
(1998) 2 ILR (Cal) 322

Calcutta High Court

Case No: A.C. No. 10 of 1998 and A.P. No. 113 of 1998

Steel Authority of India
Limited

APPELLANT

Vs

Engineering
Construction Services

RESPONDENT

Date of Decision: Aug. 6, 1998

Acts Referred:

- Arbitration Act, 1940 - Section 21, 23, 30, 33, 34

Citation: (1998) 2 ILR (Cal) 322

Hon'ble Judges: Amitava Lala, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Amitava Lala, J.

This is an application under Sections 30 and 33 of the Arbitration Act, 1940, made by the Petitioner challenging the validity of the Award passed by the Learned Arbitrator, a retired Judge of this Hon"ble Court on January 1, 1998.

2. It is to be remembered that initially a suit was instituted in the High Court at Calcutta by the Respondent herein preferring various claims for the purpose of obtaining decree on such claim as against the Petitioner. In the said suit an application was filed by the Petitioner herein u/s 34 of the Arbitration Act, 1940 stating that all the claims are covered by the terms of Arbitration in between the parties.

3. In disposing of the interlocutory application as well as the application u/s 34 of the Arbitration Act, 1940 a Single Bench of this Hon"ble Court was pleased to appoint Justice Sudhamoy Basu, a retired Judge of this "Court to enter upon the reference in respect of all matters in controversy in this suit including the costs and incidentals to the suit, and also counter claim, if any, of the Petitioner against the Respondent by giving a summary

power.

4. The Respondent referred the entire claim in toto, which was in the suit, to the Arbitrator for his disposal. The Counter Claim was also filed by the Petitioner herein.

Accordingly the Arbitrator proceeded therewith.:

The Arbitration Clause of the Agreement provides as follows:

Provisions for settlement of disputes by Arbitration:

76. All questions, disputes or difference of any kind, whatsoever, arising out of or in connection with the contract, at any time, whether during the progress of the work or after its completion but not later than one year after the completions of the work other than questions, disputes or difference for the decision of which specific provisions have been made in the foregoing clauses of these conditions (hereinafter referred to as "excepted matters" and decision on such "excepted matters" according to the said specific provisions shall be final and binding on the Contractor and shall not be re-opened or attempted to be re-opened on the ground of and informality, omission, delay or error in the proceeding in or about the same or on any other ground whatsoever) shall be submitted in writing by the Contractor to the Employer and the Employer shall, within a reasonable time, after the submission of the same make and notify its decision thereon in writing.

If the Contractor is dissatisfied within the decision of the Employer on any matter in question, dispute or difference on any ground in connection with this contract or as to the withholding by the Employer of any certificate to which the Contractor may claim to, be entitled to, or if the Employer fails to make a decision within a reasonable time, then and in such case but not including any of the excepted matters or materials for which the Contractor has given no claim certificates, the Contractor may within one month of the receipt of such decision or after the expiry of a reasonable period of time as the case may be demand in writing that such matters in question, dispute or difference in connection with this contract be referred to arbitration. Such demand for arbitration shall be delivered to the Employer by the Contractor and shall specify the matters which are in question, dispute or difference and only such question, dispute or difference, other than any of the excepted matters, in respect of the contract of which the demand has been made and no other shall be referred to arbitration.

The further progress of any work under the contract shall, unless otherwise directed by the Engineer, continue during the arbitration proceedings, provided however that determinations like measurements, etc. if any, affecting the dispute are recorded by the Engineer along with the Contractor's representative, if..... only by the Engineer or his representative, before the continuation of progress of the work.

Matters in question, dispute or difference other than the excepted matters, in respect of this contract to be submitted to arbitration as aforesaid, shall be referred for decision to a sole arbitrator who shall be the General Manager, Alloy Steels Plant or any officer of the Employer nominated by the General Manager in that behalf. In case the designation of the General Manager is changed or his office abolished, the Officer who for the time being is entrusted with the functions of the General Manager, Alloy Steels Plant whatsoever designation such officer is called, or his nominee shall be the sole arbitrator to adjudicate the disputes. And there shall be no objection to any such appointment that the arbitrator appointed is an Alloy Steels Plant servant or that he had to deal with the matter to which this agreement relates, or that in the course of his duties as such plant servant, he has expressed views on all or any of the matter in dispute or difference.

