire bricks and acid resistant bricks for lining of three number of R.C. Chimneys of 150 M.T. height which RPNNL was to erect and construct at Bokaro Thermal Power Station of Damodar Valley Corporation. The opening part of the letter dated 6th May, 1983 reads as under:

We are constructing 3 nos. R.C. Chimneys of 150 M.T. high at Bokaro Thermal Power Station. We have the proposal to use Fire Bricks and Acid Resistant Bricks for lining of all the three chimneys. A detail specification is enclosed and the reference drawing can be seen on any working day in our Calcutta Office. The total requirement of the bricks and Moriers for each chimney is reflected below:

...

3. This letter also inter alia mentioned as under:

The total requirement for any Chimney shall have to be supplied within 30 days time from the date of issue of purchase order. The balance quantity i.e. for rest 7 Chimneys, the total materials shall have to be supplied within 90 days from the date of issue of purchase order. It may be mentioned that the purchase order may be split into three or two or single purchase order at the discretion of NPCC Limited.

4. I.A. in response to the aforesaid invitation sent their quotations for supply of bricks for the aforesaid three Chimneys and accordingly on 5th/6th September 1983 a Purchase Order was placed upon I.A by RPNNL for supply of bricks. In the special conditions accompanying the aforesaid Purchase Order it was mentioned that 30 days'' period was fixed for supply of bricks for the first Chimney and 90 days in all for all the three Chimneys. Clause 6 of the special terms and conditions forming a part of the Purchase order reads thus:

6. Time is the essence of this purchase order. The total requirement for the Chimney shall have to be supplied within 30 days from the date of issue of purchase order. The balance quantity i.e. for rest 7 Chimneys, the total materials shall have to be supplied within 30 days from the date of issue of purchase order. In case the delivery is not made within the stipulated time, Supdt. Engg. BTPS, NPCC Ltd. Has every right to terminate the contract and engage another supplier at his discretion. No compensation against termination shall be payable.

5. It appears that certain disputes and differences arose between the parties leading to the specifications with regard to the supply of the bricks and accordingly the supply got disrupted. It is the undisputed case of the parties that I.A. supplied bricks only for one Chimney and that the bricks for other two chimneys were not taken by RPNNL from I.A. Accordingly the matter was referred to arbitration. One Shri R.C. Jain, the sole Arbitrator appointed in terms of arbitration agreement passed his award which was challenged by

I.A. A learned Single Judge of this Court in Matter No. 909 of 1985 vide Judgement dated 20th July. 1987 set aside the aforesaid Award passed by Shri R.C. Jain and referred the matters in dispute between the parties to the arbitration of Shri Justice A.K. Basu, a retired Judge of this court. Shri Justice A.K. Basu, the sole Arbitrator thus appointed accordingly passed his Award on 21st February 1995 in favour of I.A. and against the RPNNL whereby an amount of Rs.3,57.451/- was allowed as a principal sum in respect of claims (i), (ii) and (iii), Rs. 3 lacs by way of interest on three claims starting from 1st November, 1983 uptill 21st February, 1995 and Rs. 60.000/- as costs of arbitration. The claim of I.A. for overhead expense incurred for follow up action was disallowed. Thus a total award for a sum of Rs.7.07,451/- was passed in favour of I.A. against RPNNL which carried interest @ 10 per cent from the date of the award till the amount was paid to I.A. by RPNNL.

6. The I.A. had raised claims before the Arbitrator in respect of the following items:

I. Price of goods sold and delivered;

II. Price of goods manufactured and not supplied by IA to RPNNL because of the conduct of RPNNL:

III. Loss of profit by I.A. for unexecuted part of the order;

IV. Interest;

V. Costs:

VI. Overhead expenses incurred for follow-up for realising the overhead claims.

7. The Arbitrator awarded Rs. 1,42,262/- against Claim No. I. He awarded Rs. 64,480/- against Claim No. II and Rs. 1,60,000/- against Claim No. III. Rs. 3 lacs were awarded against Claim No. IV and Rs. 60,000/- against Claim No. V.

8. We have heard the learned Advocates of the parties and considered their rival contentions. The learned Single Judge by an elaborate reasoning and on critical analysis of various parts of the award has come to a correct finding that the award is a non-speaking one. We have ourselves gone through the award very minutely and found that despite the Arbitrator having referred to various aspects of the matter in the course of the award, in so far as the conclusions and the findings are concerned, the award is a non speaking one. Actually in the body of the award the Arbitrator has merely referred to the claims and the counterclaims of the parties and the submissions made before him by and on behalf of the parties. The Arbitrator has also highlighted certain aspects of the matter as urged before him by the parties, but as far as his conclusions and findings are concerned, he has not given any reasons in support thereof. We have therefore no hesitation in agreeing with the Single Judge that the Award in question is a non-speaking award.