The General Manager or the officer nominated by him, shall be the sole judge to decide the questions, dispute or difference and his decision shall be final and binding on both the parties. The venue of arbitration shall be the Administrative Building, Alloy Steels Plant, Durgapur.

Such submission shall be deemed to be a submission to arbitration and the decision of such arbitration shall be final and conclusive and the provision of the Indian Arbitration Act, 1940 and the rules there under and all Statutory modifications thereof shall govern all such Arbitration Proceedings and shall be deemed to apply to and be incorporated in this contract.

5. It was the submission of the Petitioner before the Suit Court in the application u/s 34 of the Arbitration Act, 1940 that because of the aforesaid arbitration clause all disputes in the suit are covered by the clause.

6. The learned Arbitrator Justice Sudhamoy Basu before adjudication framed certain, issues. Such issues include the issue Nos. 1 and 2 which are as follows:

1. Were there implied terms in the agreement between the parties, as alleged in paragraph 8 of the statement of claim ?

2. Did the Respondents make substantial variation of the scope of the contract from time to time, as alleged in paragraph 12 of the statement and claim ?

7. All such issues will be available in the award itself.

8. After settling such issues the erstwhile Arbitrator Justice Suchlamoy Basu expired and Justice Lilamoy Ghosh appointed Arbitrator in the place and instead of Justice Sudhamoy Basu by an order of a single Bench of this Court on December 1, 1992. The incoming Arbitrator proceeded on the basis of such settled issues and had given reasoned award.

9. Mr. Ajoy Chatterjee, the Learned Counsel appearing in support of the petition has taken me to the factual aspect of the case being the item wise claim and as to the context

of the award.

10. The contention of Mr. Chatterjee was that the Arbitrator exceeded his jurisdiction. In support of his contention he stated that since there is an express agreement there is no scope of the Arbitrator to go into the question of the implied conditions de hors the agreement. If Arbitrator exceeds such jurisdiction the award is liable to be set aside.- He further contended that Arbitrator should confine himself to the terms of the contract and in support of his contention he relied upon [Associated Engineering Co. Vs. Government of Andhra Pradesh and another](#), He really placed the paras. 26 to 30 and by placing such portions of the judgment he contended that Arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. The sole intention of the Arbitrator is to arbitrate in terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled outside the bounds of the contract, he has acted without jurisdiction. E Sut if he has remained inside the parameters of the contract and has construed the provisions of the contract, his award cannot be interfered with unless he has given reasons for his award disclosing an error apparent on the face of it. He also relied upon [State of Andhra Pradesh and another, etc. Vs. R.V. Rayanim etc.](#), and placed para. 5 therein to establish that in a matter of challenging the award, there are often two distinct and different grounds. One is the error apparent on the face of the record and the other is that the Arbitrator has exceeded his jurisdiction. In the later case the Court can look into the arbitration agreement, but under the former it cannot, unless the agreement was incorporated or recited in the award. An award may be remitted or set aside on the ground that the Arbitrator, in making it, had exceeded his jurisdiction and evidence of matters not appearing on the face of it, will be admitted in order to establish whether the jurisdiction had been exceeded or not, because the nature of the dispute is something which has to be determined outside the award. He also placed [K.P. Poulose Vs. State of Kerala and Another](#), and relying upon para. 6 therein he contended that if the award arrives at an inconsistent conclusion even on his own finding or arrives at a decision ignoring very material documents which throw abundant light on the controversy to help a just and fair decision, the award has to be set aside on being misconduct on the part of the Arbitrator. He belatedly supplied [Tarapore and Co. Vs. State of M.P.](#), to show that the principle of Associated Engineering was also followed therein but the same principle was not followed in a later decision.

11. Mr, S.K. Goopta, the learned Senior Counsel, of this Court is appearing on behalf of the Respondent contended that there is no specific answer of the Petitioner to the question of the Court about referability of the dispute to an Arbitrator u/s 21 of the Arbitration Act. The scope of reference is much more elaborate since in a suit in disposing the application u/s 34 of the Arbitration Act at the instance of the Petitioner herein all disputes in the suit as well as the counter claim of the Petitioner were referred to the Arbitrator for his adjudication,. After referring such dispute now the Petitioner cannot take out an application for setting aside such award by saying that Arbitrator proceeded de hors the agreement, Mr. Goopta, submitted that the entire dispute with

regard to the suit in toto referred to the Arbitrator, Therefore, it cannot be said that the Arbitrator proceeded without the jurisdiction. He also stated that in total 167 sittings were held. About 271 pages of statement of claim, counter statement and the rejoinder were placed. About 900 documents were disclosed and about 159 exhibits were made. In total 3,875 questions were asked to the witnesses in examining them and after exhausting all the process therein now the Petitioner has come with an application for setting aside the award challenging only one ground that Arbitrator should confine himself in terms of the contract.

12. He placed Sections 21 and 23 of the Arbitration Act to establish the scope of reference before the Arbitrator.

13. By placing such sections he contended that where in any suit, all the parties interested agree that in a matter in a reference between them in the suit shall be referred to arbitration, they may at any time before judgment is pronounced apply in writing to the Court for an order of reference. Mr. Goopta contended that dispensing with the formalities u/s 21 the order was passed in terms of Section 21 itself as will be available from the copy of the order. He further contended that in terms of Section 23 of the Act where a matter is referred to arbitration, the Court shall not, save in the manner and to the extent provided in this Act, deal with such matter in the suit.

14. In support of his contentions as above, he cited [Food Corporation of India Vs. M/s. Veshno Rice Millers](#), and relying upon head note thereof stated that it is not a misconduct on the part of the Arbitrator to come to an erroneous decision whether his error is one of fact or law and whether or not his finding of fact are supported by evidence. The Court in hearing an application u/s 30 of the Arbitration Act cannot sit in appeal over views of the Arbitrator for re-examining and assessing the materials.

15. Mr. Goopta contended there is no scope of the Court to substitute its own view over and above the views taken by the Arbitrator. He has relied upon *Sudarsan Trading Company v. Government of Kerala* A.I.R. 1989 S.C. 890 to establish that the Court had no jurisdiction to decide as to whether the Arbitrator at the decision had acted correctly or incorrectly. Substitution of the view of the Court or evaluation of the conclusion of law or fact come to the conclusion that the Arbitrator had acted contrary to the bargain between the parties as to whether a particular amount was liable to be paid or not is within the competency of the Arbitrator.

16. Mr. Goopta further cited [The Board of Trustees for the Port of Calcutta Vs. Engineers-De-Space-Age](#), to establish that even if there is a prohibition clause as to the question of payment of interest by the Commissioner, Court held that discretionary power of the Arbitrator is not, in any manner, stifled by the term of the contract and the Arbitrator would be entitled to consider the question of grant of interest pendent elite and award interest if he finds the claim to be justified, in the instant case the principles of Associated Engineering as above was considered and the Court found that the Arbitrator was well

within the jurisdiction in awarding interest pendent elite. He further relied upon [Collector of Central Excise Vs. Malleable Iron and Steel Castings Co. \(P\) Ltd.](#), to indicate that the Associated Engineering as well as Sudarsan Trading are in the view in apparent conflict and the Court thought it fit to refer the matter to the three Judges Bench for the decision. By placing this judgment Mr. Goopta contended that the judgment of Associated Engineering as placed by Mr. Chatterjee at the present moment has no face value.

17. Mr. Goopta also relied upon [B.V. Radha Krishna Vs. Sponge Iron India Ltd.](#), to establish that there is no scope of substitution of the Court's view over and above the view taken by the Arbitrator. Ultimately Mr. Goopta relied upon apparently latest judgment Ram Nath International Construction Pvt. Lid. v. State of U.P. AIR 1998 S.C. 367 para. 8 therein to establish that when an Arbitrator has given a speaking award giving detailed reasons while he considers this work as extra work for which the payment is required to be made to the contractor, court can not examine the correctness otherwise for the conclusion reached by the Arbitrator, it is a matter of interpretation of the contract and was referred by parties to arbitration. The High Court was not right therein in coming to the conclusion that this dispute was beyond the scope of the reference to arbitration.