9. Since the Arbitrator has not assigned any reasons in support of the findings that he has arrived at we are not in a position to gauge the working of the arbitrator''s mind or as to what led to his coming to the aforesaid conclusions. The fact remains that a contract was in existence between the parties and that in pursuance of this contract RPNNL had invited I.A. to supply bricks to RPNNL and that undisputably I.A. had supplied bricks to RPNNL, but disputes arose in regard to the specifications, whether the bricks conformed to the requirements as prescribed by RPNNL or not. After appreciating the evidence and the materials on record the arbitrator came to a conclusion that I.A. was entitled to be paid the price of goods which it sold and delivered to RPNNL. Similarly with regard to the supply of goods by I.A. which were not taken or purchased by RPNNL, the arbitrator on appreciation of the materials on record came to the conclusion that I.A. was entitled to a claim of Rs. 64,480/-. The learned Trial Judge has disallowed this claim of I.A. and to that extent set aside this award, but we find ourselves in disagreement with his view on this question and for a very simple reason. The contract in question will clearly show beyond by doubt that RPNNL had placed a composite order for supply of bricks by I.A. in respect of 3 Chimneys. I.A. was justified in construing the contract in that manner. If therefore, in such construing the contract I.A. had manufactured bricks for all the 3 Chimneys, it was justified in doing so. The learned Trial Judge has, in our opinion, incorrectly appreciated the materials whereby he has come to a wrong finding that the contract was for supply of bricks for one Chimney only. In any event this being a question of fact and this question having been referred to the arbitrator for adjudication, he was the sole Judge to decide upon this question. Similarly the arbitrator was the best Judge to decide whether I.A. was entitled to any claim in respect of loss of profit or not. We do not think that the jurisdiction of the Court u/s 30 of the Arbitration Act 1940 extends to an area where the court can interfere with such process of fact finding by an Arbitrator.

10. Claim of I.A. in respect of entitlement of interest was also referred to the Arbitrator, particularly in view of the fact that the adjudication of disputes had been pending for over 15 years. The Arbitrator therefore on proper appreciation of the material on record came to a finding that I.A. was entitled to the payment of interest which the Arbitrator in his estimation fixed at Rs. 3.00 lacs.

11. Mr. Saha, the learned Advocate appearing for RPNNL has drawn our attention to the following portion of the Judgment dated 20th July. 1987 whereby in Matter No. 909 of 1985 Justice S.K. Hazari had set aside the award of sole Arbitrator Shri R.C. Jain and had referred the matter in dispute in between the parties again for Arbitration by appointing Shri A.K. Basu as Arbitrator. This part reads thus:

Mr. Banerjee on behalf of the petitioner has agreed to the suggestion of this court that all costs of the arbitration proceeding will be borne by the petitioner irrespective of the result of the arbitration proceeding. As the learned Advocate for the respondent No. 1 submitted that if the Award is not abide the matter should be referred to the officer of the respondent No. 1 in that event, the respondent No. 1 will not incur any further expanses.

Keeping that in my mind, direct that all costs of the Arbitration proceeding will be borne by the petitioner irrespective of result of the arbitration proceeding. All the papers and documents filed by the respondent No. 2 in court will be handed over into the Arbitrator.

12. According to Mr. Saha in view of the aforesaid categorical direction contained in the Judgement of this court, I.A. was not entitled to be paid any amount towards the costs of arbitration and that the Arbitrator by awarding Rs. 60.000/- as costs to IA has committed an illegality. The learned single Judge also has set aside this part of the claim in the Judgement under Appeal.

13. We agree with the contention of Mr. Saha and find that the part of the award whereby the Arbitrator has awarded costs of Rs. 60,000/- to I.A. is wrong and erroneous. This actually is an error apparent on the face of the record. However this item of the Award is severable from other items and thus the Award can be partly set aside only in so far as it relates to this particular item.

14. For the foregoing reasons therefore we partly allow both the Appeals and to the extent indicated herein below dispose them of.

15. The Award as passed by the sole Arbitrator Shri A. K. Basu in so far as it relates to claims 1, 2, 3 and 4 and interest @ 10% from the date of the award till the payment of this amount is made a Rule of the court, but in so far as the part of the Award relates to claim No. 5 (awarding of costs Rs. 60,000/-), the same is set aside.

16. We accordingly, in terms of Section 17 of the Arbitration Act 1940 pronounce Judgement in terms of the Award, and thus making the Award rule of the Court on the terms indicated in the foregoing Para hereby pass a decree for the amounts indicated hereinabove Let the decree sheet accordingly be prepared and drawn up. The appeals accordingly are allowed partly but without any order as to costs.

Arunabha Barua, J.

I agree.

Later:

Let a xerox copy of this Judgement, duly counter-signed by the Assistant Registrar of this Court, be given to the parties upon their undertaking to apply for and obtain certified copy of the same upon usual undertaking.