18. After placing such judgments, he brought to a similar aspects of the award in which he placed how the issue Nos. 1 and 2 are dealt with by the Arbitrator. It appears that Arbitrator expressed "in my view, there cannot arise a broad question like this. Every contract is to be interpreted in various ways, and, in that course, it may have to be decided whether something more is implied or not. So, so long it is not a question of implied agreement but a question of interpretation of the contract, whether from the expressed terms of the contract, some other consequences flow by implications. Whether In a particular case a particular consequence arises or not, would be decided when dealing with that aspect. There might be some implied implication and if so that would have to be decided from time to time and not in a broad way, as suggested. The issue No. 1 is thus decided.

19. So far as the Issue No. 2 is concerned, it was decided by the Arbitrator "it is an admitted position that some extra works were done. The Respondent comes out with the case that some extra works had to be done by the claimant and the Respondent made prompt payments for the extra works. In para. 13 of the Counter Statement, it is submitted that all extra works tenable under the contract were approved and paid except the amount claimed in final bill So extra works were done admittedly and this might be deemed to be variation. Otherwise there was no variation in the sense that the original scheme was departed from. The contract was for construction of Recirculating Pump House and that remained the same all through out. Extra works were done, there was no substantial variation. The Issue No. 2 Is thus decided".

20. I have carefully considered the submissions made by the learned Counsels appearing for the parties. According to me, there is a mark distinction in between a reference u/s 21 of the Arbitration Act, 1940 and reference under Sections other than Section 21 of the

Arbitration Act, 1940. A party had chosen forum of court other than the forum of arbitration for an obvious reason that the dispute cropped up between the parties may or may not be covered by the Arbitration Clause but when authority itself says, by making an application u/s 34 of the Act, that such dispute covered by the Arbitration Clause there cannot be any hesitation of the court to refer all such disputes for the purpose of arbitration either on an application u/s 21 of the Act or upon dispensing with the formalities of Section 21 of the Act. u/s 21 of the Arbitration Act court can even refer the dispute if the parties interested to agree to an arbitration even in absence of such clause.

21. In the instant case, dispute was referred by the Respondent to a suit, Petitioner said such dispute covered by the arbitration. They have agreed to refer the dispute for arbitration dispensing with the formalities of Section 21 of the Arbitration Act. Therefore, it can be construed that whether the dispute was covered by the agreement or not, parties agree that all the disputes under the suit should be referred for an arbitration before an Arbitrator. Having done so, it is not open for such party that the Arbitrator exceeded the jurisdiction by not acting within the bounds of the contract. The stand of the Petitioner herein and the stand of the Petitioner in the application u/s 34 of the Arbitration Act in the suit is itself hit by principles of approbate and reprobate.

22. The reference may include agreement but agreement may not include reference. In an application u/s 21 of the Act there may be existence of agreement and/or there may not be existence of the agreement but there must be an existence of reference. If it is so, in that case Arbitrator has no other alternative but to proceed with such reference. Scope of the reference is much wider than a scope of the agreement and it is dependable upon the court under what circumstances such reference was made before the Arbitrator. Arbitrator is to travel within the bounds of the reference such bounds may be within the bounds of the agreement, may not be within the bounds of the agreement but for such reason Arbitrator's conduct may not be criticised that Arbitrator has exceeded the jurisdiction by not acting within the bounds of the agreement. Be that as it may, Arbitrator has given elaborate explanation/reasons that how he has acted on the basis of the issues and this Court is not sitting in appeal to substitute the view of the Arbitrator on which he has come to a conclusion otherwise the very foundation of the system of arbitration will be vitiated.

23. Under these circumstances, I do not find any reason to interfere with the award both factually and legally and I am drawing inference in favour of the contesting Respondent.

24. Therefore the application is liable to be dismissed and dismissed with costs. Interim order, if any is vacated.

25. I am not agreeable to accept the contention of Mr.. Goopta in connection with unpaid amount arising out of an interim award but Mr. Goopta's client is at liberty to take legal recourse for the purpose of recovery of such amount.

26. As a consequential effect of dismissal of the application as above there will be decree in terms of the award. The decree will carry interest at the rate of 12% per annum from the date of decree till the date of realisation.

27. Costs assessed at Rs. 5,000.00 28. Decree will be drawn up expeditiously.

29. A prayer for stay of operation of this order is made, considered and refused.

30. Department and all parties are to act on a signed copy minutes of the operative part of the order upon usual undertaking.